

# The Second Amendment: Militia and Bearing Arms as Civic Duties in the Early American Republic

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## **Abstract**

*The purpose of the article is to offer an overview of the legal and political thinking that resulted in the passing of the Second Amendment as a part of the Bill of Rights in the American Constitution. The research is organized chronologically. It proceeds from colonial era precedents to first attempts at securing the rights and duties of the early citizens of the republic. It then continues by examining the heady debate surrounding the drafting and passing of the Constitution, and finally traces the Amendment's legislative route through the 1<sup>st</sup> U.S. Congress. Source material consists of relevant political documents of the era, such as colonial charters, state constitutions, the Federalist Papers, Anti-Federalist writings etc. The research findings support the hypothesis that both competing modern interpretation models of the Second Amendment, the collective rights model and the individual rights model, are relatively hard to reconcile with historical evidence. A proposed model of understanding the Amendment through civic rights and duties is more suited to the thinking of the founders of the American Republic. It is hard to offer a concise answer on the research question of what particular right or rights the U.S. Congress intended to protect by passing the Second Amendment as a part of the Bill of Rights. This is because the Amendment was a result of political compromise, and therefore an attempt to appease several differentiating viewpoints. The right to keep and bear arms was part of the civic right to serve in the militia, which*

*had a function crucial to national defense, as well as an instrument of safeguard against the tyranny of government, be that federal or local variety.*

## **Introduction**

“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.”<sup>1</sup> This is the Second Amendment in the Bill of Rights that was added to the United States Constitution in 1791. Although the Bill of Rights was passed only after a bitter debate between the two leading political factions of the time, known as Federalists and Anti-Federalists, the Second Amendment was a mere sideshow of the whole ordeal.

As gun related deaths in the U.S. have increased, even as overall crime levels have decreased, and firearm regulation in general has become a cultural and political hot-button issue, the legal meaning of the Second Amendment has become more embattled.<sup>2</sup> To generalize a complicated issue, two opposing camps of debate have emerged, the gun-control advocates, who favor the so-called collective rights model of interpretation of the Amendment, and the gun right advocates, who favor the so-called individual rights model. In a landmark case in 2008, *District of Columbia v. Heller*, the U.S. Supreme Court made a 5-4 decision in favor of the individual rights model of interpretation. This decision was viewed as a shift in contrast to the court’s previous interpretation and followed a “revisionist” trend in the academic discourse concerning the issue.<sup>3</sup>

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<sup>1</sup> “The Bill of Rights: A Transcription,” America’s Founding Documents, National Archives, <https://www.archives.gov/founding-docs/bill-of-rights-transcript>.

<sup>2</sup> John Gramlich, “What the Data Says about Gun Deaths in the U.S.,” *Pew Research Center*, August 16, 2019, <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/>.

<sup>3</sup> David Yassky, “The Second Amendment: Structure, History and Constitutional Change,” *Michigan Law Review* 99, no. 3 (2000): 589-591.

The debate, however, has been largely portrayed in binary terms, as debates about the meaning of the past often tend to be. Yet, as historian Saul Cornell has pointed out, neither of the two leading theories are quite satisfactory to a keen student of history.<sup>4</sup> The exact meaning of the Second Amendment has often puzzled scholars, so much so, that few have ventured to investigate it until fairly recently.<sup>5</sup> Therefore, we should not be surprised that posterity has interpreted the Second Amendment often without giving its rich history the emphasis it deserves. Mark V. Tushnet, who has provided an excellent comparison on how historical arguments have been used by the opposing contemporary camps to further their respective political agendas, has also scolded academics for engaging in this partisan debate by cherry-picking arguments from the historical data to support either of these interpretation models.<sup>6</sup> Cornell, an expert on the subject, has tried to establish a third model of understanding the amendment, a model more in line with the historical understanding of the Second Amendment. It is Cornell's view that the Amendment was originally neither an individual nor a collective right to keep and bear arms, but rather a civic right for citizens to fulfill their duty in the militia.<sup>7</sup>

Keeping all of the above in mind, I have posed the following question to my research: *What particular right or rights did the U.S. Congress intend to protect by passing the Second Amendment as a part of the Bill of Rights?* With more than 200 years having passed since James Madison presented the first draft of the Second Amendment to the Congress, it is reasonable to say that knowing something about its history is not only beneficial, but essential to anyone wishing to have

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<sup>4</sup> Saul Cornell. *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York: Oxford University Press, 2006), 2.

<sup>5</sup> Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99, no. 3 (1989): 639-640.

<sup>6</sup> Mark V. Tushnet, *Out of Range: Why the Constitution Can't End the Battle over Guns* (New York: Oxford University Press, 2007), xv-xvi, 25.

<sup>7</sup> Cornell, *A Well-Regulated Militia*, 2.

a thorough understanding of the Amendment. Therefore, I am attempting to establish an introduction to the legal and political thinking in the early American republic that produced the Second Amendment. We will have a brief look at the historical precedents of the Amendment, move on to the ideological and practical background of the issues involved, and peek behind the curtains of the 1<sup>st</sup> U.S. Congress, where James Madison presented the Bill of Rights to his colleagues in 1789.

### **Militia and Bearing Arms before the Independence**

The preamble of the Second Amendment is about “a well-regulated” militia. This part of the Amendment, however, has become problematic to interpret in a modern society, because the militia institution was largely replaced by the U.S. National Guard in the turn of the 20<sup>th</sup> century.

In colonial times, the militia had a very meaningful and important role to play in society. The colonial subjects were still British at heart, and as such, they were keenly aware of the fact that they held the same rights and duties as any subject of the crown. According to historian Bernard Schwartz the colonists were from the beginning of their colonial life “endowed with the two essentials of the English Constitution: a representative legislative assembly and recognition of the rights of Englishmen.”<sup>8</sup>

The Colonial Charters were the first documents to establish these essentials. Already in 1606, the First Charter of Virginia states how “all and every the Persons being our Subjects... , shall have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all

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<sup>8</sup> Bernard Schwartz, ed., *The Bill of Rights: A Documentary History* (New York: Chelsea House Publishers, 1971), 1:49-50. In accessing colonial and early republic documents, I have relied heavily on Schwartz’s brilliant book, which offers a large selection of relevant material with useful commentary by the author.

Intents and Purposes, as if they had been abiding and born, within this our Realm of England.”<sup>9</sup> The colonies were also granted an astonishing amount of self-governance, which laid effective foundations for the later republicanism of the United States. Specific statutes for organizing militias or bearing arms do not appear in these charters. British common law tradition, another legal construction that the colonists brought with them from England, however, did support these ideas.<sup>10</sup>

Well before American Independence, the North American colonists had already formed militias to provide security for themselves.<sup>11</sup> This was natural, because regular British troops were not always available or wanted. To the colonists the militia was not just a military force, but “it also provided the only means to protect communities from civil unrest.”<sup>12</sup> In essence, it functioned as a police force when needed. These militias were most often drawn from local men and rarely served outside their home region and typically included white males from the age of sixteen up to sixty years.<sup>13</sup>

To fulfill their civic duty in the militia, the colonists naturally needed weapons. The English Bill of Rights from 1689 guaranteed a right to these, with some caveats. “...the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law; that the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.”<sup>14</sup> The preceding segment about standing armies is relevant here,

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<sup>9</sup> Schwartz, *The Bill of Rights*, 59-60.

<sup>10</sup> Michael Waldman, *The Second Amendment: A Biography* (New York: Simon & Schuster, 2014), pt. 1, ch. 2, section 1.

<sup>11</sup> *Ibid.*, pt. 1, ch. 1, section 2.

<sup>12</sup> Cornell, *A Well-Regulated Militia*, 3.

<sup>13</sup> Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right*, rev.ed. (Albuquerque, NM: University of New Mexico Press, 2014), 64, 73, and 187.

<sup>14</sup> Schwartz, *The Bill of Rights*, 43.

because it relates to a debate that was to become prominent in the early American republic; the debate on whether to entrust the national defense to militia or a regular army. The colonists, essentially, decided to choose the former approach.

As the advent of the revolution drew nearer, the colonists started to give more and more thought to organizing a military defense. In 1772, two years after the Boston Massacre, a document known as “The Rights of the Colonists and a List of Infringements and Violations of Rights” was produced in Massachusetts. Among the natural rights of the colonists, it listed: “First, a Right to Life; Secondly to Liberty; thirdly to Property; together with the Right to support and defend them in the best manner they can.”<sup>15</sup>

The colonists were becoming increasingly concerned about what they viewed as continuous usurpations of their rights. The British had quartered an increasing number of regular soldiers in Massachusetts, which had become the hotbed of American insurgency. Suddenly there was a tangible fear among the colonists of being stripped of their weapons. Militias, which previously had been “occasions for friends and neighbors to come together to drill and celebrate”, attained a much more serious role.<sup>16</sup> The militia was also well suited to the idea of civic republicanism (or civic humanism) that cherished civic virtue and civil society above all, and was one of the leading principles of the early Republic.<sup>17</sup> Permanent armies were an antithesis, the favorite tool of the tyrannical European monarchs, and therefore better avoided, especially during times of peace.

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<sup>15</sup> Ibid., 200. According to Schwartz, this document was largely drafted by Massachusetts statesman Samuel Adams. Adams was also a vocal advocate for individual right to possess arms. See: Cornell, *A Well-Regulated Militia*, 14-15.

<sup>16</sup> Cornell, *A Well-Regulated Militia*, 12-13.

<sup>17</sup> Tushnet, *Out of Range*, 11.

## **Militia and Bearing Arms before the Constitution**

American independence brought with it the arduous task of constructing a functioning framework of society for the new nation. The American Constitution was still some years away, but The Articles of Confederation, which preceded it, as well as the respective state constitutions, already featured attempts to protect the rights that were later included in the Second Amendment.

Many of the state constitutions contained either a separate bill of rights or provisions protecting a wide range of individual and collective rights in the constitutions themselves.<sup>18</sup> Statutes warning against standing armies were common, as were statutes placing military forces under local civilian control.<sup>19</sup> Again, while these statutes are not mentioned in the Second Amendment, they are closely related to the broader discourse concerning security and defense of the United States. In written texts they also often appeared right after or before the statutes concerning militias and bearing arms.

New Jersey, Delaware and Maryland all articulate regulations for militia, but do not mention anything specifically about arms.<sup>20</sup> The subject of arms does come up in several state constitutions, however. Virginia Declaration of Rights (1776), article number 13, states, “That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free State.”<sup>21</sup> Pennsylvania, North Carolina, Georgia, New York, Vermont, Massachusetts, and New Hampshire all discussed bearing or keeping arms in some detail.<sup>22</sup> It is notable that the context was in most cases related to either militia, defense of the state in general, or people religiously

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<sup>18</sup> Schwartz, *The Bill of Rights*, 256.

<sup>19</sup> A fine example of this would be the Pennsylvania Declaration of Rights, 1776. In *Ibid.*, 266.

<sup>20</sup> *Ibid.*, 259, 278, 282.

<sup>21</sup> *Ibid.*, 235.

<sup>22</sup> *Ibid.*, 266, 287, 297, 312, 324, 342, 377-378.

scrupulous of bearing arms, such as Quakers.<sup>23</sup> Only Pennsylvania and Vermont explicitly guaranteed an individual right to bear arms outside the civic duty of common defense. Vermont Declaration of Rights (1777), article XV, declares “That the people have a right to bear arms for the defence of themselves and the State.” This is a verbatim repetition of the article XIII from Pennsylvania Declaration of Rights.<sup>24</sup>

The Articles of Confederation provides an interesting take about arming and defense. Article VI, section 4 states: “...nor shall anybody of forces be kept up, by any State, in time of peace, except such number only as, in the judgment of the United States, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.”<sup>25</sup> Here again the subject of arming citizens is discussed in the context of militia, and indeed the men serving in the militias were to be provided arms and ammunition by their home state. This of course does not mean that these men were not allowed to own their own individual weapons, only that The Articles of Confederation, de facto constitution of 1781 to 1789, did not provide specific guarantees towards such right.

The Articles proved to be a short-lived experiment. For reasons too complex and numerous to address here in any meaningful detail, the political leaders of the Republic decided to assemble a Constitutional Convention in 1787. This produced one of the most enduring and influential legal documents of human history, the current Constitution of the United States, which replaced the

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<sup>23</sup>A fine example of this would be the New Hampshire Declaration of Rights. In *Ibid.*, 377.

<sup>24</sup> *Ibid.*, 266, 324.

<sup>25</sup> “Transcript of Articles of Confederation (1777), ourdocuments.gov, <https://www.ourdocuments.gov/doc.php?flash=false&doc=3&page=transcript>.

Articles of Confederation. The Constitution as we know it, however, was not yet complete. A bitter political debate for and against the new Constitution between the Federalists and Anti-Federalists preceded its ratification. The most concrete compromise between the viewpoints was the suggestion to amend the Constitution with a bill of rights.

As the state legislatures pondered the ratification of the new constitution, the debate moved from private to the public sphere. The goal of the Federalist faction was to influence the public as well as the legislatures to pass the Constitution. The Anti-Federalists wanted to stop this at first, and later, after the Constitution was ratified, turned their attention towards amending it.

### **Militia and Bearing Arms in the Fight for the Constitution**

The task to organize an efficient and trustworthy defense for the new republic was made much harder by the fact that the new American nation was comprised of several quasi-independent states that all cherished their sovereignty. Concerns of personal rights and liberties were also to be considered. The colonists had felt betrayed by the British monarchy and wanted to explore all the possible avenues to guard against similar betrayal from their own government(s). Their aspiration was to have armed forces that were dependable but could not be turned against their own citizens. The Second Amendment was to be a part of the means to this end.

The Federalist faction, arguing for the swift ratification of the Constitution, rallied behind Alexander Hamilton, James Madison and John Jay, who under the pseudonym of Publius, authored *The Federalist Papers*, a collection of essays that posterity has elevated among the most studied and revered documents of American history. The essays were published between 1787 and 1788 in New York newspapers.

The Anti-Federalist writings, authored by several persons under various pseudonyms, did not achieve the same level of canonization as their counterparts, but are nevertheless among the most

important Founding Era documents. The fact that the Anti-Federalists ultimately succeeded in their demand to amend the Constitution is a testament to their historical importance.

A close reading of the essential essays for and against the Constitution provides some fruitful insight into the debate that finally resulted in the formation of constitutional amendments. Before examining them more closely, however, it is prudent to see what the Constitution itself had to say about the topics related to the Second Amendment.

Article I, section 8, authorizes the federal government “To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years,” and “To make Rules for the Government and Regulation of the land and naval Forces,” and “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”, and “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”<sup>26</sup>

Clearly the powers granted to the federal government in this respect were much more specifically enunciated than in the Articles of Confederation. It left relatively little room for the states in the matter, or at least that is what many critics of the Constitution claimed. As the following will adequately show, the exchange between the two opposing camps concerning these powers was fierce.

Standing army, an institution that was described as “grand engine of oppression” by a leading Anti-Federalist, could now be used as a tool to enforce the collection of taxes.<sup>27</sup> His fellow Anti-

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<sup>26</sup> “The Constitution of the United States: A Transcription,” America’s Founding Documents, National Archives, <https://www.archives.gov/founding-docs/constitution-transcript>.

<sup>27</sup> Murray Dry and Herbert J. Storing, eds., *The Anti-Federalist: An Abridgement* (Chicago: University of Chicago Press, 1985), 20.

Federalist, The Federal Farmer concurs: "...a military execution of laws is only a shorter way to the same point - despotic government."<sup>28</sup>

As we have seen, some state constitutions did provide statutes limiting the use of standing armies, or warning against them. The Anti-Federalists wished a similar statute would be attached to the Federal Constitution as well. Alexander Hamilton, however, in "Federalist #24," argues against his opponents. He describes at some length the geopolitical situation of the United States to justify the need for a standing army. He also remarks that the power of raising these armies is "lodged in the *Legislature*, not in the *Executive*" and that "this legislature was to be a popular body, consisting of the representatives of the people, periodically elected." So the fact that the people of the United States had the power to periodically elect their representatives, who in turn held the power to raise the army, in Hamilton's opinion, made sure that the Congress would find it hard to oppress its citizens.<sup>29</sup> The ability to vote the legislators out of office was to be the ultimate safeguard against government tyranny.

Another idea that the Anti-Federalists absolutely hated was the idea of a select militia, an elite militia that could at times be placed under the control of the federal government. The Federal Farmer writes that this select militia, formed most likely by "young and ardent part of the community, possessed of but little or no property" will "answer all the purpose of an army" and leave the rest of the population defenseless against them. He also reiterates the fear that this (or any other military force under government control) could be used "to enforce an execution of federal laws". This enforcement in the Farmer's view is best left to the sheriffs.<sup>30</sup>

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<sup>28</sup> Dry and Storing, *The Anti-Federalist*, 43.

<sup>29</sup> "The people" refers to that part of the population that had access to citizenship and voting rights.

<sup>30</sup> Dry and Storing, *The Anti-Federalist*, 51-52.

As one might expect, Alexander Hamilton, was far from pleased with this proposition. In “Federalist #29” he answers The Federal Farmer directly. “By a curious refinement upon the spirit of republican jealousy, we are even taught to apprehend danger from the militia itself, in the hands of the federal government.”<sup>31</sup> A bit later, Hamilton continues: “There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity or with raillery; ...or as the serious offspring of political fanaticism. Where, in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens?”<sup>32</sup>

Shays’ Rebellion during the Revolutionary War had shown that armed local militias could rise up in arms against state or federal government, should they feel injustice in the hands of it. To many Anti-Federalists, the right to insurrection was a safeguard of tyranny, but to Federalists like Hamilton it was a serious threat. They preferred the military forces of the nation to be under the control of the federal government.

As Hamilton puts it in “Federalist #29”, the citizens would need to undergo regular military exercise to attain a degree of skill that he describes as “the character of a well-regulated militia,” and that this would be a “real grievance” and a “serious public inconvenience” to the people.<sup>33</sup> This paragraph offers crucial insight into what the Second Amendment meant with the preamble of “a well-regulated Militia”.

The Anti-Federalists, however, could not bring themselves to trust any sort of centralized military force. This positioned them at clear opposition with the Constitution, which intended for

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<sup>31</sup> In “Federalist #29,” Hamilton repeats Farmer's words “young and ardent,” clearly referring to his opponent’s previously published text. Alexander Hamilton, John Jay, James Madison, *The Federalist*, ed. B.F. Wright (Cambridge, MA: Belknap Press of Harvard University Press, 1961), 228.

<sup>32</sup> Hamilton, Jay and Madison, *The Federalist*, 229-230.

<sup>33</sup> *Ibid.*, 228.

the nation to have both a (limited) standing army, strong enough to defend the garrisons and forts of the country, as well as centrally commanded militia to repel invasions or act against inner disturbances.

Both factions also had their say about arms in general. As we have concluded, many legal scholars argue that the English common law recognized a right to have arms for one's self-defense.<sup>34</sup> James Madison, in “Federalist #46”, mentions the Americans possessing an advantage of being armed over “almost every other nation”.<sup>35</sup> Another Federalist, Noah Webster observed “The Supreme Power in America cannot enforce unjust laws by the sword; because the body of the people are armed.”<sup>36</sup>

Reading *The Federalist Papers*, it is difficult to come to the conclusion that the authors intended to secure the right to keep arms constitutionally. Americans certainly did and should possess arms in their view, but it would seem that at least Hamilton was satisfied with whatever protection the state constitutions and common law provided. A quote from “Federalist #84” by Hamilton illustrates this thinking: “bill of rights, in the sense and to the extent in which they are contended for, are not only unnecessary..., but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?”<sup>37</sup> No specific amendments were needed in Hamilton's view, because they could be misconstrued or misused, and the federal government did not have powers to infringe upon the rights that the Anti-Federalists wanted to constitutionally protect. Hamilton was certain that the

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<sup>34</sup> See footnote 10, also: Halbrook, *That Every Man Be Armed*, 15-16 & 36.

<sup>35</sup> Hamilton, Jay and Madison, *The Federalist*, 335.

<sup>36</sup> Cornell, *A Well-Regulated Militia*, 47.

<sup>37</sup> Hamilton, Jay and Madison, *The Federalist*, 535.

state constitutions provided ample protection for the rights of their respective inhabitants. One can debate endlessly whether he was right or wrong, but he appears to have foreseen with some clarity the troubles that future generations were to have when interpreting the Bill of Rights.

The Federal Farmer, who most constitutional academics distinguish as the most eloquent of the Anti-Federalists, offers a view with more individualistic tinge in his letter XVIII, while issuing a warning against centrally commanded militia. “These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenceless; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.”<sup>38</sup>

Another interesting Anti-Federalist voice in this discourse is the “Address and Reasons for Dissent”, published in *Pennsylvania Packet and Daily Advertiser* in December 1787. Pennsylvania had ratified the federal Constitution with the final vote standing as 46-23, but the Anti-Federalist camp wanted to make public its dissent in the address. The writer/writers proposed a declaration of rights to be added to the Constitution. Statute No. #7 is of particular interest to us: “That the people have a right to bear arms for the defense 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.”<sup>39</sup>

In this proposal, which was not adopted, but was nevertheless influential, the individual right to bear arms for several different reasons was retained, but also the potential public danger of such

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<sup>38</sup> “Letters from the Federal Farmer to The Republican XVIII,” Lee Family Digital Archive, Papers of the Lee Family, <https://leefamilyarchive.org/papers/essays/fedfarmer/18.html>.

<sup>39</sup> Dry and Storing, *The Anti-Federalist*, 207-208.

right was considered. Sadly, the final adopted form of the Second Amendment is nowhere near as plain-spoken. It is also noteworthy that while individuals were to retain their right to bear arms in this proposal, the state was still charged with the duty of arming the militia, thus ensuring that the weapons used by the militia were military grade instead of weapons used for recreational purposes.

To summarize the discourse between the Federalists and Anti-Federalists as it pertains to the Second Amendment; there clearly was some political will for ensuring an individual right to keep arms among the Anti-Federalists, but the issue was a minor one during this period, a “subplot” of the much more pressing issue of organizing the military matters of the country. The Federalists, meanwhile, most likely did not resist an individual right in any way but did not see the need for a specific constitutional right either.

The opposition, however, did eventually manage to convince at least one of them. By 1789, when the 1st U.S. Congress assembled, James Madison, one of the authors of *The Federalist Papers*, presented the first draft of the Second Amendment (among several other amendments) to his colleagues in the House of Representatives. Madison’s change of heart is an interesting story in and of itself, but for the purpose of this article, it is sufficient to say that he tried to reconcile the differences between the opposing political factions for the benefit of the country at large.

## **Second Amendment in the First U.S. Congress**

As we finally turn our attention towards the congressional debates concerning the Second Amendment, we once again discover that the discourse revolved around several intersecting issues. Militia and the right to keep and bear arms were wrapped together in a manner that might seem perplexing to our contemporary eyes. Serving as a contextual backdrop to this debate were bitter disagreements over different types of military forces and the power to control them, as well as

concerns of how to factor in the religiously scrupulous citizens, all bound together with the nearly pathological fear of tyranny that is perhaps the key emotion that drove the founding era politics.

On the 8<sup>th</sup> of June 1789, keeping his promise to his constituents, Madison presented the constitutional amendments to the House of Representatives.<sup>40</sup> The proposal that would become the Second Amendment was originally recorded to the Congressional annals in the following form: “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.”<sup>41</sup>

The reception that Madison received was rather unenthusiastic. Although the amendments were not dismissed out of hand, several representatives felt that the timing was not right for the Congress to consider amending a constitution that had only recently been ratified.<sup>42</sup> Madison's proposition was referred to a Committee of the whole, and the assembly would return to the matter on a later date.

On July 21, Madison implored his colleagues to take the amendments into further consideration.<sup>43</sup> A select committee consisting of one member from each state was appointed to report on the matter.<sup>44</sup> On the 13<sup>th</sup> of August, the select committee reported back, and again, some members were less than enthusiastic to act. Theodore Sedgwick from Massachusetts thought this as “a very improper time to enter upon the consideration of a subject which would undoubtedly

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<sup>40</sup> House of Representatives, “Annals of Congress, 1<sup>st</sup> Cong., 1<sup>st</sup> sess.,” *A Century of Lawmaking for A New Nation: U.S. Congressional Documents and Debates, 1774-1875*, 440-441, <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=0%20>.

<sup>41</sup> House of Representatives, “Annals of Congress,” 451.

<sup>42</sup> *Ibid.*, 464-466.

<sup>43</sup> *Ibid.*, 685-686.

<sup>44</sup> *Ibid.*, 690-691.

consume many days; and when they had so much other and more important business requiring immediate attention.” Madison obviously did not think that the time was improper. He dryly responded that “the House had already gone through with subjects of a less interesting nature.”<sup>45</sup>

The House of Representatives then began its deliberations on the subject, and the whole process lasted for several days. On the 17th of August, the proposal had been changed into the following form: “A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.”<sup>46</sup> The amendment was now close to its final wording, although it still contained a clause concerning conscientious objectors. The clause concerning the right to keep and bear arms had been repositioned after the militia clause. According to Saul Cornell this is consequential, because “preambles, the introductory clauses of statutes, were commonly understood by eighteenth-century lawyers to hold the key to the 'design and meaning' of a law.”<sup>47</sup> Whatever the reasons for this repositioning may be, they must have been important enough for the congressmen to take such action in the first place. It does however point towards the fact that the right to keep and bear arms was intricately connected with civic duties of forming militias and militia service in general.

Another small modification made at this time was replacing the word “country” with “state”. This also alters the understanding of the Amendment somewhat significantly as it nudges it towards protecting states' rights instead of the country at large.

Elbridge Gerry from Massachusetts commented on the proposal in Congress. “This declaration of rights, I take it, is intended to secure the people against the mal-administration of the

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<sup>45</sup> Ibid., 731.

<sup>46</sup> Ibid., 777.

<sup>47</sup> Cornell, *A Well-Regulated Militia*, 60.

government.” This view was not contested among his colleagues. Gerry then turned his attention to the clause concerning the “religiously scrupulous.” He feared that if the federal government could determine any group of people as religiously scrupulous, they could use this clause as a pretext to “prevent them from bearing arms” and thus, he concludes that “under this provision, together with their other powers, the Congress could take such measures with respect to a militia, as to make a standing army necessary.”<sup>48</sup>

A research that concerns itself with the original understanding of the Second Amendment could not hope for a more revealing witness in history than Mr. Gerry. Here is an influential contemporary voice from the 18<sup>th</sup> century expressing his understanding on the subject. Gerry interprets the purpose of the proposed amendment to be securing “the people against the maladministration of the government.” The clause concerning the religiously scrupulous could possibly compromise this purpose in Gerry's opinion, because it could stop citizens from forming militias by disarming them. This concern harkens back to the fear of tyranny that was constantly on the mind of the Framers, Anti-Federalists especially. The militia was to be the great shield of liberty that would protect the Americans from government encroachment and weapons were needed for that institution to function properly.<sup>49</sup>

After a few minor changes to the amendments, the House of Representatives sent them to the Senate on the 24th of August 1789. Unfortunately, for us, unlike the House of Representatives, the U.S. Senate did not keep a public record of its deliberations until much later, only a brief journal recording the general proceedings. On 4th of September that year, the Senate passed a motion to adopt the (then) fifth article of the amendments. On the same date, it rejected a motion to add a

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<sup>48</sup> House of Representatives, “Annals of Congress,” 778.

<sup>49</sup> Mr. Gerry's fears are later echoed by Thomas Scott of Pennsylvania. House of Representatives, *Ibid*, 796.

clause warning against the keeping of standing armies during the time of peace. The wording now stood as follows: “a well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed.”<sup>50</sup>

On the 9th of September, the Senate, for a final time, returned on the subject. A motion to add words “for the common defense” after the words “bear arms” was rejected.<sup>51</sup> One can only wonder what sort of effect these words would have had to the historical interpretations of the amendment, had the motion been adopted. It certainly would have added a more collective tinge to our understanding of the Second Amendment. Only change to the form presented in the previous paragraph that was adopted, was omitting the word “best” that stood in front of the words “security of a free state”.

After the Congress had approved the final list of the amendments, following the constitutional rules of amending itself, the Bill of Rights was now sent forth to the state legislatures.

After another long process, the Bill of Rights finally became of the law of the land on 15 December 1791. Ten of the twelve amendments proposed by the Congress were approved and ratified. The Second Amendment now stood in its final form.

## **Conclusion**

We have traced the legal and political history of the ideas that influenced Madison and his compatriots to frame the Second Amendment from early British colonials all the way to the passing of the Bill of Rights. Right to form militias, right to keep and bear arms, treatment of conscientious

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<sup>50</sup> United States Senate, “Journal of the Senate of the United States of America, volume 1,” *A Century of Lawmaking for A New Nation: U.S. Congressional Documents and Debates, 1774-1875*, 71, <https://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=001/llsj001.db&recNum=0&itemLink=r?ammem/>.

<sup>51</sup> *Ibid.*, 77.

objectors, and organizing the defense of the American nation were all on the framers' agenda, as we have seen. We have also seen that the particular words chosen on the Amendment echoed many similar statutes and proposals presented in other documents. In that respect, the words chosen by the 1st Congress were hardly anything new or exciting.

We have established that “a well regulated Militia” was something that was formed by the white male population of the country between the ages of 16-60, approximately. It was to be a well-armed and well-exercised force. The Constitution already provided the federal government with the means to use this militia force against insurrections and invasions, as well as the right to organize, arm and discipline it. The Anti-Federalists were unsatisfied with the large control that the federal government had over the militia. The Second Amendment, essentially, was designed to return some of that control back to the states. The fear of government tyranny was a pervasive concern of the Anti-Federalists, and they saw the militia as the most important safeguard against this. Individual citizens could never stand against government oppression, but a militia could. For that safeguard to function properly, the militias needed weapons, and therefore the government, state or federal, was not to infringe upon the right of the people to keep arms and bear them in the service of the militia.

These essentially are the rights that the Framers intended for the Second Amendment to protect; the rights of the people to keep and bear arms, so they could fulfill their civic duty (and right) to serve in the local militia, that was to provide security and protection for the state and the country, but also to act as the ultimate safeguard against tyranny of the federal government, or other states for that matter. This is as concise an answer as we can come to, which is not to say that it is very concise at all. The Second Amendment does reflect the fact that the framers had to resolve very complicated issues with relatively little consensus on the details.

The contemporary understanding of the Second Amendment is problematic, largely because its history has been forgotten, and the society has undergone a significant change.

Sometime in the late 19th century or early 20th century, the United States forgot its fear for a standing army. Today it has one of the largest, and arguably the strongest permanent military force in the world. State guards, the National Guard, and police forces both statewide and local have taken over the role that the militia played in the 18<sup>th</sup> and 19<sup>th</sup> century. This leaves the American jurisprudence with the difficult task of reconciling the Second Amendment with a contemporary society that relies on fundamentally different institutions to provide for its security. It also leaves the Second Amendment vulnerable to repeated reimagining, not only by legal scholars, but also by political forces. These, of course, are things that a historian cannot change. All that is left for him or her to do is to inform people of the historical implication of things, which could and perhaps should provide useful context in the unenviable task of trying to forge a better society.

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