No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA and
MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* ACADEMICS FOR THE SECOND AMENDMENT IN SUPPORT OF THE RESPONDENT

[Ratification And Original Public Meaning]

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INTEREST OF THE *AMICUS*

Amicus Academics for the Second Amendment ("A2A"), is a §501(c)(3) tax-exempt organization. Formed in 1992 by law school teachers, A2A's goal is to secure the right to keep and bear arms as a meaningful, individual right. A2A has filed *amicus* briefs in this Court in *United States v. Lopez* and in the Fifth Circuit in *United States v. Emerson*. It has also published a series of "Open Letters" signed by college and university professors in the NEW YORK TIMES, the NATIONAL REVIEW, REASON, the NEW REPUBLIC, the NATIONAL LAW JOURNAL, and the CHRONICLE OF HIGHER EDUCATION.[1]

SUMMARY OF ARGUMENT

Petitioners' position is that the otherwise-articulate Framers of the Second Amendment wrote "the people" when they meant "only those people serving in a sufficiently-organized militia."

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[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* is a non-membership not-for-profit, and obtained contributions from several hundred individual supporters via an internet appeal. If the Court desires, *Amicus* will provide a proprietary list. This brief is filed with the written consent of the parties. *Amicus* complied with the conditions by providing seven days advance notice.

Clayton E. Cramer, author of FOR THE DEFENSE OF THEMSELVES AND THE STATE (1994), provided historical assistance.

It is remarkable no Framer, and no contemporary, ever directly espoused this narrow reading for "right of the people." It is *inconsistent* with Madison's original organization of the Bill of Rights. It is *inconsistent* with Madison's notes on the document, with the actions of the First Congress, and with widely published contemporaneous writings. It is moreover *inconsistent* with Madison's grand purpose, to foreswear those actions the Federalists had no intention of taking, while preserving the new government's powers. **In 1789, for Congress to renounce any intent to disarm Americans would be no real loss; the same cannot be said of reopening the fight over control of the militia.**

To Petitioners, the Amendment creates a "right of the people" that is void where prohibited by law, indeed void unless authorized by law. What intent, one might ask, could possibly have motivated so remarkable a "right"? Petitioners answer that it must have been intended to ensure that States could arm the militia if Congress neglected to do so. Yet this is one intent we can absolutely rule out. The Virginia Ratifying Convention proposals, from which Madison worked, had a clause providing *precisely* that. Madison did not include it, and the First Senate voted down a motion to reinsert it.

Petitioners moreover mistake the relationship between arms and the militia. In 1789, Americans

knew of "unorganized militias" – and required their members to have arms.

Petitioners' interpretative method is likewise flawed. Preambles expressing the principal purpose – not necessarily *all* purposes – of a right were commonplace in constitutions. To properly read the guarantee in light of the preamble we would posit that a well-regulated militia is necessary to liberty, and then ask whether a power to ban an entire class of arms, comprising over a third of all firearms, makes evolution of a well-regulated militia more or less likely.

Petitioners ultimately simplify into a single crabbed understanding a history that is actually as varied and complex as the Framers themselves. The Founding generation believed that the individual had a natural right to arms, that only an armed people would be free and virtuous, and that militias composed of those armed individuals were necessary to preserve free governments. Some Framers stressed protection of a militia system, others protection of an individual right to arms. That is precisely why the Amendment has two provisions, why both survived the tight edits of the First House, and why the last effort to narrow the scope of one, a motion to make it a right to arms "for the common defence," lost in the First Senate.

There is a reason why Petitioners' interpretation is in conflict with the historical record. The "individual rights for individual purposes" view of the Amendment held sole sway from the Framing until

the early 20th century, when a rival view, the collective or States' rights approach, was invented.[2] The latter's credibility was, however, vulnerable to simple textualism (*i.e.*, "right of the people" was universally used in an individual sense) and attacked by scholarship. Its destruction was so complete that neither Petitioners nor any *amici* assert it here. The substitute theory which they now present to the Court is a creation of the last decade, a beta version of history subject to bugs its creators did not foresee. Acclaimed historian Robert Shalhope notes the substitute is driven by *quite* ***contemporary*** *ideological needs*.[3]

[2] Its first judicial acceptance came in *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905), where neither side briefed the "collective right" because that theory did not yet exist. Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 UNIV. OF DAYTON L. Rev. 59, 76-77 (1989).

[3] Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENT. 269, 275 (1999).

ARGUMENT

I. PETITIONERS' ATTEMPT TO EXPLAIN THE PURPOSE OF THE SECOND AMENDMENT MISREADS THE HISTORICAL RECORD, MISTAKES THE RELATIONSHIP BETWEEN ARMS AND MILITIA DUTY, AND IMPROPERLY APPLIES THE VERY INTERPRETATIVE PRINCIPLE IT INVOKES.

A. The One Certainty in the Historical Record is that Madison and the First Congress did not Intend to Protect the Power of States to Arm the Militia if Congress Failed to Do So.

Petitioners' position is that the Framers intended the Second Amendment to protect only possession of arms in connection with a well-regulated, *i.e.*, government-organized, militia.

This presents us with an anomaly: an "individual right" that exists only if the government implements it by statute. Indeed, Petitioners argue that Respondent is himself outside the protection of the Second Amendment, because he is outside the Federal militia age range. Petitioners' Brief at 14 n. 2. Apparently this is a constitutional safeguard void where prohibited by law, indeed void unless authorized by law. Why would the Framers have created so peculiar and empty a "right of the people"?

Petitioners have an answer. "The fear that the Militia Clauses give Congress *exclusive* power to arm the militias, and thus the power to 'disarm' them, by

failing to provide arms, engendered particularly contentious debates at the Virginia ratifying convention." Petitioners' Brief at 24. "The Amendment was a response to related fears raised by opponents of the Constitution: that Congress would use its powers under the Militia Clauses to disarm the state militias ... " *Id.* at 22. "[S]eeing a problem – the possibility of disarmed state militias – the Framers acted to address it." *Id.* at 33.

If there is one historical certainty to be had, it is that neither James Madison, nor the First Congress, had such an intent.

1. In Drafting the Bill of Rights, Madison Discarded Proposals to Provide for State Arming of the Militia.

In preparing his draft, although aware of the others, Madison worked primarily from the Virginia demands. The Virginia request had two parts. The first was a "declaration or bill of rights," setting out "the essential and unalienable rights of the people." This included:

> 17th. 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 defense of a free state; ....

3 ELLIOT'S DEBATES 659. The second was a series of proposed "Amendments to the Body of the Constitution," relating to intergovernmental distribution of

power rather than to individual *rights*. These included:

> 11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the Militia shall not be subject to Martial law, except when in actual service in time of war, invasion, or rebellion....

Id. at 660.[4] Madison had Virginia's language before him when he began. If Congressional neglect to arm the militia was his concern, he would have chosen the first sentence of the 11th Virginia proposal – *not* the bill of rights provision declaring a right of the people to keep and bear arms. He certainly took account of the second sentence of Virginia's 11th proposal, and incorporated its essence into his draft of the future Fifth Amendment.[5]

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[4] North Carolina copied Virginia. 4 ELLIOT'S DEBATES 242-46.

[5] Virginia had requested a right to jury trial "except in the government of the land and naval forces." 3 ELLIOT'S DEBATES 658. Madison added "or the militia when on actual service in time of war or public danger," giving the militia a right to a jury except when called out. 12 PAPERS OF JAMES MADISON 202.

2. The First Congress Considered, and Voted Down, a Motion to Add Virginia's Militia-Arming Proposal to the Bill of Rights.

The First Senate considered – and rejected – a motion to attach language identical to Virginia and North Carolina's 11th proposal:

> On motion, To add the following clause to the Articles of Amendment to the Constitution of the United States, proposed by the House of Representatives, to wit:
>
> 'That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same, That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion or rebellion, and when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments, as shall be directed or inflicted by the laws of its own state.'
>
> It passed in the Negative.

JOURNAL OF THE FIRST SENATE OF THE UNITED STATES at 75.[6]

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[6] Original title JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES (1820), reprinted as 1 JOURNAL OF THE SENATE (Martin Claussen, ed. 1977).

Petitioners do address this vote – in a footnote. Petitioners' Brief at 29 n. 6 first argues that this proposal "went much farther than the Second Amendment." This hardly explains why the Senate voted it down entirely, and why Madison failed to make use of its first sentence, when he borrowed from the second one.

Petitioners next argue the motion might have provoked disputes as to whether the Congress had failed to discipline the militia. Yet (1) Petitioners' own explanation of intent assumes that this concern existed and (2) the argument ignores that Congress had only existed for three months.

Petitioners finally submit that it might have been thought redundant with the Second Amendment. This is circular reasoning, and contradicted by the historical record.[7] The rejected language clearly expressed the alleged purpose, and the accepted language did not. It cannot moreover explain why Madison rejected the language *at the very beginning* of the drafting process, and instead chose to recognize a "right of the people."

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[7] Neither Virginia's nor North Carolina's ratifying conventions considered them redundant; each listed one as a *right*, the other as a *power*. Of this Senate vote, Senator John Randolph wrote that the Senate was "for not allowing the militia arms &c...." HELEN VEIT at 292. He did not think the militia-arming clause was already covered, nor apparently did the Senate.

3. The First Congress Considered Militia Armament a Key Federal Power, and Rejected Attempts to Allow States to Provide or to Require it.

There is additional direct evidence that the First Congress was not driven by the intent that Petitioners project upon it: Congress intended to directly control arming the militia. When, in its third session, the First Congress considered a militia bill, Rep. Fitzsimmons moved to replace the requirement that a militiaman "provide himself" with arms with the proviso he "shall be provided" with them.

Madison and five others objected, with the record reflecting: "It was said it would be destructive of the bill, as it would leave it optional with the States, or individuals, whether the militia should be armed or not. This motion was lost by a great majority." 1 ANNALS OF CONGRESS 1855-56.[8] This vote came a year after the *same* Congress approved the Bill of Rights.

Petitioners' explanation of the Framers' intent fails when tested against the legislative history. And this failure leads to the collapse of Petitioners' entire interpretative effort.

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[8] A concern might have been that States would require, or issue, firearms of varying caliber. That happened anyway; militiamen brought, and States issued, whatever they had. A roster of arms issued to Missouri militia during the Civil War lists guns of every caliber and description. http://www.slpl.lib.mo.us/libsrc/moquartermaster.htm

As Judge Cooley aptly noted a century ago, "if the right were limited to those enrolled [in the militia] the purpose of the guarantee might be defeated altogether by the action or neglect to act of the government it was meant to hold in check." THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 298-99 (3d ed. 1898). Why would the Framers have labored to create an empty "right of the people," protecting only those named by statute, and thus entirely useless as a check on government?[9]

B. Petitioners' Position Mistakes the Relationship Between Militia Organization and Arms: the Framing Generation Had Unorganized Militiamen, and Required Them to Keep Arms.

It is critical to realize that "unorganized militias" are *not* a modern concept, and that arms ownership requirements were *not* coextensive with membership in the organized militia.

Pre-1787 laws frequently exempted from training and muster government officials and key occupations such as ferrymen, merchant sailors, millers, and

[9] Petitioner might contend that the First Congress could have thought the States could use their militia as a check against the national government. This would, however, contradict Petitioners' argument against an "insurrectionary" intent. Petitioners' Brief at 15 n. 3. It would also contradict their suggestion that Respondent lacks Second Amendment rights because he is not in the Federally-defined militia.

lawyers, but provided no such exception from their duty to procure arms. *See* Robert A. Churchill, *Gun Regulation, the Police Power, and the Right to Bear Arms in Early America*, 25 L. & HISTORY REV. 139, 145, 148, 166 (2007); LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX UPON DELAWARE 171-77 (Philadelphia 1741). Conversely, female householders were sometimes obligated to own militia arms for militia members in their household (*e.g.,* sons or servants). 1 WILLIAM HAND BROWNE, ED., ARCHIVES OF MARYLAND 77 (1885).

The former concept was carried over into the 1792 Militia Act, whose first section required *all* able-bodied white males 18-45 to be armed, while its second section exempted from "militia duty" government officials, ferrymen and mariners, and any other persons whom a State chose to exempt. 1 Stat. 271-72. The *requirement* of arms ownership extended beyond those who were subject to militia duty; nor is there any reason to question that the *right* to arms was seen as similarly extensive.[10]

[10] The exempted persons could be called up in an emergency. Robert H. Churchill at 145. The same holds true today: the entire militia, not only the organized portion, can be called to service. 10 U.S.C. §§332, 333; Va. Code §§44-75.1, 44-87; S.C. Code §25-1-1890; Ariz. Rev. Stat. §26-124. In fact, as *amicus* American Legislative Exchange Council points out, unorganized militias were called up during WWII and used their private arms.

C. Petitioners' Position Misapplies the Principles of Construction it Espouses.

Petitioners explain their purpose is to give effect to the Amendment's preamble. Petitioners' Brief at 17-18. This is certainly an acceptable interpretative methodology, well known to the Framers. 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION 363-374 (1953).

But Crosskey notes two relevant rules: (1) the preamble is considered only if the operative words admit of more than one equally-valid construction; and (2) in that event, the interpreter rejects whichever construction of the operative clause impairs the purpose stated in the preamble. *Id*. at 367, 373.

Respondent deals with (1), and we will discuss (2).

The preamble expresses a goal: the nation must have a well-regulated militia. What manner of *right* (for this was a Bill of Rights) could the Framers guarantee that would make this more likely? A broad individual right would ensure that Americans were armed, forming the infrastructure of a militia, which might well then evolve into a well-regulated one. This interpretation makes it more likely that the preamble's goal will be achieved. The District's approach makes it less likely: there is no right to arms until a well-regulated militia exists, yet having arms and being skilled with them is the first step to such a militia existing.

II. CITIZEN ARMS, CITIZEN ARMIES: THE INTELLECTUAL FOUNDATIONS OF THE SECOND AMENDMENT.

The Second Amendment did not erupt in a philosophical vacuum. The Amendment, like the remainder of the Bill of Rights, arose from widely shared judgments regarding citizenry, government, and the distribution of power. Three of these judgments are particularly relevant here.

Private possession of arms is not merely acceptable, but virtuous. Thus Jefferson advised his nephew to take up marksmanship since "it gives boldness, enterprise and independence to the mind." 8 PAPERS OF THOMAS JEFFERSON 407 (1950).

> Madison, in the FEDERALIST NO. 46, noted the "advantages of being armed, which Americans possess over the people of almost every other nation." Then he observed that in Europe "the governments are afraid to trust the people with arms." ... Joel Barlow, however, most eloquently articulated the vital role of arms in American political thought. He insisted that 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 source of their oppression." To republicans, a dynamic relationship existed between the possession of arms and the virile, independent citizen

> considered the basis of America's superiority over Europe.

Robert E. Shalhope, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 J. OF AMERICAN HISTORY 587, 590 (1984).

Universal armament was further seen as the basis of republican equality. As Joel Barlow informed his European audience, from "the original, unalterable truth, that all men are equal in their rights," flowed the conclusion "that the people will be universally armed." JOEL BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE 46-47 (1792, reprinted 1956). Thus one British officer, shocked at American "peasants'" lack of deference to their colonel, was told that "every one who bore arms, esteemed himself on a footing with his neighbour." 2 THOMAS AUBREY, TRAVELS THROUGH THE INTERIOR PARTS OF AMERICA 370-71 (London 1789).

There is a natural right to arms, linked to that of self-defense. As demonstrated by *amici* Cato Institute and Joyce Malcolm, this consciousness was formed by Stuart monarchs' attempts to disarm their subjects, and was recognized by the 1688 Declaration of Rights and by Blackstone's exposition of it as the fifth auxiliary right.

Americans drew the corollary conclusion: a government that does not trust its citizens in this respect, itself cannot be trusted. Thus Madison wrote of oligarchies that they cannot be safe "without a standing army, an enslaved press, and a disarmed

populace." RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 640 (1971).

A militia composed of all freeholders and voters is the only safe and effective defense of a republic. This derived not from common law, but from the Whig writers of the 18th century, and the Classical Republican movement. A professional army must either be sufficiently powerful to take over the republic, or too weak to defend it. A universal militia can be powerful yet safe; its members cannot seize the power they already have as voters, nor the property they have as freeholders.[11]

As Respondent demonstrates, British efforts to disarm the colonists reinforced these views. Moreover, in the desperate early days of the struggle, American governments used their military (not police) power of impressment to take private guns for their armies, leaving their owners defenseless and resentful: "The people hide their arms, and say they will risk their lives, rather than give up what few remain." Robert H. Churchill at 152; CLAYTON E. CRAMER, ARMED AMERICA 114-115, 117, 130-131, 143-144 (2007).

[11] As we discuss below, Americans saw "select militias," comprised of a portion of the population with special training, to have the same risk as a standing army. To be safe, a militia must embody all voters and freeholders – the "body of the people," just as the House Committee of Eleven inserted into its right to arms proposal.

The Framers believed that a universal militia was essential to a free society, that possession of arms promoted civic virtue, and that individuals had a legal right to arms. The Revolution drove home another lesson: Americans could not trust a government – in moments of desperation, perhaps not even a friendly government – to keep its hands off their arms.

III. THE RIGHT TO ARMS IN EARLY AMERICAN STATECRAFT.

These consciousnesses played a prominent role in structuring the newly independent American governments. The early States, however, divided sharply on which aspect they emphasized: militia or individual arms.[12] The division is illustrated by the Virginia experience.

Thomas Jefferson submitted a draft state constitution which would have enfranchised nearly all free males, with a bill of rights that would have recognized "No freeman shall ever be debarred the use of arms." 1 PAPERS OF THOMAS JEFFERSON 344. Perhaps fearing poaching, Jefferson contemplated adding "within his own lands or tenements," *id.* at 363, making it still clearer that he had in mind purely personal uses.

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[12] *See generally* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 141-143 (1999). For a discussion of the influence of classical republicanism vs. Jeffersonianism upon the choice, *see* David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. OF LAW & POLITICS 1, 34-43 (1987).

The legislature, however, adopted a constitution that restricted voting rights to freeholders and a declaration of rights that recognized that "a well regulated militia, composed of the body of the people,[13] trained to arms, is the proper, natural, and safe defense of a free state...." Virginia Declaration of Rights §13. Delaware and Maryland followed the Virginia model.

In contrast, States more inclined toward what would come to be known as Jeffersonianism adopted declarations that stressed the individual right to arms. Pennsylvania's Declaration of Rights, Art. 13, recognized that "the people have a right to bear arms for the defense of themselves and the state...."[14] Its 1790 Constitution elaborated: "the right of citizens to bear arms, in defense of themselves and the State, shall not be questioned."[15]

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[13] *i.e.*, Jefferson's armed "freeman."

[14] Pennsylvania had no State-ordered mandatory militia in 1776; it had private "associations" for defense that were sometimes described as militia. Robert A. Churchill at 146 n. 17. Brief of *Amici* Jack Rakove, *et al.* at 12 asserts the Pennsylvania language was somehow meant to require a mandatory militia. But the Pennsylvanians handled that elsewhere, in Article 8 of the Declaration of Rights ("That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto ... ").

[15] As Jeffersonianism took hold, new States followed Pennsylvania's formulation. Vermont's 1777, 1786, and 1793 Constitutions recognized "That the people have a right to bear

(Continued on following page)

North Carolina and Massachusetts compromised, with the first recognizing a right to bear arms "for the defense of the State," and the latter recognizing a right to keep, as well as to bear, arms "for the common defense."[16]

American statecraft of the time thus recognized three relevant constitutional models: praise for the militia, or recognition of a right of the people to arms, or recognition of such a right with a qualifier such as "for the common defense." The First Congress would combine the first two, and vote down the last.

IV. THE RATIFICATION PROCESS AND PROPOSALS FOR A BILL OF RIGHTS

A. The Conflict Over Ratification; Of Armies and Citizens' Arms

After the passage of two centuries, it is easy to forget how nearly the Constitution failed of ratification. North Carolina and Rhode Island initially failed to ratify; Massachusetts ratified with a vote of 187-168; a shift of ten votes would have lost the day. Even after Federalists agreed to add calls for a bill of

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arms for the defence of themselves and the State...." Ohio's 1802 Constitution and Indiana's 1816 Constitution used identical language. Kentucky's 1792 and 1799 Constitutions used: "That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."

[16] Whether "for the common defense" ambiguously narrowed the right to arms was vigorously debated in Massachusetts. *See* Robert H. Churchill at 169-171.

rights, votes remained close: ratification would have been lost in New York had two votes gone the other way, and in Virginia and New Hampshire had six done so.

The Antifederalists had no shortage of arguments. The Framers had given the new and untested government wide powers without the constraint of a bill of rights – "a colossal error of judgment," in the words of Leonard Levy.[17] Congress could raise, and the President command, a standing army in time of peace, and could extensively control the militia.[18]

The relevant portions of the ratification debates can be divided into three segments: the initial Antifederalist arguments, the Federalist response, and the Antifederalist reply.

The initial Antifederalist arguments. These were straightforward. A tyrannical national government would use the standing army, "that engine of arbitrary power," for oppression. 1 ELLIOT'S DEBATES 371. It might either neglect the militia, 3 ELLIOT'S DEBATES 381, or, at the other extreme, make its service so onerous that the public would "cry out 'give us a

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[17] LEONARD W. LEVY, ESSAYS ON THE MAKING OF THE CONSTITUTION 271 (2d ed. 1987).

[18] Seeing the militia as "State-regulated" is not entirely accurate. Federal standards would dictate who was enrolled, what equipment he held, and what rules of discipline his State-appointed officers could enforce. *See* 1 ELLIOT'S DEBATES 371; 5 AMERICAN STATE PAPERS (MILITARY) 241. *See generally,* Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 70 DET. MERCY L. REV. 39 (2001).

standing army.'" *Id.* Or it may form a select militia, rewarding its chosen few with special training and arms. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 21-22, 124 (William Bennett ed. 1978). Federalists could not meet these objections directly. After all, the Constitution allowed Congress to do all these things by a simple majority vote.

The "Federalist mantra." Faced with inability to deny, supporters of the Constitution instead developed a counter. "Federalists advanced arguments ... in part to claim that no bill of rights was necessary – that is, so long as the people were armed, no government could limit their freedom." LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 147 (1999). This argument became what one author has termed the "Federalist mantra." DAVID E. YOUNG, THE FOUNDERS' VIEW OF THE RIGHT TO BEAR ARMS 93 (2007). Perhaps Congress *could* abuse its power, but it *won't*, because it would be suicidal in a nation where everyone is armed; standing armies are dangerous in Europe only because the people are disarmed.

The theme developed early in the ratification process, indeed in the first Federalist pamphlet. There Noah Webster assured Americans that

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that

> can be, on any pretence, raised in the United States.

NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 43 (1787). In the Massachusetts Convention, Theodore Sedgwick asked delegates whether they imagined that a standing army "could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?" 2 ELLIOT'S DEBATES 97; in Virginia, a delegate argued it would prevent an establishment of religion: "The extent of the country is very great. The multiplicity of sects is very great likewise. The people are not to be disarmed of their weapons. They are left in full possession of them." 3 ELLIOT'S DEBATES 645-46.

The Federalist mantra reached its greatest development in Madison's FEDERALIST NO. 46, where the Father of the Constitution (and of the Second Amendment) considered the benefits both of universal citizen armament, and of the militia system. He begins by calculating that a standing army could not exceed 25,000-30,000 men, who would be opposed by 500,000 militia under State control. He then distinguishes between citizen armament ("the advantage of being armed") and the militia system:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia

> officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

Madison then sharpens the distinction. Citizen armament is a guarantee of liberties; that is why the monarchs of Europe cannot abide an armed people. Alone, it might not sweep them and their armies from power, but if they added to that a militia system, it would be sufficient even for that task:

> Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone 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 ... 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.

Webster, Sedgwick, and Madison referred to individuals – "the people," "freemen," and "Americans" – as the source of a free society's ultimate security. Acknowledging that the armed citizenry has no status in the original constitution, the Federalists claimed none was needed. That claim didn't sell.

The Antifederalist reply. The reply to the Federalist mantra was simple. What would stop a tyrannous national government from removing the check by disarming the people?[19] Thus in Pennsylvania John Smiley argued that the Congress might form a select militia and then "the people in general may be disarmed." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (M. Jensen, ed. 1976).

Likewise, George Mason warned the Virginia convention that British plans had been "to disarm the people – that was the most effectual way to enslave them – but that they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia." 3 ELLIOT'S DEBATES 380. Mason's first concern related to disarmament: neglect of the militia system would simply be a means to this more dangerous end.

Americans of the period thus knew: (1) Congress had unlimited power to raise a standing army; (2) Federalists had contended the check on this was civilian armament, but (3) Antifederalists had

[19] Petitioner suggests this could not have been a fear due to limits of enumerated Federal powers. Petitioners' Brief at 32. The same could be said of freedom of speech and religion. The Federalists sought to quiet fears by renouncing powers they never thought they had in the first place. The Senate added a preamble stating that the Bill of Rights was "to prevent misconstruction or abuse of ... powers ... " JOURNAL OF THE FIRST SENATE 73.

responded that Congress might remove the check by disarming the people. The question was how to resolve the problem, and the fear, posed by the last.

B. Proposals for a Bill of Rights

Petitioners suggest that Antifederalists pressed for a bill of rights after losing the fight over ratification. Petitioners' Brief at 26. The history is far more involved. Calls for such a bill of rights began by Virginia's George Mason in the 1787 Constitutional Convention, and continued to the last ratifying conventions. In Pennsylvania, a substantial minority of delegates called for a bill of rights with a provision

> 7. That the people have a right to bear arms for the defense of themselves and their own State, or of 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.

2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1971). This was clearly a call for protection of an individual right. It employs "bear arms" in connection with indisputably private uses, and specifically forbade disarming "any" of the people, with exceptions keyed to individual personal characteristics of the citizen. The Minority *separately*, in Article 11, would have provided that the power to organize and arm the militia would remain with the States. *Id.*

Some *amici* scoff that the signers reflected only a third of the Convention. Brief of *Amici* Jack Rakove, *et al.* at 23. The proposal has, however, three significances. First, it illustrates that a *significant number* of Americans, if not in this case a majority, were concerned about disarmament. Second, the fear concerned private arms and private purposes. Third, the Minority proposals were reprinted and widely circulated in the remaining States, becoming a part of popular understanding nationwide. LEONARD LEVY, ESSAYS ON THE MAKING OF THE CONSTITUTION 278 (2d ed. 1987); EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 11 (1957).

The next call came in the Massachusetts Convention, from Federalist leader Samuel Adams. Adams unsuccessfully[20] called for guarantees

> [T]hat 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, except when necessary for the defense of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature for a redress

[20] The complex history of the voting on Adams' proposal is explained in DAVID E. YOUNG at 263 n. 4. Antifederalists "hijacked" Adams' idea and he ended by voting against it.

> of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

2 BERNARD SCHWARTZ at 675. This also was clearly a call for protection of an individual right of "peaceable citizens."

New Hampshire's Convention is noteworthy for a number of reasons. Its ratification was the ninth vote that ensured there would be a Constitution of the United States. Moreover, Federalists hit upon the key compromise: they would accept a call for a bill of rights *provided* it was not an express condition of ratification. The New Hampshire proposal called for a guarantee that "Congress shall never disarm any Citizen except such as are or have been in Actual Rebellion." 1 ELLIOT'S DEBATES 326. Once again, this is clearly a call for protection of an individual right of "any Citizen." New Hampshire's language, like expressions in Pennsylvania and Massachusetts, is important evidence of the original public meaning of the Second Amendment's language.

In Virginia, as in New Hampshire, Federalists accepted a compromise of ratification plus a call for a bill of rights. It is noteworthy that they phrased the right to arms similarly to their calls for protection of other individual rights:

> 15th. *That the people have a right* peaceably to assemble....
>
> 16th. *That the people have a right* to freedom of speech, and of writing and publishing their sentiments....

> 17th. *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 defense of a free state; that standing armies, in time of peace, are dangerous to liberty....

3 ELLIOT'S DEBATES 648-59. The Virginia drafters appear to have begun with the Pennsylvania Minority language. They then drew from the Massachusetts 1780 Declaration the clarifying term "keep" but *not* the ambiguous phrase "for common defense," thus making it the broadest statement of the right to date. Finally, they attached a militia reference from their own 1776 Declaration.

As we note above, Virginia *separately* proposed that the States have the power to arm militias if Congress failed to do so. It further proposed that authorizing a standing army would require a 2/3 vote of both houses. *Id.* at 660. Neither proposal would make it into Madison's draft. Both would also be rejected by the First Congress.

New York's Convention, in ratifying, adopted Virginia's individual right language with the broadening substitution of "capable of bearing arms" for "trained to arms." 1 ELLIOT'S DEBATES at 328. It, too, inserted a *separate* clause criticizing standing armies. *Id*.

V. THE DRAFTING OF THE AMERICAN BILL OF RIGHTS

Madison sought to prove that Federalists were "sincerely devoted to liberty and a republican government," while at the same time "leaving unimpaired the great Powers of the government." 12 MADISON PAPERS 198, 259. Madison was also acutely aware that he must avoid "all controvertible points," because he needed a two-thirds vote in both houses, and ratification by three-quarters of the States. HELEN VEIT, *ET AL.* ED. CREATING THE BILL OF RIGHTS 254 (1991).

His object was to leave untouched the powers that the Federalists *did* intend to exercise, while abjuring the "horrible hypotheticals" argued by their opponents. Federalists had sincerely argued Congress would have no power to establish a church or suppress newspapers or disarm the people: it cost them nothing to put it in writing.

Congress needed control over the militia; as Madison had argued in FEDERALIST NO. 46, it was to be the primary defense of the nation. He knew from the Convention that this would be a bitterly disputed topic.[21] In contrast, disavowing Congressional power

[21] As we note in Argument I(C) above, when a proposal merely hinting at allowing States to control militia arms arose in the First Congress, the motion "lost by a great majority." 1 ANNALS OF CONGRESS 1855-56. Even *if* Madison had wanted the States to arm the militia, he was not going to get a majority, let alone two-thirds.

to disarm individuals would be utterly uncontroversial. To do so, Madison chose language the well-known public meaning of which supported his intention. As Petitioner agrees, it is doubtful that anyone in the First Congress even thought Congress had this power anyway. Petitioners' Brief at 34. Giving it up would indeed be throwing a "tub to the whale."

A. Background to the Drafting Process

Americans of this period believed they had a personal, natural, right to arms for self-defense, saw a government that did not trust them with arms as itself untrustworthy, and had recent experience with a British ministry that had tried to disarm its American subjects.

Madison and the First Congress knew of the sensitivity of Americans on the arms issue. Calls for a right to arms had been voiced in five Conventions, compared to three calls for freedom of speech, and only one for a guarantee against double jeopardy. 2 BERNARD SCHWARTZ at 1167.

An illustration of this sensitivity: when the First Congress later considered a militia act, a proposal to issue arms to the indigent and the young was abandoned over the objection:

> Mr. Wadsworth ... The motion appeared at first to be in favor of poor men, who are unable to purchase a firelock; but now it seems minors and apprentices are to be provided for. Is there a man in this House who would

> wish to see so large a portion of the community, perhaps one-third, armed by the United States, and liable to be disarmed by them? Nothing would tend more to excite suspicion and arouse a jealousy dangerous to the Union.

1 ANNALS OF CONGRESS 1855. The mere *potential* that the government might recall *its own arms* had to be avoided at all cost.

B. Madison's Crafting of the Right to Arms.

Madison's 1789 draft, as introduced in the House, drew heavily from the Virginia language:

> 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.

1 ANNALS OF CONGRESS 451. Madison's work had several noteworthy points.

First, we are familiar with "right of the people" in connection with the individual right of assembly and that against unreasonable searches. But Madison also used a variant for freedom of expression: "The people shall not be deprived or abridged of their right to speak, to write, or publish their sentiments...." *Id*. "Right of the people," even combined with a plural "their," was used by Madison to identify individual rights.

Second, Madison's use of an explanatory clause was unexceptional. For freedom of press, he used "the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." *Id.* For civil jury trial, he used "the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." *Id.* at 453. Madison and Jefferson agreed that a bill of rights served to remind the people of their rights, 11 MADISON PAPERS 298-99: there was no harm to mentioning the more prominent reasons for them. But a mention was all the militia system would get; Madison was committed to a Bill of Rights that did not alter the Federal-State balance struck in the original militia clauses.

Third, what *did not* make it into Madison's draft is significant. As noted above, the Virginians also requested a State power to arm the militia should Congress neglect to do so, and a supermajority requirement to authorize a standing army. Neither proposal made it into Madison's draft. Madison would not re-open the contentious issues of State control over the militia, or of a standing army. The protections against the standing army would be the ones he outlined in FEDERALIST NO. 46: citizens with arms, and a universal militia.

Fourth: Madison's very organization shows the right to arms was seen as an individual right and not as militia-related. Madison's draft did not take the format with which we are today familiar, that of a numbered list of amendments following the Constitution. Rather, his draft designated where, within the

Constitution, each provision was to be inserted. 1 ANNALS OF CONGRESS 451-52.

For example, his provisions relating to the House of Representatives were to be inserted in Article I, Section 2. An unsuccessful proposal to forbid States to infringe the rights of conscience was to be inserted in Article I, Section 10, alongside its other "Restrictions Upon Powers of States." Provisions relating to jury trial, grand juries, and appeals were to be placed in Article III.

Thus, if Madison had seen the future Second Amendment as militia-related, he would have designated its place next to the Militia Clauses in Article I, Section 8.

Instead Madison grouped it with freedom of speech, press, assembly and other individual rights, and designated their place in Article I, Section 9, right after "No bill of attainder or ex post facto law shall be passed." Madison's arrangement is compelling evidence that he did not view the right to arms as a guarantee relating to States and militias; its militia reference was explanation, not an operative part of its guarantee. *See* LEONARD W. LEVY, ORIGINS at 145; Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROB. 125, 135 (1986).

Petitioners assert that no one has brought forth a person directly connected with the drafting who asserted that the right to arms covered private purposes. Petitioners' Brief at 34. We note Petitioners

and their *amici* have been unable to bring forth one such person who asserted that the right was restricted to militia uses. We would, however, rise to the challenge, with two nominees.

The first is James Madison himself. As *amici* Cato Institute and Joyce Malcolm demonstrate, the British 1688 Declaration of Rights, which guaranteed the right – of Protestant subjects[22] – to have arms "for their defense," had no militia linkage; indeed, it was the Royal militia who had carried out the disarmament giving rise to the Declaration.

In Madison's notes for his floor speech, he discusses why the 1688 Declaration is inadequate protection:

> fallacy on both sides – espcy as to English Decln of Rts –
>
> 1. Mere act of parlt.
>
> 2. no freedom of press – Conscience
>
> Gl. Warrants – Habs corpus
>
> Jury in Civil Cause – criml.
>
> Attainders – arms to Protestts.

[22] Protestants then comprising about 98% of the English population. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 184 n. 3 (1994).

12 MADISON PAPERS 193. The last can only be read as "inadequate because the right to arms is guaranteed to Protestants only."

Our second nominee is William Rawle, who sat in the Pennsylvania Assembly when it ratified the Bill of Rights. ELIZABETH BAUER, COMMENTARIES UPON THE CONSTITUTION 1790-1960, 61 (1965). In his book A VIEW OF THE CONSTITUTION, Rawle bifurcated his Second Amendment discussion, discussing first the militia portion with qualified praise, and then turning to the remainder:

> The corollary, from the first position is that the right of the people to keep and bear arms shall not be infringed. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to Congress a power to disarm the people.

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION 125 (2d Ed. 1829).

C. The First Congress and the Second Amendment.

The parties, and other *amici*, extensively discuss editorial changes made by the First Congress. We note there were three significant events.

First, the Congress brutally trimmed Madison's draft to reduce its size and eliminate his explanations for, or praises of, many rights. Only the Second

Amendment's explanatory clause survived. This is suggestive that the two clauses had two different purposes, or viewed practically, were necessary to allay two different fears. If Congress had only meant to protect a militia system, it would have stopped with "necessary to a free state."

Second, the House Committee of Eleven, to whom it was initially referred, rejected a rival proposal by Rep. Roger Sherman to guarantee that "The militia shall be under the government of ... the respective States, when not in actual service of the united States...." HELEN VEIT at 267. The future Second Amendment remained Madison's *right* "of the people" not Sherman's *power* of the "state."[23]

Third, the Senate rejected any idea of linking the "right of the people" to militia or collective defense:

> On motion to amend article the fifth, by inserting these words, 'for the common defence,' next to the words 'bear arms:'
>
> It passed in the negative.

JOURNAL OF THE FIRST SENATE OF THE UNITED STATES 77. Petitioners' attempts to reconcile this vote with their position, Petitioners' Brief at 19, are unconvincing. The District *speculates* that the proposal might

[23] The Committee retained Madison's concept of inserting the amendments into the body of the Constitution. They also voted to insert "composed of the body of the people" after "militia." HELEN VEIT at 30.

have impaired use of militias for law enforcement; yet as it notes several States had this language in their own Bills of Rights, *id.* at 30, and the issue seems never to have arisen. Or perhaps, Petitioners assert, it would have impaired use of militias by individual States. Yet this is a Bill of Rights, not a statute empowering State militia uses.

The most natural reading of the Senate's action is that (given the extreme sensitivity of the issue) it did not wish to be seen as limiting "right of the people to keep and bear arms" to matters involving the ambiguous phrase "the common defense."

VI. THE ORIGINAL PUBLIC MEANING OF THE SECOND AMENDMENT INCORPORATED THE ARMS AMENDMENTS PROPOSED IN THE VARIOUS STATE RATIFYING CONVENTIONS

In the 1780s the individual *right* to have personal arms for personal purposes was simply not questioned by anyone, anywhere. As cultural historians observe, such a situation is commonplace: "the most elemental and important facts about a society are those that are seldom debated and generally regarded as settled."[24] The Pennsylvania Minority, Massachusetts minority, and New Hampshire proposals as well as Virginia's (and North Carolina's)

[24] Louis Wirth, *Preface* to Karl Mannheim, IDEOLOGY AND UTOPIA xxiv (1946).

have to be understood against this background. The *right* existed, so any "bill of rights" however worded was understood to preserve that personal right. Had anyone publicly suggested otherwise, all hell would have broken loose. *And it did not.*

We turn here to original public meaning, rather than Madison's personal thoughts. Petitioners cite no contemporaneous source for the proposition that the First Congress's language was seen as embodying a guarantee distinct from the earlier proposals. Madison and the First Congress were attempting to allay popular concerns, and not merely those of the delegates to the Virginia Ratifying Convention. Madison would hardly have written that his proposal would "kill the opposition every where," and "put[ ] an end to the dissatisfaction with the Gov't itself," HELEN VEIT at 282, had he ignored the concerns of a third of the Pennsylvania convention and a majority of the New Hampshire ratifiers.

To the contrary, all evidence of the original public meaning indicates that the final Congressional language was seen as incorporating the earlier proposals.

Even as the Bill of Rights was under consideration, the Philadelphia Independent Gazetteer reprinted an article from the Boston Independent Chronicle, reproducing Madison's draft, with the preface:

> It may well be remembered that the following 'amendments' were introduced to the convention ... by ... SAMUEL ADAMS.... To

> the honor of this gentleman's ... just way of thinking ... every one of his intended alterations, but one,[25] have already been reported by the committee of the House of Representatives in Congress, and will probably be adopted by the federal legislature.

The article followed with a reproduction of Adams' proposals, including "or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Philadelphia Independent Gazetteer, Aug. 20, 1789, reprinted in DAVID E. YOUNG at 701-02. Others in Massachusetts drew similar conclusions. *See* HELEN VEIT at 260-61.

Also during the House deliberations, a newspaper article written by Tench Coxe appeared in the *New York Packet*. Given its timeliness and distribution – "reprinted throughout the nation," LEONARD W. LEVY, ORIGINS at 147 – and the fact that Madison wrote back with gratitude, the article is of exceptional importance to identify the original public meaning of the text. Coxe wrote that Madison's proposals guaranteed the people the "right to keep and bear their private arms," *id.* at 146; STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS 85 (1989).

A third indicator: the Speaker of the First House was Frederick Muhlenburg of Pennsylvania, and toward the end of the House debates he wrote to Benjamin Rush that

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[25] Adams had also proposed a bar on standing armies.

> [A]s it is now done I hope it will be satisfactory to our State, and as it takes in the principal amendments which our [Pennsylvania] Minority had so much at heart, I hope it may restore harmony & unanimity amongst our fellow citizens ...

HELEN VEIT at 280-81.

Finally, we have the testimony of George Mason who had expressed the fear that the people might be disarmed with the government "disusing and neglecting the militia" as a first step. Mason had no hesitation proclaiming that he had "received much satisfaction from the amendments to the federal constitution, which have lately passed the House of Representatives ... " 3 PAPERS OF GEORGE MASON 1172 (Robert Rutland, ed. 1970). He would hardly have expressed such satisfaction, had he believed that the government still had the power to neglect the militia, and use that as a justification for disarming the people, precisely as he had feared.

All evidence suggests that Americans of the Framing period viewed the public meaning of the Second Amendment as incorporating the earlier requests of Samuel Adams and the Pennsylvania Minority. Petitioners and their *amici* invoke not a scintilla of contemporary *evidence* to the contrary.

CONCLUSION

The operative clause of the Second Amendment is as unambiguous as any command of the First Amendment. Read in light of its preamble, it is meant to guarantee the existence of an armed citizenry, the militia infrastructure from which the Republic could obtain (and would be more likely to create) a well-regulated militia. Rather than giving effect to both the Amendment's clauses, Petitioners propose that this Court give effect to neither. Under its reading, there is no duty to create a well-regulated militia, and absent that, the people have no right to arms, either.

Petitioners' interpretation of the Second Amendment moreover disregards its history: Madison and Congress *rejected* language creating a power of the States to arm the militia, just as they *rejected* language limiting it to a right "for the common defense."

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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