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Article

Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment

David C. Williams[†]

Ever since its modern rediscovery as a source of ideas for constitutional analysis, civic republicanism has not rested entirely easily in the bosoms of its principal supporters, the academic left. This discomfort may be unavoidable, because republicanism is an old belief system and carries signs of its age, while the academic left aspires to be progressive. In particular, republicans have persistently celebrated the right of citizens to keep and bear arms.¹

This endorsement and the discomfort it causes to neorepublicans is the central theme of Sanford Levinson's recent, insightful essay, *The Embarrassing Second Amendment*.² Focusing on their distrust of constituted authority, Levinson argues that the republican Framers of the Second Amendment insisted (pg.552) on the right of all private citizens to keep arms, so as to be able to revolt.³

[†] Associate Professor of Law, Cornell Law School. For their many helpful comments, I would like to thank Gregory Alexander, Akhil Amar, Hendrik Hartog, James Henderson, Don Kates, Isaac Kramnick, Sanford Levinson, David Lyons, Frank Michelman, Steven Shiffrin, and Susan Williams.

¹ Historically, republicanism was also at times associated with racism and slavery, see KENNETH S. GREENBERG, *MASTERS AND STATESMEN* 4 (1985), as well religious intolerance, patriarchy, and oppressive corporatism and elitism, see JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790'S*, at 8-19 (1984); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1668-69 (1988). Old-style republicanism also endorsed a "natural" division of the citizenry into "the One, the Few, and the Many," see Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 44-46 (1986), and an objective public good to which dissenters were required to conform, see *id.* at 22.

² Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). The Second Amendment provides: "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." U.S. CONST. amend. II.

³ Levinson and others commonly describe the Amendment as resting on a "right of revolution." I generally use the phrase "right of resistance" instead, because the right of revolution is so intimately associated with a Lockean framework in which citizens revolt to protect their individual rights under the social contract.

Under a republican interpretation, then, the Second Amendment provides for a personal right to own firearms.⁴ This reading, Levinson suggests, would be "embarrassing" to the academic left, which would prefer to prohibit private ownership of guns.⁵ In a response, Wendy Brown observes that the republican right of revolution presupposed a virtuous citizenry, and as we do not now have such a populace, we should not have such a right—even if we believe in republicanism.⁶ Moreover, in Brown's view, we need not today slavishly accept all aspects of early republican doctrine; instead, we should purge the tradition of its offensive elements—particularly of the sexism and violence suggested by the Second Amendment.⁷

This dialogue between Levinson and Brown has had several important consequences. It has drawn attention to the Second Amendment as a subject for scholarly analysis,⁸ and it has attracted the notice of no less a popular pundit than George Will at a time when the federal government is seriously discussing nationwide gun control.⁹ In addition, this dialogue explicitly addresses the concern that reviving republicanism may bring with it an acceptance, even an encouragement, of violence.¹⁰ Levinson and Brown confront these issues with boldness, clarity, and acuity. I suggest, however, that careful examination of the intellectual context of the right to arms leads to conclusions different from both Levinson's and Brown's.

This Article addresses the meaning that the Second Amendment would bear in a modern republican interpretation. My purpose is primarily heuristic rather than prescriptive: I offer an analysis of the role of the right to bear arms in republican theory, not a judgment concerning the general attractiveness of republican theory as a whole. Such a concentration on the right to arms in the republican tradition is important for several reasons. First, the Second Amendment, perhaps more than any other provision of the Constitution, is grounded (pg.553) in the republican tradition.¹¹ We must therefore look principally to republicanism for illumination of the historical meaning of this particular Amendment—even if one gives a liberal reading to the rest of the document. Many commentators have instead offered historical exegeses of the Amendment that, in my view, miss the significance of its surrounding tradition and mistakenly find an individual right to arms for self-defense. Second, as the dialogue between Brown and Levinson illustrates, some neorepublicans find the Amendment embarrassing and feel the need to prune it from the republican thicket. In contrast, I argue that the Amendment is central to the republican tradition and perfectly consistent with its principal commitments. Finally, in a broader sense, an analysis of the Second Amendment

⁴ See Levinson, *supra* note 2, at 646-50.

⁵ See *id.* at 642.

⁶ See Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 663, 665 (1989).

⁷ See *Id.* at 663-64, 665-66.

⁸ Levinson observes that the amount of academic writing on the Amendment, especially in major journals, is vastly less than that on other provisions of the Bill of Rights. See Levinson, *supra* note 2, at 639-42. Before Levinson, the only analysis in a major law journal was Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983), a particularly influential piece.

⁹ Will recently endorsed Levinson's argument, concluding that gun control advocates—like himself—must first repeal the Amendment. See George F. Will, *The Gun Amendment Befogs a Gunfire Crisis*, ITHACA J., Mar. 22, 1991, at 8A.

¹⁰ Many commentators have noted this possibility as a concern without discussing it at any length. See, e.g., Ruth H. Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 SIGNS 37, 42-45 (1987); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1539-40, 1564 (1988).

¹¹ I attribute significance to republicanism in explicating only this provision, not the Constitution as a whole or late 18th-century American thinking in general.

in the republican tradition allows a clearer perspective on the overall advisability of a modern republican revival: to the extent one finds the modern implications of the provision troubling, utopian, or just not very useful, one might question the wisdom of the revival as well.

The republican tradition that lies behind the Second Amendment is not just embarrassing—it is terrifying. It acknowledges that humans are never wholly in control of their own destinies. At the heart of republicanism lies a paradox that mocks human efforts at self-government: republics can never successfully survive unless their citizens act in a virtuous manner, eschewing private interests for the sake of the public good, but citizens will not act virtuously except in a republic that fosters such virtuous conduct. Hence, a republic is in effect a logical contradiction, a paradox in its very nature. Creating or maintaining a republic against the constant risk of corruption by particularistic interests is therefore the most difficult of tasks. Republican theory, however, offers some structures to aid in this task, prominent among them the universal militia.

The republican framers of the Second Amendment were painfully aware that ultimate political power would lie with those who controlled the means of force. As a result, they sought to arm not a narrow slice of society that might seize the government for its own end, but rather all the citizens in a state, in the form of a universal militia, which would always act in the common good. In republican thinking, this militia had an ambiguous status. On the one hand, it was a creature of the state apparatus, inasmuch as the state¹² gathered it, ensured it was universal, trained it in the use of arms, and mobilized it against foreign invasion or domestic insurrection. On the other hand, it was composed of all of the citizens, deriving its legitimacy from them and being virtually synonymous with them.^(pg.554)

The militia, in other words, constituted a forum in which state and society met and melded,¹³ and this combination offered some advantages for curbing corruption. If the evil of partiality touched a segment of the population, then the militia—constituted as an instrument of the state—could restrain any movement toward demagogic rebellion. But if the state became corrupt, then the militia—now constituted as "the people"—could resist despotism. Indeed, the line between state and people ideally disappeared in the militia, in that the militia members were both rulers and ruled.

From this republican perspective, the error of those who today seek to guarantee a private right to arms is that they would thereby consign the means of force to those who happen to possess firearms—a partial slice of society—rather than to the whole people assembled in militia. Even in the eighteenth century, literal universality was never more than a rhetorical aspiration or a regulative ideal, but it was nevertheless the prevailing ideal, and any departure from it meant failure. At a minimum, therefore, any modern version of this militia must be so inclusive that its composition offers some meaningful promise that it will not become the tool of a slice of society, as it could in the case of those who decide for private reasons to buy a gun or to become members of the national guard.¹⁴ The militia must be the people acting together, not isolated persons acting individually.

¹² For reasons explained in the next footnote, I use the term "state" throughout this Article to refer narrowly to the state *apparatus*—the government and its ministers.

¹³ The melding of rulers and ruled is a characteristic republican aspiration: ideally, there should be only self-governing citizens. Indeed, there is some question whether or not before *The Federalist* Americans even had a theory of the "state" in its modern European sense. See Isaac Kramnick, *Editor's Introduction* to THE FEDERALIST PAPERS 67 (Isaac Kramnick ed., 1987). But republicans did recognize that the state *apparatus* was separate from the people and might threaten liberty. The militia offered a place where the apparatus and society merged.

¹⁴ Neither the guard nor private gunowners reflect universality; they are distinct interest groups in the American game of pluralistic politics.

As we today have no such universal militia and no assurance that contemporary arms-bearers will be virtuous, the Second Amendment itself is—for now—outdated. But republican theory does not, in the absence of a virtuous citizenry, give up. Through the militia ideal, republicanism offers practical guidance on how positively to engender civic virtue, in the form of disinterested self-sacrifice, amongst a nonvirtuous, self-interested populace. Although this militia ideal may seem hopelessly utopian in its conception of the redemptive possibility of politics, it is central to the historical tradition as an icon of the main theme of republicanism—empowering citizens engaged in deliberative politics in pursuit of a common good.¹⁵ It therefore seems worthwhile to consider the present implications of the militia ideal for courts interpreting the Second Amendment, and, more importantly, for citizens seeking to realize the promise of republican government.

For courts, the great change from the 1780's is that without a universal militia it is impossible to hazard a republican reading of the Second Amendment. (pg.555) The militia was a precondition for the right to arms. Without a militia the right is meaningless. The republican tradition thus suggests that the provision as written has become outdated. From a judicial perspective, this part of republicanism is not very useful, because the world really has changed, and republicanism cannot mean what it once did.

On the other hand, the Amendment can serve as a regulative ideal, emphasizing the importance of committing force to virtue. Despite the effective nullification of the provision by the disappearance of the militia, judges might seek other means to secure those ends. In particular, courts can give the Amendment new life by reinterpreting other constitutional provisions to serve the functions of the old militia.

The militia ideal has even greater significance for neorepublicans seeking to reconstruct society in nonjudicial fora. It suggests, in particular, that they should emphasize the populist strain of republican theory. Since the people can no longer directly participate through the militia, they need militia-surrogates, bodies that serve functions formerly served by the militia. One course would be to reactivate the universal militia itself, which would act on its own views of the commonweal to resist tyrants and demagogues. The problem with this course is the extreme danger in giving arms to citizens who are not now and may never become virtuous. That fear is rational and one that contemporary republicans should share: republican measures may be inappropriate for an unrepublican populace.

The better course is to pursue other measures that would grant the people opportunities to develop virtue, such as universal service, and to control their own lives—such as workplace democracy. At some later point, it may be appropriate to reconstitute a universal militia, and the Second Amendment would reacquire its original meaning. In the interim, the control of arms will lie with the government, not the people—a profoundly unrepublican condition—but even within a republican framework some risks are not worth taking. The suggestion of a revived militia, however, starkly poses the central difficulty faced by modern neorepublicans: How does a population characterized by selfish pursuit of discordant interests become a society in which realization of the "common good" is anything but utopian rhetoric? Neorepublicans have offered some possible answers, but they go only part of the way—and under present conditions can not go further—toward reconstructing a republican militia-surrogate.

This Article will advance two themes. First, unlike Levinson, I do not think that republicanism supplies a useful way to interpret the Second Amendment unless there are substantial

¹⁵ Cf. Michelman, *supra* note 1, at 74-77 (offering Supreme Court decisionmaking as icon of republican dialogue).

changes in society. Second, unlike Brown, I do think that the Amendment's history offers an important regulative ideal in constructing a modern version of republicanism. The Article proceeds in four parts. Part I considers the extant scholarship and case law dealing with the Second Amendment, focusing on the colloquy between Levinson and Brown. Part II describes (pg.556) the role of the right to arms in republican thought. It first sketches the constant sense of danger that beset republicans: a republic was a fragile enterprise, always vulnerable to corruption. It then analyzes the corruption-battling functions served by the militia and the right to bear arms. Service in the militia trained one to a life of virtue, both self-sacrificing and independent; these virtuous arms-bearing citizens could block the designs of corrupt factions, whether those of demagogues among the people or despots among government ministers, and, if a corrupt faction should seize power, the citizens could resist, to restore the moral and political health of the republic.

Part III considers the implications of this tradition for a modern interpretation of the Second Amendment. In particular, I argue that because of the disappearance of the militia, the Amendment cannot have any literal meaning; at best, we can use it as a regulative ideal in interpreting other provisions. Finally, Part IV argues that the militia ideal is consistent with the rest of republicanism and discusses modern reforms based on that ideal, suggesting that universal service and measures to increase direct popular control of government can move toward serving the function of the old militia.

I. THE DEBATE

A. *Before Levinson and Brown*

Before the recent dialogue between Levinson and Brown, serious discussion of the Second Amendment was notably limited.¹⁶ The Supreme Court had offered little guidance; it has decided only four significant cases under the provision, none of them recent or definitive.¹⁷ In 1875, the Court held that the Amendment limited the actions only of government, not of private individuals.¹⁸ Later in the century, the Court twice held that the Amendment limited the actions only of the federal government and not of the states, on the grounds (pg.557) that the Bill of Rights did not apply to the states.¹⁹ The Court decided these cases, however, well before it began to incorporate the rest of the

¹⁶ Some Commentators have suggested explanations for this silence: a dissembling or timorous Supreme Court has refused to take cases that would force them to recognize the right. *See, e.g.,* Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 103-04 (1987). Academics have abetted the judges by pretending that the Amendment does not exist, or else by willfully ignoring history and reducing the Amendment to a protection for the national guard. Similarly, Levinson explains that because the Amendment is embarrassing to the established academy, constitutional scholars dwell long on the First Amendment but then close their eyes and leap to the Fourth. *See* Levinson, *supra* note 2, at 639-42.

¹⁷ The Court did mention the Second Amendment in a fifth case, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), in which Chief Justice Taney warned that if blacks were citizens, they would have the right to bear arms. *See* 60 U.S. (19 How.) at 416-17. Indeed, the right to bear arms was important to blacks in the years after the Civil War, not only symbolically, as a badge of citizenship, but practically, as a way to resist white terrorism. *See* STEPHEN HALBROOK, *THAT EVERY MAN BE ARMED* 107-53 (1984); Robert Cottrol & Ray Diamond, *The Second Amendment: Towards an Afro-Americanist Reconsideration*, 80 GEO. L.J. (forthcoming Dec. 1991).

¹⁸ *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). The defendants, who had disarmed ex-slaves, were indicted under federal laws against conspiracy to deprive a citizen of constitutional rights. The Court quashed the indictment on the grounds that citizens had no constitutional right against private disarming.

¹⁹ *Miller v. Texas*, 153 U.S. 535, 536 (1894) (dismissing writ of error from state conviction for carrying dangerous weapons on person); *Presser v. Illinois*, 116 U.S. 252, 264 (1886) (dismissing writ of error from state conviction under law against organization, training, and marching of private armies).

Bill of Rights into the Fourteenth Amendment, so the continuing validity of these decisions is uncertain.²⁰ In any event, these cases discussed only the actors against whom the right applied, not the scope of the right itself.

The Court seriously considered the scope of the right to bear arms in only one case—*United States v. Miller*, decided in 1939.²¹ In *Miller*, the Court addressed a Second Amendment challenge to the National Firearms Act of 1934,²² which prohibited, inter alia, possession of a sawed-off shotgun except in limited circumstances. The Court explained that the purpose of the Amendment was to "assure the continuation and render possible the effectiveness of [militia] forces," so that the government would not rely on standing armies.²³ But because the parties had not adduced "any evidence tending to show that possession or use of a [sawed-off shotgun] has some reasonable relationship to the preservation or efficiency of a well regulated militia," the Court could not "say that the Second Amendment guarantees the right to keep and bear such an instrument."²⁴ At a minimum, then, *Miller* limits the scope of the Amendment to arms suitable for use by militia.

Lower courts have suggested that *Miller* limits the right even further. If the Amendment's purpose is only to assure the "continuation" and render possible the "effectiveness" of the militia, then it may protect state governments against federal tampering with their militia, but it does not guarantee individuals any (pg.558) rights at all.²⁵ Some of *Miller's* language, however, is in tension with such a reading. In the eighteenth century, the Court explained, the militia "comprised all males physically capable of acting in concert for the common defense," and "when called for service these men were expected to appear bearing arms supplied by themselves."²⁶ In other words, the Court strongly suggested that the Amendment guarantees a private right to own guns, at least by all males of arms-bearing age, so as to be ready for militia service. But the Court did not articulate that

²⁰ Many commentators have argued that courts should assume that the Supreme Court would incorporate the Amendment today, as it has incorporated other provisions. *See, e.g.,* Kates, *supra* note 8, at 252-57; Lund, *supra* note 16, at 110. A number of courts have ignored such an invitation on the grounds that even if the Court would so rule, it has not yet done so; *Presser and Miller*, however old, are still the Court's last words on the subject. *See, e.g.,* *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982).

²¹ *United States v. Miller*, 307 U.S. 174 (1939).

²² Ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801-45 (1988)).

²³ 307 U.S. at 178. The Court did not explicitly say so, but it was presumably relying on the opening clause of the Amendment—"a well-regulated militia, being necessary to the security of a free state"—for this assertion. Actually, the Court's full analysis of this point is confusing. The Court first pointed out that Article I gives Congress the power to call forth the militia to execute the laws of the Union, suppress insurrections, and repel invaders. The Court continued: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made." *Id.* The Court here seems to be saying that the Second Amendment guarantees a right to arms, so that the militia will be ready for Congress' call. The provision thus protects a federal interest in the readiness of the militia. Such a reading is hard to square with the historical record. *See infra* text accompanying notes 171-86. The goal of the Amendment cannot be to protect Congress' interest in calling forth the militia, because Congress had the power to require militia readiness without the Amendment. Instead, the Amendment limits the power of Congress by providing that it may not disarm the people, even if it believed that such disarming would for some reason serve the preparedness of the militia.

²⁴ 307 U.S. at 178.

²⁵ *See, e.g.,* *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (2d ed. 1988); Roy Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 999 (1975).

²⁶ 307 U.S. at 179.

conclusion in so many words. It was enough to conclude that a sawed-off shotgun was not appropriate for militia use.²⁷

Faced with this dearth of judicial instruction, commentators fall into only two groups—often called the individual rights and states' rights positions. The latter position relies on the language of the clause explaining the Amendment's purpose: "*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.*" According to this view, the goal of the provision is thus merely to guarantee the right of the states to maintain their militias, not to guarantee any right to individuals, and Congress has adequately protected the right of the states with the National Guard system.²⁸

In contrast, the individual rights' view emphasizes that the Amendment grants a right to "the people" not to the "states." Moreover, the unorganized militia in the 1790's included every male of arms-bearing age²⁹—and still does.³⁰ The Framers emphasized the importance of the unorganized militia in the constant struggle to forestall tyranny; one could not rely on the organized or "select" militia, as that body itself could become corrupt.³¹ As a last step, (pg.559) advocates of the individual rights view typically assert that the Amendment enshrined a right to own guns not only for revolution but also for defense of the home and perhaps for hunting and target practice as well.³²

B. *Levinson and Brown*

Professor Levinson injects important new insights into this debate. First, he brings the recent research to bear on republican ideology. Second, he carefully distinguishes between the two rights that other commentators have merged: the Second Amendment might protect an individual right to self-defense or a "collective" right to revolution, or neither, or both. Republican ideology, Levinson suggests, supports the right to revolution, but apparently does not concern itself with the right to self-defense.³³ Moreover, Levinson himself finds the right to revolution more "interesting"³⁴ and

²⁷ Since *Miller*, the Court has offered only one perfunctory interpretation of the case. In *Lewis v. United States*, 445 U.S. 55 (1980), the Court held that a federal prohibition on the possession of firearms by a felon did not violate the Constitution because "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Id.* at 65-66 n.8 (quoting *Miller*, 307 U.S. at 178).

²⁸ See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST* 95, 227 n.76 (1980); TRIBE, *supra* note 25, at 299 n.6; Weatherup, *supra* note 25, at 995-96; Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 61-62 (1966); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148, 158-59 (1971).

²⁹ First Militia Act, Ch. 33, 1 Stat. 271 (1792) (current version at 10 U.S.C. §§ 311-12 (1988)). The Amendment does specify a "well regulated" militia, which does not sound much like an "unorganized" militia. But individual rights advocates point out that in the 18th century, "well regulated" was more likely to mean "trained" or "disciplined" than "government-controlled." See David T. Hardy, *Armed Citizens, Citizen Armies*, 9 HARV. J.L. & PUB. POL'Y 559, 626 n.328 (1986); Lund, *supra* note 16, at 107 n.8. As I will argue, one meaning that "well regulated" does not have is "less than universal." See *infra* note 207.

³⁰ 10 U.S.C. § 311(a) (1988).

³¹ See, e.g., HALBROOK, *supra* note 17, at 84-87; David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 37-40 (1976); Hardy, *supra* note 29, at 623-24; Kates, *supra* note 8, at 214-18; Joyce L. Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 314 (1983).

³² See *infra* notes 198, 200.

³³ Levinson's discussion of neorepublicanism occurs only in the context of his analysis of the right to revolution. See Levinson, *supra* note 2, at 646-50.

³⁴ *Id.* at 646-47.

apparently believes that social change may have rendered the right to self-defense, but not the right to revolution, outdated.³⁵

Levinson's implicit claim that republicanism has little to say about the right to self-defense and much to say about a right of resistance is, in my view, correct.³⁶ If the Second Amendment does provide a right to own guns for self-defense, republicanism cannot supply the intellectual foundation for it. But if Levinson is correct to tie a right of resistance to republicanism, he is not clear about who possesses that right—the states, individuals, or some other body. On the one hand, he considers the republican right as entailing protection for private, individual ownership of guns. Defining the republican militia as "all of the people, or at least all of those treated as full citizens of the community,"³⁷ he attributes to that great republican James Harrington the view that liberty depends on independent citizens, and that to be independent of government, citizens must own arms. The Second Amendment thus serves to check government: "[T]he ultimate 'checking value' in a republican polity is the ability of an armed populace, presumptively motivated by a shared commitment to the common good, to resist governmental tyranny."³⁸ The Second Amendment thus guarantees to each citizen the ability to intimidate potentially tyrannical government with private arms.^(pg.560)

On the other hand, Levinson calls the right to bear arms "collective," and he distinguishes it from an "individualist" right of self-defense. In what sense is this right collective? Levinson does not specify. It is plainly not collective in the sense that it must be exercised by the organized state militia: Levinson emphasizes that the republican militia includes every citizen, even those who are not members of the organized militia. At one point, he describes the citizenry as a "structure" that stands ready to defend liberty against those "other two structures," the state and federal governments. But he never explains how the citizens are yoked together into a "structure" rather than existing as loose atoms. The right described by Levinson seems to be collective in only two limited senses. First, it is a right held by individuals, though for the good of the whole: resistance to tyrants is service to the commonweal. Second, as a practical matter, a single individual cannot resist the government; he needs help from his friends in a collective surge of indignation. The citizenry is thus a structure only in the sense that all those atoms serve a structural role in the republican form of government: considered en masse, but not melded into any form of organization, the citizens may sufficiently frighten the government so that it will not become tyrannical.³⁹

Wendy Brown launches a three-part attack on Levinson's right of revolution: it is not republican; it is no longer relevant in our changed world; and even in its original form, it is a part of republicanism better discarded. First, she maintains that the "republican argument for arming the citizenry is most powerfully elaborated not by the English thinkers Levinson cites, but in that

³⁵ See *id.* at 656. Indeed, the most that Levinson has to say for the right to self-defense is that "it seems tendentious to reject out of hand the argument that one purpose of the Amendment was to recognize" it. *Id.* at 645-46.

³⁶ See *infra* text accompanying notes 171-86.

³⁷ Levinson, *supra* note 2, at 646-47.

³⁸ *Id.* at 648.

³⁹ Second Amendment rights are thus not like the Fourteenth Amendment right of intimacy, *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that statute preventing contraceptive use violated right of marital privacy); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that statute compelling Jaycees to accept women as regular members does not violate male members' freedom of intimate or expressive association). They need collective action to work but are not inherently associational.

passionate republican work, Machiavelli's *Discourses on the First Decade of Titus Livius*.⁴⁰ Focusing on Machiavelli's statist tendencies, she then claims that the "republican citizenry is not armed against the state but *as* the state—an armed citizenry is the state's heart, not its opposition or counterweight."⁴¹ The right of revolution, on the other hand, is a product of Lockean liberalism, "in which a diffident and depoliticized populace squares off against the state, in which there is no political heart at all but only hands and feet all armed against one another."⁴²

This privileging of Machiavelli over all later republicans, in reading an eighteenth-century amendment, seems unnecessary.⁴³ As a significant early (pg.561) republican, Machiavelli may be relevant to the Amendment, but it is difficult to discern why he is more relevant than Harrington or Trenchard and Gordon. As Brown acknowledges, those later writers endorsed a right of resistance,⁴⁴ which belonged not to a liberal "diffident and depoliticized populace" but to an intensely active citizenry, for whom self-arming was an act of concern for the health of the state.⁴⁵

Brown's second criticism of Levinson is more persuasive: republicanism needs a virtuous citizenry, but Brown "cannot imagine a less appropriate appellation for the contemporary American citizenry, which bears a shared commitment to almost nothing, least of all a common good."⁴⁶ If the citizenry is not virtuous, we have no assurance that it will use its arms in virtuous ways. So Brown predicts pernicious results if we arm our present citizenry: gun owners are likely to use them to rape women and to murder young urban black men.⁴⁷ Whatever the need for a right of resistance by arms in the United States, there is a high probability that guns will continue to be used in the future as they

⁴⁰ Brown, *supra* note 6, at 661.

⁴¹ *Id.* at 662-63.

⁴² *Id.* at 663.

⁴³ Moreover, Machiavelli is susceptible to a different reading from Brown's. Machiavelli believed that a militia offered the best defense against foreign invaders; in that sense the militia was armed as the state. See NICCOLO MACHIAVELLI, *Discourses on the First Decade of Titus Livius*, in 1 THE CHIEF WORKS AND OTHERS 175, 411 (Allen Gilbert trans., 1965). But another advantage of an armed populace was that it could resist domestic tyrants. See NICCOLO MACHIAVELLI, *The Art of War*, in 2 *id.* at 561, 578. In so resisting, the citizens were still armed "as the state" in the sense that the despot had stopped representing the state and the people had stepped into the gap. But this description does not lead to Brown's conclusion. In one semantic usage, the Machiavelian citizenry cannot resist the state because it is the state; but it can resist the government. Indeed, Quentin Skinner has argued that Machiavelli's call for devotion to the common good was strictly instrumental to ensuring each citizen negative liberty from government; only if we each act as responsible citizens can any person have the freedom to order his own affairs as he wishes. See Quentin Skinner, *The Idea of Negative Liberty: Philosophical and Historical Perspectives*, in PHILOSOPHY IN HISTORY 193, 204-19 (Richard Rorty et al. eds., 1984).

⁴⁴ These English writers may be more antistatist than Machiavelli because republicanism, when it crossed the English Channel, confronted a more established and monarchical state than the unstable city-states of Italy. English republicans therefore had to develop a doctrine of resistance to justify their departure from royalism. See J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 345-48, 371-75 (1975).

⁴⁵ Brown seems to equate the republican right of revolution with a liberal right of autonomy. She describes the right of revolution as a "freedom that depicts man, collectively or individually, securing his autonomy, his woman, and his territory with a gun—a formulation signified in our epoch by Eugene Hasenfus flying over the forests of Central America ... or Ollie North's good intentions." Brown, *supra* note 6, at 664. But far from the goals of republicanism, the Hasenfus and North events signify its deepest fears: members of a standing army or shadow standing army under executive direction running a secret war on private funds in distant lands against the express will of Congress. In fact, 18th-century republicans would point precisely to these events as the inevitable outcome of the failure of the private population to arm itself, leaving their defense to cowboy adventurers. Brown may mean that "redneck" gun owners (who seem to be her real target, see *id.* at 666-67) may applaud Hasenfus and North, but there is a great difference between Thomas Jefferson and North.

⁴⁶ *Id.* at 663.

⁴⁷ *Id.* at 665.

have been used in the past. There is no reason to believe that current American gun owners are either virtuous or representative.⁴⁸

The republican concept of the universal militia, however, also poses a challenge to Brown's analysis. Recognizing that republicanism relies on a virtuous populace that we lack does not end the inquiry, but only frames it: what do we do now? For Brown, the answer seems self-evident. We should abandon republicanism or at least this aspect of it: "Like Levinson, I would prefer a republican order to a liberal-capitalist one. But we do not have a (pg.562) republican political order; we are not a republican citizenry And we cannot generate a republican order merely by interpreting our Constitution through a republican hermeneutic scheme."⁴⁹ But this imprecation is a counsel of despair. "Merely" reading the Constitution through republican lenses may not by itself create a republican order, but it may be one piece of the process. And republicanism offers us other ways by which citizens may achieve virtue: political participation, owning property independent of landlords or employers, and membership in a citizen militia.

Ultimately, Brown may discount the possibility of creating a virtuous populace through a militia because she has a deeper critique of the right to arms: "[E]ven within republicanism, we do not have to swallow it whole. The republican intellectual tradition includes a militarism, elitism, and machismo that is past due for thoughtful critique and reworking."⁵⁰ Republicanism appeals to many because it emphasizes community over separation and public dialogue over strict autonomy. In this sense, it shares many features with modern cultural feminism.⁵¹ But contained within republicanism is this harsh "macho" kernel: the right to arms is a "bit 'gendered' ... subduing with force, what it cannot discursively persuade, tame, or cohabit the universe with, and possessing with force what it cannot seduce."⁵² Facing this apparent conflict within republicanism, Brown, like others, recommends that we wean republicanism from its objectionable elements—in this case by abandoning the right to arms.⁵³

This recommendation, however, assumes that the militia is on the periphery of republicanism and in conflict with its core. Rightly understood, however, the right to arms is thoroughly consistent with republicanism's other commitments. It does contemplate that citizens may sometimes have to take up arms to defend liberty. But it vests that right in a body notable for its interactive and collective nature, to prevent the politics of interest and to encourage the politics of the (pg.563) common

⁴⁸ See *infra* text accompanying notes 214-25.

⁴⁹ Brown, *supra* note 6, at 665.

⁵⁰ *Id.* at 666.

⁵¹ See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 550-54, 591 (1986); Michelman, *supra* note 1, at 17 n.68, 28-33 (1985).

⁵² Brown, *supra* note 6, at 663-64.

⁵³ *Id.* at 665; see also Kerber, *supra* note 1, at 1665 (noting that an emphasis on arms-bearing gave republican tradition a militaristic core); Sunstein, *supra* note 10, at 1564 (classifying one strain of republicanism thought as "militaristic and heroic, and associating political behavior with warfare"). Although these writers do not directly cite it, the inspiration for this view may be Hannah Fenichel Pitkin's *Fortune Is a Woman*, which argues that much of Machiavelli's thought is misogynistic. HANNAH F. PITKIN, *FORTUNE IS A WOMAN* (1984). Actually, Pitkin argued that in writing about the citizenry and the militia, Machiavelli is at his least misogynistic. Machiavelli often casts the citizen and militia member as an appealing blend of those feminist virtues of interdependence, cooperation, and healthy disagreement within dialogue. See *id.* at 63-68, 90-97, 232. When Machiavelli comes to doubt the possibility of such a public-spirited dialogue, he becomes most emphatically misogynistic, conjuring up the specter of a protofascist Father/Founder to bring order, see *id.* at 75, 97-105, against the threat of Fortune, Woman, and Mother. See *id.* at 230-32, 68-73; see also Isaac Kramnick, *Rousseau and Women: An Alternative Reading*, in *COMPARATIVE THEORY AND POLITICAL EXPERIENCE* 64, 66-75 (Peter J. Katzenstein et al. eds., 1990) (although Rousseau is sometimes sexist, his true community rests on maternalized state characterized by politicized love for others).

good. If one believes in the bulk of republicanism, then, one should believe in the militia as well. The next part will develop this claim by putting the right to arms in context within the republican tradition.

II. THE RIGHT TO ARMS IN THE REPUBLICAN TRADITION

This part offers an historical reconstruction of the role of the right to arms in republican thinking. Fundamentally, republicans saw the militia as a response to the danger of corruption. In the first section below, I outline the nature of the republicans' fears. In the next section, I analyze the way in which the militia responded to those fears.

A republican government was thought to be one that pursued the common good rather than the private interest of a slice of society. But republics were inherently unstable, because a republican form of government depended on virtuous citizens, while citizens could be virtuous only in a republican government. As a result, corruption could arise either from a distortion of the form of government or from a public falling into self-interest.

The militia was thought to be able to restrain corruption because it was virtuous and possessed ultimate control over the means of force. It was virtuous both because it comprised the universal people and because it offered training in the habits of virtue. And as the people, it was both government and society. The state raised it and ensured that it was universal. Under state direction, the militia would repress demagogic revolts made in the interests of a few. But despite this tie to the government, the militia was a people's body. Its membership included all of the citizenry, and if the government should ever become corrupt, it could resist by arms. To offer these advantages, the militia had to be universal, not a subset of private persons or the state apparatus.

A. *The Danger of Corruption*

1. *Republican Paradoxes*

Eighteenth-century republicans shared certain views about the nature of human beings. Humans have public, political selves; they are capable of forming cooperative ventures that will benefit all. The polity itself is a universal association, "in which all types of men combine to pursue all human goods," that can achieve a universal good that is more than the realization of the private interests of a few.⁵⁴ At the same time, however, each individual has a private, (pg.564) particular self and self-interest,⁵⁵ and his public and private selves can come into conflict. A good state is one in which citizens pursue the common good; a bad state is one that has been seized by a slice of society for its own narrow ends.⁵⁶

⁵⁴ J.G.A. POCOCK, *Civic Humanism and Its Role in Anglo-American Thought*, in *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 80, 86 (J.G.A. Pocock ed., 1973). The classic exposition of these ideas, and the inspiration for later republicans, is Aristotle's *Politics*. See, e.g., POCOCK, *supra* note 44, at 66-68; Michelman, *supra* note 1, at 38.

⁵⁵ See, e.g., POCOCK, *supra* note 44, at 68.

⁵⁶ See, e.g., *id.* at 71, 75; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 53-57 (1969). It should be noted that the common good was not in opposition to individual freedoms. Republicans typically believed that part of the common good was individual liberty for all, see *id.* at 18-28, and in any event, liberty was instrumentally necessary to the commonweal. See *infra* text accompanying notes 68, 71. Indeed, Machiavelli may even have valued a politics of the common good chiefly as an instrument to negative liberty against government. But the common good did not include the pursuit of self-interest as such; liberty must never be abused. See Skinner, *supra* note 43, at 204-19.

Republicans hoped to induce citizens to pursue the common good, but in doing so they faced a problem: the virtue of the state and of its citizens are always interdependent.⁵⁷ To be virtuous, a citizen must live in a state that enshrines the common good; otherwise he can be no more than one bit of self-serving flotsam swirling around other bits, for there is no common good to serve.⁵⁸ The state, however, will never enshrine the common good unless its citizens are virtuous—but the only way for them to be virtuous is for the state to enshrine the common good. The causation is two-way: citizens make the state, and the state makes citizens. Neither can be virtuous unless the other is.⁵⁹

This closed circle created a republican paradox:⁶⁰ citizens are simultaneously creatures and creators of the state. That paradox gave rise to another one: the problem of creating a republic—the problem of origins. Virtuous citizens would create virtuous states, and virtuous states would create virtuous citizens, but how does one secure either of these? The paradox lies in the self-levitating quality of republics: they somehow come into being, but humans might not be able to find a patch of terra firma from which to launch one. A republic thus depends on conditions being right; a republican form of government (pg.565) would not be viable at all times and for all peoples.⁶¹ Those hoping for a republic might be unable to induce those conditions, and they might have to wait for history or providence to deliver a virtuous people, so that republican government becomes possible.⁶² Some republican thinkers pursued the other end of the equation: they hoped for good government to make possible a virtuous people.⁶³

⁵⁷ I think that this idea may be implicit in Pocock's discussion of the "Machiavellian Moment," *see supra* notes 44, 56; *infra* note 58, but I have formulated it in a somewhat more stark and direct way to emphasize the republican sense of danger.

⁵⁸ *See, e.g.,* POCOCK, *supra* note 44, at 74-75.

⁵⁹ *See* WOOD, *supra* note 56, at 118-119; POCOCK, *supra* note 44, at 204-05. By the same token, state and society can be mutually reinforcing if both are virtuous. For American republicans, "The relationship between government and society, in America as in England, was reciprocal, and America's healthy republican society presented the proper framework for a free government that would in turn sustain the integrity of a republican society and economy." DREW R. MCCOY, *THE ELUSIVE REPUBLIC* 62 (1980).

⁶⁰ I speak of this tension as a paradox because at its strongest it involves logically inconsistent propositions: citizens are creatures and creators of the thing that creates them; a republic can come into being only through a citizenry that can come into being only through a republic; rights are both the precondition and product of deliberative politics. The paradox might only be apparent; indeed, for republics to exist, it would have to be. In a less stark form, the tension might more closely resemble a dialectic: a somewhat virtuous state may act on a citizenry, which would then react on the state to make it more virtuous, and so forth. But I express the tension in its strong, paradoxical form to stress the anxiety it caused: citizens must be independent of the state but also a product of it.

⁶¹ *See* MCCOY, *supra* note 59, at 5. The vulnerability of republicanism to certain conditions is in contrast to so-called liberal individualism, which takes people as it finds them—presuming them to be self-interested—and constructs a scheme of government that tempers even their worst excesses. *See infra* text accompanying notes 96-98. Martha Nussbaum argues that vulnerability to conditions is one of the central features that distinguish the Aristotelian tradition from the liberal tradition associated with Plato and Kant. *See* MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS* 3-7, 329-330 (1986).

⁶² *See, e.g.,* WOOD, *supra* note 56, at 66, 91-93, 123-24; Sherry, *supra* note 51, at 557. Some republicans sought a different way out of this difficulty: a glorious and virtuous leader might inspire or mold the citizenry to virtue. In Hannah Pitkin's view, this idea explains the fascist elements of Machiavelli's thought. In desperation at Florentine corruption, he conceived the semimythical figure of the Founder—infinately good, powerful, and self-originating—who could mold them to virtue. *See* PITKIN, *supra* note 53, at 54-56, 75-79. By definition, the Founder is unlike ordinary mortals in that he escapes the republican paradox: he can be virtuous outside of a republican state and can therefore provide the necessary starting point for a republic. Therefore, to hope for a Founder is to hope for a miracle.

⁶³ *See* MCCOY, *supra* note 59, at 7. John Adams, for example, ultimately concluded that virtue was the effect, not the cause, of good government. *See* JOHN P. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS* 69-71 (1984). Similarly, the idea that the militia can provide training in virtue, *see infra* text accompanying notes 162-70, suggests that republican government can create

Even if the miracle did occur, and a republican state somehow came into being, it was always in danger of slipping into corruption—the problem of maintenance. Because state and society depended on each other, if either began to lose virtue, each would quickly corrupt the other. Since neither could serve as an anchor, republicans saw the path to perdition as short, smooth, and slippery. And the world contained many hostile forces that might induce that slide; Fortuna, under various names, always lurked as a malevolent force.⁶⁴ So at the first sign of corruption, there seemed only a short time to save the republic before it was too late.⁶⁵

This set of relationships is connected to another paradox: the complicated republican status of rights and autonomy.⁶⁶ In republican theory, citizens must, on the one hand, be independent of the state, so that they may critique it if it becomes corrupt: hence the republican denunciation of slavish subservience and praise of those brave enough to defy public ministers and even public opinion.⁶⁷ (pg.566) In order to attain this independence, citizens must have rights that cannot be affected by politics, so that the citizens will not be threatened by reprisals from a corrupt government.⁶⁸ This end of the paradox reflects one side of the interdependence between state and society: to have a virtuous state, there must be virtuous citizens.

At the same time, republicans believed that individuals are unable to be truly separate or fully independent, because they are products of the state. The very values that republican citizens hold are not given, but are the product of politics—hopefully deliberative, healthy politics, but politics nonetheless.⁶⁹ Citizens, moreover, must not use their rights to pursue their own self-interest ahead of the common good. Thus, the citizen cannot stand apart from the political process and use it as a mere instrument of his desires.⁷⁰ This conviction reflects the other side of the state/society equation: to have virtuous citizens, there must be a virtuous state. For republicans, then, rights are not only the precondition for good politics, but also the product of politics, not to be invoked as trumps to disrupt the deliberative dialogue.⁷¹

republican citizens. Those who chose this strategy seem to have been more activist: one could take steps to secure virtue by changing the form of governments. See WOOD, *supra* note 56, at 120-22.

⁶⁴ See *infra* text accompanying notes 74-78, 84-87.

⁶⁵ See, e.g., LANCE BANNING, *THE JEFFERSONIAN PERSUASION* 61 (1978); POCOCK, *supra* note 44, at 205, 506-07.

⁶⁶ For other descriptions of this tangled attitude, see Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Michelman, *supra* note 1, at 42-43. For an example of a modern writer struggling with the same tension, see Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 20-36 (1989).

⁶⁷ On this side of the Atlantic, the greatest pitch of denunciation occurred just before and during the War for Independence. See CHARLES ROYSTER, *A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER 1775-1783*, at 6-10 (1979); WOOD, *supra* note 56, at 37-38, 52-53.

⁶⁸ See Michelman, *supra* note 1, at 43.

⁶⁹ See Michelman, *supra* note 1, at 27; Sunstein, *supra* note 10, at 1548-49.

⁷⁰ See WOOD, *supra* note 56, at 61-64.

⁷¹ See Michelman, *supra* note 66, at 1505. This paradox may be most acute in republican ideas about property rights. On the one hand, along with arms possession, private property was the central guarantee of citizen independence from the government. See POCOCK, *supra* note 44, at 386-89; Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 *N.Y.U. L. REV.* 273, 294-95 (1991); MCCOY, *supra* note 59, at 62-68. On the other hand, republicans recognized that property rights were a product of collective decisions and depended on collective protection. They also knew that severe inequalities of property would bring their own form of dependence of some citizens on others. See Michelman, *supra* note 1, at 40-41; POCOCK, *supra* note 44, at 386-91; Alexander, *supra*, at 287, 293-94. But what if a system of private, alienable property resulted in severe inequalities of wealth through private exchange? For the state to intervene would be to acknowledge the social construction of property rights and the ephemerality of citizen independence. But for the state not to intervene would be to tolerate the very dependence that property rights were supposed to eliminate in the first place. See MCCOY, *supra* note 59, at 72; Alexander, *supra*

Citizens must thus have sufficient autonomy to stand against the state when it errs, but they also must be aware that their autonomy exists only for the common good and because of the self-restraining virtue of other citizens. Republican virtue includes two components: a good citizen must be prepared to sacrifice himself for the good of the whole, and he must also be independent enough to know when to resist a corrupt state. There is no inherent contradiction here. Because citizens in a republic must always act for the common good, when the state is representing that good, the citizen must sacrifice his good to that of the state. In contrast, when the state is wandering, the citizen must resist. There is, however, a deep tension in the habits of mind required: the citizen (pg.567) of a republic is expected sometimes to be profoundly selfless, and sometimes profoundly assertive. He must have the intelligence to know when to be which and the emotional agility to shift modes when appropriate.

2. *The Balance of Estates*

Both problems—origin and maintenance—rested on fear of lack of popular virtue and susceptibility to corruption. As a result, republicans endlessly analyzed the causes and cures of corruption. By the eighteenth century, two primary themes had emerged from this discussion—the danger of an imbalance of estates, which emphasized corruption in government, and the danger of professionalization, which emphasized corruption in society.

Balance-of-estates theory presented society as naturally divided into three estates—the One, the Few, and the Many—each with its own political virtues and vices. Unchecked, any one of the three might misdirect the state to its own partial good; thus a republican polity should balance the estates against one another, allowing each to walk a distinct path to the universal good.⁷² Maintaining that relationship, however, was never easy.⁷³ In the eighteenth century, concern about the balance of estates in Britain focused on the Crown. As the empire grew by trade and arms, so did the power of the Crown, through new military organizations—especially the standing army⁷⁴—and through royal exploitation of newly developed financial institutions and techniques, notably taxes, credit, and banks.⁷⁵ The core of the fear was executive dominance of Parliament: with its expanded resources, the Crown could buy the loyalty of Members of Parliament (M.P.'s) by offering places and pensions in the royal service.⁷⁶

During the imperial crisis, American colonials frequently expressed their grievances with Britain in similar terms: the tyrant George III had subverted Parliament, invaded historical colonial

at 294-302; WOOD, *supra* note 56, at 64-05. In the face of this tension, republican responses differed: some recommended redistribution of property, *see* POCOCK, *supra* note 44, at 387; Michelman, *supra* note 1, at 41 n.214; Alexander, *supra* at 290; WOOD, *supra* note 56, at 64, some recommended a bar to redistribution, *see* Alexander, *supra*, at 291, and most conveniently ignored the problem.

⁷² *See* POCOCK, *supra* note 44, at 71-80, 99-100, 115-16; BANNING, *supra* note 65, at 22-28, 33-34, 40-41; WOOD, *supra* note 56, at 197-202; Michelman, *supra* note 1, at 43-46.

⁷³ The classical form of this problem, sometimes recited in the 18th century, was the Polybian cycle. A republic might achieve equilibrium between the three estates, but never for long; as it became more prosperous and powerful, it would become impossible to maintain the balance. It would then begin to degenerate into less healthy forms of governments in a predictable sequence. *See* POCOCK, *supra* note 44, at 79-80; BANNING, *supra* note 65, at 42, 47-48.

⁷⁴ *See, e.g.*, BANNING, *supra* note 65, at 54.

⁷⁵ *See id.* at 65-66.

⁷⁶ *See id.* at 42-03, 49-51; WOOD, *supra* note 56, at 32-34; POCOCK, *supra* note 44, at 406-08.

privilege, and appointed autocratic governors.⁷⁷ Upon achieving independence, the new states reacted to this fear of the executive by drafting new constitutions that curtailed executive power and expanded the power of the lower legislative house.⁷⁸ In the process, they began to alter the meaning of mixed government by insisting that the Few and (pg.568) the One should not consist of hereditary estates.⁷⁹ They felt that the creation of hereditary orders would give the Few and the One too much power, tempting them to subvert the balance.⁸⁰ Moreover, while most republicans believed that a natural aristocracy existed in America, they viewed this aristocracy as one of talent rather than of birth,⁸¹ which was assimilable into a broadly democratic frame of government. While the elements of government that reflected aristocratic influences might be less democratic than others, all would be directly or indirectly elected by the people.⁸² In this manner, American republicans developed a system of democratic republicanism in which the One, the Few, and the Many ceased to be separate estates, and became instead distinct parts of a balanced government staffed by the people's representatives.⁸³

3. Professionalization

In republican eyes, however, the threat of corruption was wider and deeper than the traditional language of balanced estates could accommodate. Because of the developing economy and empire, the whole fabric of English society during the eighteenth century seemed in peril of being rent into partial interests acting for their own ends. The new commercial society encouraged citizens to pursue selfish interests.⁸⁴ Perhaps more importantly, it gave them separate ends because it promoted the specialization of economic function.⁸⁵ English republican writers held up as an ideal the ancient republics in which every citizen fulfilled every function—working his own land and taking up arms to defend the republic.⁸⁶ (pg.569)

⁷⁷ See BANNING, *supra* note 65, at 78-80, 82; WOOD, *supra* note 56, at 32-34, 200-02.

⁷⁸ See BANNING, *supra* note 65, at 84-87; EDMUND S. MORGAN, *INVENTING THE PEOPLE* 245-47 (1988).

⁷⁹ See BANNING, *supra* note 65, at 81, 86; WOOD, *supra* note 56, at 208-09; POCOCK, *supra* note 44, at 514-17.

⁸⁰ See WOOD, *supra* note 56, at 111-30.

⁸¹ See *id.* at 70-73. On this point, Americans followed earlier republicans, especially Harrington himself. See POCOCK, *supra* note 44, at 394-95.

⁸² See WOOD, *supra* note 56, at 205-07; POCOCK, *supra* note 44, at 515.

⁸³ See WOOD, *supra* note 56, at 237-55.

⁸⁴ See MCCOY, *supra* note 59, at 23; POCOCK, *supra* note 44, at 444-45, 462-66. For example, Members of Parliament looked to their own income, rather than to the public welfare, by taking monarchical bribes, see MCCOY, *supra* note 59, at 57-58; BANNING, *supra* note 65, at 52, 59; ISAAC KRAMNICK, *REPUBLICANISM AND BOURGEOIS RADICALISM* 178 (1990); the standing army looked to ensure its own continued existence by fomenting and standing ready to fight foreign wars, see POCOCK, *supra* note 44, at 409-10, 412-14; KRAMNICK, *supra*, at 178; the monied interest, too, encouraged war, because war gave rise to public debt, which made money for men of wealth, see BANNING, *supra* note 65, at 65-67; POCOCK, *supra* note 44, at 409-10, 439; KRAMNICK, *supra*, at 178. Deeply complicit in this vast conspiracy was the crown, which now possessed both money and military might, so that if any should be inclined to protest, their resistance could not be a long one. See BANNING, *supra* note 65, at 52-59, 65-67.

⁸⁵ See MCCOY, *supra* note 59, at 37-38; BANNING, *supra* note 65, at 67; POCOCK, *supra* note 44, at 430-31.

⁸⁶ The Court Party and its intellectual backers defended specialization as progress, since it created prosperity and culture. See, e.g., POCOCK, *supra* note 44, at 459-60; MCCOY, *supra* note 59, at 25-32. The Country Party—the self-conscious expositors of republican ideas—responded that if prosperity and culture could come only with specialization, it was better to accept some coarseness and retain political morality. See MCCOY, *supra* note 59, at 32-33; POCOCK, *supra* note 44, at 430-31, 499-505. In the context of 18th-century England, one might describe the Country Party itself as a special interest: the party of rural, backward-looking landed wealth. See KRAMNICK, *supra* note 84, at 165, 177; ISAAC KRAMNICK, *BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF*

Many American colonial writers shared these worries about Britain's social character. In their view, the English people had made their peace with tyranny and so had come to prefer luxury to liberty.⁸⁷ More broadly, the degenerative effects of social development had fractured the English populace.⁸⁸ Americans, in contrast, retained a virtue that Britons had lost. They remained poised between barbarism and effete decay—sturdy but civilized farmers, independent and unspecialized.⁸⁹

This American concern over professionalization as a cause of corruption reflected a subtle democratic drift away from the classical ideal of mixed government. Even within the balance-of-estates structure, republicans typically cast themselves as the champions of the liberty of the Many against the One, and this posture gave their rhetoric a populist tone.⁹⁰ But in standing against specialization, republicans cast themselves not as the representatives of any particular estate, but as those virtuous souls—the mass of the American people—who stood for a commonwealth against the corrupting tide of modernity.⁹¹

4. *The Liberal Constitution and Democratic Republican Demands for a Bill of Rights*

Immediately after achieving independence, one course of reform seemed particularly desirable to many Americans. Since the threat of overreaching arose primarily from the less democratic elements of government and since the body of the American people possessed uncommon virtue, the new constitutions should increase the role of the people in government. Ultimately, this role had its limits. Few republicans claimed that direct democracy was a practicable course in any of the new states;⁹² virtually all conceded that a representative democracy must balance the branches of government against one another.⁹³ At the same time, however, republican reformers sought to redistribute the (pg.570) balance by limiting the authority of the executive, expanding the power of the lower house of the legislature, and increasing the dependency of the upper house on the will of the Many.⁹⁴

The 1780's, however, brought new worries. To many, the new democratic legislatures seemed to be fora for pursuit of private interests, especially of the less affluent, rather than for discussion of the common good. America, it seemed, had entered modernity with the rest of the world, fragmented

NOSTALGIA IN THE AGE OF WALPOLE (1968). They did not perceive themselves as such, however, because they believed that if all remained like themselves, Britons could share a common good—but in no imaginable order could soldiers, administrators, stockjobbers, lacemakers, factory owners, and farmers coalesce into a shared interest. *See* BANNING, *supra* note 65, at 68-69. Later, American republicans would exhibit a similar tendency by identifying the middle class with the people as a whole. *See* KRAMNICK, *supra* note 84, at 277.

⁸⁷ *See* BANNING, *supra* note 65, at 80; WOOD, *supra* note 56, at 34.

⁸⁸ *See* BANNING, *supra* note 65, at 75-76; WOOD, *supra* note 56, at 34-37; MCCOY, *supra* note 59, at 57-58.

⁸⁹ *See* BANNING, *supra* note 65, at 76-77; MCCOY, *supra* note 59, at 62-70; WOOD, *supra* note 56, at 52-53, 57-60, 98-101, 113-14; KRAMNICK, *supra* note 84, at 268-69. Still others would allow for development but were concerned to stop it before it went too far. *See* MCCOY, *supra* note 59, at 72-75.

⁹⁰ *See* BANNING, *supra* note 65, at 63-64; WOOD, *supra* note 56, at 20.

⁹¹ The transition apparently was easy, since republicans often conflated the good of the whole and the good of the Many. *See* WOOD, *supra* note 56, at 20.

⁹² *See id.* at 222-24.

⁹³ *See* BANNING, *supra* note 65, at 70, 197.

⁹⁴ *See* WOOD, *supra* note 56, at 162-173; Kramnick, *supra* note 13, at 18, 21-23.

and self-interested.⁹⁵ One response to this crisis was the Federalists' embrace of liberalism. With an apparent sense of relief, they leapt off the tightrope of virtue into the chasm of appetite. Proclaiming that the bulk of the people would always be self-interested, they asserted that any sensible political system must use the structure of government not to inspire virtue but to limit the damage done by self-interest.⁹⁶ Taking the old rhetoric of mixed government and imbuing it with new meaning, the Federalists sought to remove power from local legislatures to a central government where different factions and branches of government could check one another.⁹⁷

By the 1780's, it was too late to deny that all power derived from the people, but the Federalists gave the people a new role. The people mythically erected the Constitution that delegated power to each of the components of a distant government, and they participated from afar in the selection of their representatives. Otherwise, they essentially retired from politics; they had no direct hand in their own government. Meanwhile, their representatives carried forward the messy business of mutual limitation.⁹⁸ No longer would the people have to be virtuous for government to be just and stable.

By the early 1790's, then, many of the nation's leaders had adopted a largely liberal ideology, and the decade as a whole was one of complex interaction between new ideas and old, with both amply represented.⁹⁹ But even after (pg.571) the adoption of a more liberal Constitution, some American thinkers retained old republican convictions.¹⁰⁰ They continued to hope that prompt action on both social and governmental fronts might preserve a truly republican America.¹⁰¹

These thinkers, predominantly Anti-Federalist republicans, feared the central government because they believed that it would be dominated by economic elites, distant from the people, acting to pursue their own self-interest. They resisted the adoption of the Constitution in order to keep

⁹⁵ See WOOD, *supra* note 56, at 396-98, 402-06, 410-11, 414-18.

⁹⁶ See, e.g., *id.* at 429, 612-13; POCOCK, *supra* note 44, at 521-23; KRAMNICK, *supra* note 84, at 262-64. Federalists embraced a variety of views, departing from the old republican ideal by degrees. James Madison, for example, maintained only that the bulk of the people would be self-interested, so that the goal of government was to elevate the virtuous few to office. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-48 (1985); WOOD, *supra* note 56, at 505-07; KRAMNICK, *supra* note 84, at 270-71. Alexander Hamilton, by contrast, closely anticipated modern free market liberals by insisting that the end of government is not virtue but prosperity and that individuals best help the country by helping themselves. See, e.g., BANNING, *supra* note 65, at 134-40. All, however, shared a conviction that a republic pervaded by virtuous self-denial was not possible.

⁹⁷ See WOOD, *supra* note 56, at 407, 501-05, 547-62; BANNING, *supra* note 65, at 87-90; POCOCK, *supra* note 44, at 522-23.

⁹⁸ See WOOD, *supra* note 56, at 544-47; BANNING, *supra* note 65, at 97-102; POCOCK, *supra* note 44, at 517-21.

⁹⁹ See generally KRAMNICK, *supra* note 84. Even Gordon Wood, who is most associated with the recovery of the republican tradition, believes that the decade was a time of transition to more liberal ideas. See, e.g., WOOD, *supra* note 56, at 606-15. Others, however, argue that republicanism retained a powerful hold on American thinking into the 19th century. See POCOCK, *supra* note 44, at 526-52. See generally BANNING, *supra* note 65 (arguing that Jeffersonian party platform was product of civic republican heritage); STEVEN WATTS, *THE REPUBLIC REBORN: WAR AND THE MAKING OF LIBERAL AMERICA 1790-1820* (1987) (arguing that republicanism gave way gradually to liberalism in general culture in early 19th century). Still others argue that liberal Ideas had largely replaced republican ones by the 1790's. See generally JOHN P. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS* (1984); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988). For my purposes, the exact resolution of this debate is not critical because, regardless of whether the decade as a whole was liberal, the Second Amendment in particular was republican.

¹⁰⁰ See WOOD, *supra* note 56, at 425-29; KRAMNICK, *supra* note 84, at 266-68.

¹⁰¹ They issued perorations to the people to return to austere republican simplicity, see, e.g., WOOD, *supra* note 56, at 426-28; KRAMNICK, *supra* note 84, at 267-68, and they waited for new republican governments to mold the people to virtue. See, e.g., WOOD, *supra* note 56, at 426.

power in their more egalitarian and democratic state assemblies,¹⁰² and they urged the creation of a Bill of Rights that would limit the damage that the central government could do.¹⁰³ Thus, while over much of its history republicanism may have been associated with wealthy elites who possessed the leisure to devote themselves to politics, at this Anti-Federalist moment, republicanism belonged in large part to men with back-country accents who feared such elites.¹⁰⁴ The Second Amendment grew out of this reaction—a republican avatar, perhaps, in a growingly liberal age. Thus, even if liberal ideas had begun to supplant republican ones by 1792,¹⁰⁵ it is appropriate to read the Second Amendment in a republican light.¹⁰⁶ (pg.572)

B. *Arms and the Militia in Republican Thought*

1. *The Problem of a Standing Army*

The Second Amendment begins with the claim that a "well regulated militia" is "necessary to the security of a free state." This language implicitly refers to an old set of republican fears and hopes: a militia could help to limit corruption, unlike a standing army, which would be part of the problem. As Elbridge Gerry stated during congressional discussion of the Amendment: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty."¹⁰⁷ Liberals, by contrast, little feared a standing army and little valued the militia.¹⁰⁸

Republicans believed that the state must arm itself to resist foreign aggression and to keep civil order. But the distribution of arms caused them great anxiety, because whoever held the weapons and real property within a republic also held ultimate control.¹⁰⁹ In arming itself, the state had two options: a standing professional army or a popular militia. The former posed two great

¹⁰² See EDWARD COUNTRYMAN, *A PEOPLE IN REVOLUTION* 273-79 (1981); WOOD, *supra* note 56, at 519-23; Kramnick, *supra* note 53, at 15, 45-46.

¹⁰³ See, e.g., WOOD, *supra* note 56, at 536-38; Kramnick, *supra* note 13, at 60-61. This view of the Bill of Rights—as a democratic republican response to the text of the Constitution—is the central thesis of a recent, rich, and significant article by Akhil Amar. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131 (1991). Professor Amar advances an interpretation of the Second Amendment that, like mine, emphasizes its populist and localist character. See *id.* at 1162-73. He also sensitively discusses the ways in which these themes underlie other provisions of the Bill of Rights.

¹⁰⁴ Kramnick, *supra* note 53, at 23-24, 27, 62-63.

¹⁰⁵ See *supra* text accompanying notes 95-99.

¹⁰⁶ Commentators on both sides of the historical debate seem to agree. Pocock, for example, explains: "[T]he Second Amendment to the Constitution ... affirms the relation between a popular militia and popular freedom in language directly descended from that of Machiavelli, which remains a potent ritual utterance in the United States to this day." POCOCK, *supra* note 44, at 528. On the other side, Kramnick connects the new comfort with a standing army with a new liberal mood, see KRAMNICK, *supra* note 84, at 171, 265-66; Kramnick, *supra* note 13, at 56-57, but as I will elaborate, the Second Amendment grew out of that strain of American thinking still uncomfortable with a professional army.

¹⁰⁷ 1 *ANNALS OF CONG.* 749-50 (Joseph Gales ed., 1789).

¹⁰⁸ See *supra* note 106.

¹⁰⁹ For example, James Burgh, the great transmitter of republican ideas to the colonies, see BANNING, *supra* note 65, at 60-62, made the connection between power and arms explicit: "Those, who have the command of the arms in a country, says *Aristotle*, are masters of the state, and have it in their power to make what revolutions they please." 2 JOSEPH BURGH, *POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES* 345 (London, 1775). On power following property, the classic republican source is James Harrington, who made that claim the center of his theory of government. See POCOCK, *supra* note 44, at 385-91.

threats of corruption. First, it could become a tool of executive usurpation. Second, the army posed a risk of factionalism and professionalization.

Evidence of the former threat was ample. Standing armies arose in England as a tool of the Stuart monarchs' ambitions for power, and memories of that time remained vivid in republicans' minds.¹¹⁰ The standing forces were at hand to tempt the King to adopt and enforce unpopular policies; its members would follow his will rather than the common good because they depended on him for their livelihood.¹¹¹ The army was, moreover, one of the chief avenues for subversion of Parliament, as many M.P.'s held places in the army.¹¹²

American colonists were familiar with the consequences of executive control of the military. Throughout the eighteenth century, colonists experienced (pg.573) friction with the contingents of British regulars stationed near them.¹¹³ Following the Seven Years' War, this friction increased dramatically when Britain decided that the colonists should pay for their own defense. For the first time, the imperial government levied a tax on the colonies for revenue purposes,¹¹⁴ and that revenue, ominously, went to the upkeep of the standing army. When the colonists refused to pay, claiming that taxation without representation was tyranny,¹¹⁵ the imperial government ordered the military occupation of Boston to enforce the policy. Perhaps most alarmingly, the occupying army was made up not only of British regulars, but also of Hessian mercenaries.¹¹⁶ The colonists were experiencing a republican nightmare: an unrepresentative government was using a standing army against them to enforce an unjust policy.¹¹⁷

Like English radicals, many American republicans blamed George III for these abuses.¹¹⁸ Others recognized that Parliament, controlled by conspiratorial ministers and placemen, was at least as complicitous as the King in the new policies.¹¹⁹ It made little difference to American republicans, however, whether Parliament or the King controlled the standing army, since in either case it was

¹¹⁰ See JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS No. 94, reprinted in THE ENGLISH LIBERTARIAN HERITAGE 222-23 (David L. Jacobson ed., 1965); Andrew Fletcher, *A Discourse of Government with Relation to Militias*, in SELECTED POLITICAL WRITINGS AND SPEECHES 1, 10 (David Daiches ed., 1979); W.A. SPECK, RELUCTANT REVOLUTIONARIES 145-46, 154-56 (1988); POCOCK, *supra* note 44, at 411-12. After the Glorious Revolution, Parliament controlled the finances of the army—a fact that assuaged the worries of many moderate Whigs.

¹¹¹ See Fletcher, *supra* note 110, at 4, 15; LAWRENCE D. CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 23-25 (1982); POCOCK, *supra* note 44, at 413.

¹¹² See Fletcher, *supra* note 110, at 6; CRESS, *supra* note 111, at 20, 23-25; POCOCK, *supra* note 44, at 409-410, 412-13.

¹¹³ See generally DOUGLAS E. LEACH, ROOTS OF CONFLICT: BRITISH ARMED FORCES AND COLONIAL AMERICANS, 1677-1763 (1986). The colonies never raised a standing army; they defended themselves against Indian attack first by militia and later by expeditionary forces made up of volunteers or impressed paupers, sometimes commanded by British officers. See CRESS, *supra* note 111, at 4-8; E. Wayne Carp, *The Problem of National Defense in the Early Wood*, in THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS 19-20 (Jack P. Greene ed., 1987). But colonial militia served with British regulars in various conflicts and came away with sour recollections. See generally LEACH, *supra*. Throughout the century, moreover, there was constant tension between colonists and regulars over quartering troops and impressment. See CRESS, *supra* note 111, at 10-11; LEACH, *supra*, at 10-11, 87-92; PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 6-7, 9-12, 20, 124-25 (1974).

¹¹⁴ See JACK P. GREENE, PERIPHERIES AND CENTER 80 (1986).

¹¹⁵ See *id.* at 81-82.

¹¹⁶ Hence the charge against George III in the Declaration of Independence that he sent "large Armies of foreign Mercenaries to compleat the works of death, destruction, and tyranny...." THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

¹¹⁷ See CRESS, *supra* note 111, at 11, 36-39; Carp, *supra* note 113, at 21-22; ROYSTER, *supra* note 67, at 36.

¹¹⁸ See MAIER, *supra* note 113, at 200-03, 208-11, 237-38.

¹¹⁹ See *id.* at 234-37.

not subject to the colonists' own legislatures.¹²⁰ After the Revolution, the framers of the new state constitutions took pains to ensure that the state military was under legislative, rather than executive, control. For some, this arrangement ameliorated the worst fears of a standing army.¹²¹

A standing army, however, posed a second threat: regardless of who controlled it, the very existence of a standing army provided the opportunity for social corruption through professionalization. The army was a symptom and product of modern specialization of economic function, because soldiers were trained to a particular trade—fighting—and sought to maintain their particular (pg.574) interests.¹²² Thus, the army desired foreign wars to justify its existence, ample taxation to support it, a strong executive to collect the taxes, and docile citizens to pay the taxes.¹²³ The American republican Joel Barlow, in denouncing European systems of government, put the idea pithily: "Thus money is required to levy armies, and armies to levy money; and foreign wars are introduced as the pretended occupation for both."¹²⁴ Soldiers thus contributed to the breakdown of the common good in much the same way that any other professional group did. In addition, a standing army posed a special threat: it controlled the means of force.¹²⁵ As society developed and diversified, many ignominiously chose to surrender the sword to a professional army. As a consequence, those who surrendered the sword to the standing army gained a luxurious way of life but lost their moral character and their only guarantee of liberty in the bargain.¹²⁶

2. *The Militia, the Balance of Estates, and Centralization*

In republican theory, the militia offered protection against all of these dangers.¹²⁷ The militia was viewed as the universal people armed—the whole people, the republic. This *armato populato* did have one limit: it included only citizens, not all residents.¹²⁸ Within this limit, however, the

¹²⁰ See CRESS, *supra* note 111, at 8-9, 11, 36-38, 47; GREENE, *supra* note 114, at 83-84.

¹²¹ See CRESS, *supra* note 111, at 60-61; ROYSTER, *supra* note 67, at 51-53.

¹²² See FLETCHER, *supra* note 110, at 9; CRESS, *supra* note 111, at 19; POCOCK, *supra* note 44, at 430-32.

¹²³ See ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 10 (Paul L. Ford ed., Da Capo 1968) (1888); Fletcher, *supra* note 110, at 6, 12; POCOCK, *supra* note 44, at 409-13, 430.

¹²⁴ JOEL BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE 44 (1956).

¹²⁵ See Fletcher, *supra* note 110, at 4, 9; POCOCK, *supra* note 44, at 199-200.

¹²⁶ See Fletcher, *supra* note 110, at 6; CRESS, *supra* note 111, at 19; POCOCK, *supra* note 44, at 203-04 (Florentine origin of idea). Barlow claimed that when the people lay down their arms, they "lose at once the power of protecting themselves, and of discerning the cause of their oppression" because doing so "palsies the hand and brutalizes the mind." BARLOW, *supra* note 124, at 45.

¹²⁷ Many republicans believed that the militia offered another advantage: it would be more effective against foreign enemies than would a professional army because it fought for home and hearth, rather than for lucre. See MORGAN, *supra* note 78, at 154-56; Fletcher, *supra* note 110, at 9, 17; CRESS, *supra* note 111, at 43-44. In fact, however, militias were never very effective, especially against trained bands and especially given the increasing sophistication of warfare in the 18th century. See MORGAN, *supra* note 78, at 160-62. By the 1780's most Americans had come to perceive the militia's shortcomings. See ROYSTER, *supra* note 67, at 37; CRESS, *supra* note 111, at 58-59. Americans still quarreled over the appropriate role of an army, but the basis of the disagreement had shifted. Opponents now argued not that an army was less effective than a militia but that it was more effective, and thus posed a threat to liberty. The militia was perhaps less proficient, but it was virtuous. See CRESS, *supra* note 111, at 75-93.

¹²⁸ See Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 25, 29 (1984). In the 19th century, states often limited militia membership to whites, but colonial practice typically included African-American citizens. See Cottrol & Diamond, *supra* note 17, at 37-40. Today, the citizenry comprises a much greater proportion of the population than it did in the 1780's, and a modern analogue to the militia would thus include a vastly greater proportion of the population as well. I consider the intellectual difficulties attending such an expansion in Part IV.A.1-2.

militia reflected the most populist strand of republican thinking. To republican thinkers, identification (pg.575) of the militia and the people made the militia incomparably more attractive than a standing army.

Initially, the existence of a citizen militia was thought to limit the threat of executive usurpation. From the beginning of the tradition, theorists had closely identified the militia with the Many, to give the Many a check on the monarchical and aristocratic elements of government.¹²⁹ By the 1780's, however, the balance of estates had come to be less central to Americans. Republicans had moved toward purer democracy, and military forces had been under the control of legislatures.¹³⁰

A new issue, however, soon replaced concern about executive usurpation: fear of the excessive concentration of power in the central government. This fear went to the heart of the debate between Federalists and Anti-Federalists over the adoption of the new Constitution. Traditionally, militia forces were local bodies, and prior to the 1790's, republicans generally believed that this proximity to the people would prevent their capture by malignant governmental actors.¹³¹ By the 1790's, however, many had lost faith in the local militia. At times the militia had sided with the troublemakers in domestic insurrections after the Revolution. Many concluded that these insurrections were not legitimate forms of resistance, but constituted sedition against legitimate authority; it followed that the militia might also be seditious.¹³² Abandoning trust in the militia¹³³ (and contrary to received republican wisdom),¹³⁴ the Framers of the Constitution gave Congress power to raise a standing army and to regulate state militias.¹³⁵

The Federalist defense of this decision was even more alarming. In startlingly un-republican fashion, Alexander Hamilton argued for the creation of a strong and modern state, distinct from its population, with sufficient means to (pg.576) carry out its will.¹³⁶ In particular, a standing army would be necessary to repel foreign invasion because "[w]ar, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice."¹³⁷ More

¹²⁹ See, e.g., Fletcher, *supra* note 110, at 16; POCOCK, *supra* note 44, at 87-91 (Leonardo Bruni); *id.* at 196-99, 202-03, 210-11 (Machiavelli); *id.* at 389-91 (Harrington).

¹³⁰ See *supra* text accompanying notes 78-83. In line with the new emphasis on democracy, writers argued that popular government must depend on a popular militia. See, e.g., BARLOW, *supra* note 124, at 46; Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 602, 605-06 (1982) (quoting republican thinkers).

¹³¹ See Carp, *supra* note 113, at 19-20; see also CRESS, *supra* note 111, at 4-6 (specifying local nature of militia).

¹³² See CRESS, *supra* note 111, at 95-96, 128; Carp, *supra* note 113, at 32; Richard D. Brown, *Shay's Rebellion and the Ratification of the Federal Constitution in Massachusetts*, in BEYOND CONFEDERATION 113-15 (Richard Beeman et al. eds., 1987).

¹³³ See, e.g., CRESS, *supra* note 111, at 71-73.

¹³⁴ See REGINALD C. STUART, WAR AND AMERICAN THOUGHT 50 (1982); Carp, *supra* note 113, at 33-34; CRESS, *supra* note 111, at 95-97.

¹³⁵ See U.S. CONST. art. I, § 8, cls. 11-16; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1495-96 (1987); Carp, *supra* note 113, at 32-33; CRESS, *supra* note 111, at 97; STUART, *supra* note 134, at 59-63. In particular, Congress was given the power "[t]o 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." U.S. CONST. art. I, § 8, cl. 16.

¹³⁶ Indeed, Isaac Kramnick argues that before the Federalists, American thinkers had no modern conception of the state; in that sense, Hamilton was engaged in creating an American state for the first time. See Kramnick, *supra* note 13, at 67-72. (The republicans did have a concept of government, and I have loosely used the term "state" to refer to their notion of government. See *supra* notes 12-13.)

¹³⁷ THE FEDERALIST No. 25 (Alexander Hamilton).

disturbingly, this standing army might be turned against the states themselves: "If [an] insurrection should pervade a whole State, or a principal part of it, the employment of a different [non-militia] force might become unavoidable."¹³⁸ The alternative, in Hamilton's mind, was chaos. With no firm hand from above, individual states or regions would inevitably erupt in constant civil war.¹³⁹

For Anti-Federalist republicans, such sentiments were like a fireball in the night. They feared that the new central government would be dominated by the Few, distant from the people, and lustful for power.¹⁴⁰ Hamilton's writings seemed to promise that the government would use its army in repressive ways. The Anti-Federalists had not lost faith in the virtue of a people's militia,¹⁴¹ and they resisted the Constitution because it would take power away from the local legislatures, which were more democratic and more devoted to the common good.¹⁴² Even some Federalist defenses of the new government implicitly accepted the republican premise that the militia is the ultimate bulwark of virtue. Madison, for example, argued that if the federal government sought to subvert the militia, the states retained the constitutional power to protect it. So if Congress should ever use standing armies to advance tyrannical designs, they would be outnumbered and outfought by liberty-loving militia members.¹⁴³

These reassurances were not, however, enough to allay the fears of Anti-Federalist republicans, and a number of state legislatures approved the Constitution with recommendations that Congress adopt a bill of rights. Virtually all of these proposals included some version of the right to arms, with a range of components: some sought to return complete control of the militia to the states, some sought to ban standing armies, but all sought to guarantee the right of the (pg.577) people to keep and bear arms.¹⁴⁴ Supporters of the Second Amendment thus inscribed faith in the local militia—not liberal concern about individual self-defense—into the Constitution: "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."

The Second Amendment therefore sought to protect local democracy by protecting popular, public military bodies. The states would always have an armed populace from which they could form a militia. The federal government could regulate the use of that militia, but could not disarm or disband it. As a result, state militias could always check the distant politicians in Washington.¹⁴⁵ On military policy, the text of the Constitution and the Bill of Rights are thus chronologically inverted

¹³⁸ THE FEDERALIST No. 28 (Alexander Hamilton).

¹³⁹ *See id.*

¹⁴⁰ *See* WOOD, *supra* note 56, at 487-96; MORGAN, *supra* note 78, at 276-87.

¹⁴¹ Indeed, the new republic initially saw remarkably little change in military policy. *See* Carp, *supra* note 113, at 35-37. Despite Federalist proposals for a federal select militia, Congress provided for a universal militia under state control. *Id.* at 36-37; CRESS, *supra* note 111, at 119-21. At the end of the Revolution, the Newburgh conspiracy and the Society of Cincinnati revived fears of a standing army, *see* CRESS, *supra* note 111, at 67-71; ROYSTER, *supra* note 67, at 345-57, and republicans used the old rhetoric throughout the 1790's to denounce any armed force other than a universal militia. *See* CRESS, *supra* note 111, at 127-34, 137-49.

¹⁴² *See* CRESS, *supra* note 111, at 98-102.

¹⁴³ *See* THE FEDERALIST No. 46 (James Madison); Amar, *supra* note 135, at 1496-97.

¹⁴⁴ *See* HALBROOK, *supra* note 17, at 72-75; Cress, *supra* note 128, at 35-36; Shalhope, *supra* note 130, at 608-10.

¹⁴⁵ Akhil Amar also argues that the Second Amendment provides an important linguistic gloss on Congress' military powers under Article I. In the republican tradition, an army was composed of soldiers for hire, as opposed to a militia, which was conscripted from the general public. As a result, Congress' power to raise an "army" involves authority only to enlist soldiers, not conscript them. *See* Amar, *supra* note 103, at 1163-75.

compared to the general development of political ideas: the 1787 Constitution represented the new liberal mood, and the 1792 Second Amendment the older republican tradition.¹⁴⁶

3. *The Militia and Universality*

Overconcentration of power in the central government was not, however, the only fear from which the militia offered protection. Republicans hoped that the militia would check state government as well as federal: state constitutions, too, contained right to arms provisions. Many hoped that Congress itself would rely on a militia, rather than on a standing army.¹⁴⁷ Even apart from its association with local governments, therefore, the militia promised virtuous control of force.

This trust in the virtue of the militia rested on its rhetorical identification with the whole of the citizenry—an equation with three significant conceptual results. The first focused on the character of the American public: because the citizenry was or could be virtuous, the militia was or could be virtuous.¹⁴⁸ Second, as militia members were citizens and property holders, they had a stake in the well-being of the republic—unlike mercenaries or professional soldiers, who were committed only to their own fortunes.¹⁴⁹

Most important, the militia would be virtuous because it was thought to include all of the citizens of the republic. By definition, this universality (pg.578) reflected the common good, rather than the good of a narrow slice of society. The militia was nothing more or less than the whole people in their military capacity.¹⁵⁰ Americans incessantly repeated this theme—rather than the importance of individual self-defense—in support of the militia and the Second Amendment. State proposals for the Amendment typically described the militia as "the body of the people"¹⁵¹—a phrase denoting the whole or the bulk of the community.¹⁵² Richard Henry Lee explained: "A militia, when properly formed, are in fact the people themselves ..."¹⁵³ Similarly, George Mason asked: "Who are the militia? They consist now of the whole people, except a few public officers."¹⁵⁴ In a much-quoted

¹⁴⁶ Cf. Carp, *supra* note 113, at 35 (the "passage of the Second Amendment ... clearly reveals America's divided mind on military policy").

¹⁴⁷ See CRESS, *supra* note 111, at 78-87.

¹⁴⁸ See Henry Knox, *General Knox's Militia Plan*, 2 ANNALS OF CONG. 2088-89 (1790).

¹⁴⁹ See Fletcher, *supra* note 110, at 9; Cress, *supra* note 128, at 29.

¹⁵⁰ See POCOCK, *supra* note 44, at 414. As I will discuss, actual Anglo-American militias were never truly universal, but the militias of republican rhetoric, theory, and aspiration nearly always were.

Recently, Elaine Scarry has connected this insistence on the universal distribution of arms with social contract rhetoric. Social contract theory requires not only the "threshold consent" to the original contract but also the "perpetual consent" of the population to government through voting, the amendment process, and willingness to go to war; the concentration of arms in a single group, however, would lead to the coercive dominance of society by that group and would destroy the possibility of a government limited by the consent of the population. See Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1276-89 (1991).

¹⁵¹ Cress, *supra* note 128, at 29-30, 36; see also *id.* at 29-30; Shallhope, *supra* note 130, at 608-09.

¹⁵² See MAIER, *supra* note 113, at 35-36.

¹⁵³ RICHARD H. LEE, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 169 (New York, 1788).

¹⁵⁴ 3 DEBATES IN THE SEVERAL STATE CONVENTIONS 425-26 (Jonathan Elliot ed., B. Franklin 1968) (2d ed. 1888) [hereinafter DEBATES].

passage, Patrick Henry maintained: "The great object [of the Second Amendment] is, that *every* man be armed."¹⁵⁵

As the people, the militia could not act against the general good because the general good and their good were one and the same. Trench Coxe declaimed: "THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY Who are the militia? *are they not ourselves*. Is it feared, then, that we shall turn our arms *each man against his own bosom*."¹⁵⁶ Samuel Adams argued: "The Militia is composed of free Citizens. There is therefore no Danger of their making use of their Power to the destruction of their own Rights, or suffering other to invade them."¹⁵⁷ To be universal, the militia must comprise all of the citizenry. Republican writings, of the Anti-Federalist period and before, therefore insisted that the whole people should be armed, and contrasted this universality with the partiality of a standing army or a select militia.¹⁵⁸ (pg.579)

The republican militia member was thus envisioned as the quintessentially unspecialized citizen, Horatio at the Plow, whose own interests reflected the general good. At one moment, he controlled policy in his enfranchised role; at another, he controlled resources in his propertied role; and at a third, he controlled force in his armed role.¹⁵⁹ Indeed, for some republicans the citizen's status as militia member may have been more significant than his status as voter, because it was a more direct exercise of self-government. Most American republicans conceded that direct democracy on any scale was impracticable, but understood that by foregoing such immediate citizen participation in government, they lost an important part of the republican tradition.¹⁶⁰ After the Federalists managed to make representation even more ephemeral, the citizen as franchise holder

¹⁵⁵ See, e.g., HALBROOK, *supra* note 17, at 74 (emphasis added).

¹⁵⁶ A *Pennsylvanian*, PENNSYLVANIA GAZETTE, Feb. 20, 1788, reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Microfilm Supp.) 1778-1780 (Kaminski & Saladino eds., 1981) [hereinafter *A Pennsylvanian*]. Decades before, an English pamphleteer made the same point: "The *Militia* must, and can never be otherwise than for *English Liberty*, because else it doth destroy *itself*; but a *standing Force* can be for nothing but *Prerogative*, by whom it hath its *idle living and Subsistence*." POCOCK, *supra* note 44, at 410; see also CRESS, *supra* note 111, at 3, 43-45.

¹⁵⁷ 3 SAMUEL ADAMS, WRITINGS 251 (Henry A. Cushing, ed., 1906).

¹⁵⁸ See LEE, *supra* note 153, at 169; ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 155-57 (London, 1698); Fletcher, *supra* note 110, at 18-21; BARLOW, *supra* note 124, at 46; CRESS, *supra* note 111, at 100; HALBROOK, *supra* note 17, at 69-74 (1984); Cress, *supra* note 128, at 31-32. For the Anti-Federalists, the primary demon on this point was probably Hamilton, who insisted that the people should surrender liberty for wealth: a universal militia would be impracticable because "[i]t would form an [enormous] annual deduction from the annual labour of the country...." THE FEDERALIST No. 29, at 184 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In the Pennsylvania Ratifying Convention, John Smilie responded: "Congress may give us a select militia which will, in fact, be a standing army When a select militia is formed; the people in general may be disarmed." *A Pennsylvanian*, *supra* note 156, at 1778-80.

¹⁵⁹ JOHN TRENCHARD & WALTER MOYLE, AN ARGUMENT SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT, AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY 7 (London, 1697); CRESS, *supra* note 111, at 19. One of the best examples of this view was the creation of the utopian Georgia Colony by English philanthropists. They sought to prevent the development of self-interest and to promote virtue by restricting the market in land and labor. Instead of economic activity, "[t]he chief form of group participation would be military service, which was required of all adult male inhabitants." J.E. CROWLEY, THIS SHEBA, SELF: THE CONCEPTUALIZATION OF ECONOMIC LIFE IN EIGHTEENTH CENTURY AMERICA 20-21 (1974).

¹⁶⁰ See POCOCK, *supra* note 44, at 517-21.

was left still further from the reins of governmental power. As a militia member, however, the citizen could still directly participate in politics by intimidating would-be despots and demagogues.¹⁶¹

The militia's two features—decentralization and universality—can thus be separated, and they are each independently important. But they are not in fact radically distinct, because both proceed from the same fear that a small group of powerful citizens (in an oligarchic central government) could come to dominate the republic by control of the means of coercion (held by a select militia or standing army). The solution was to vest arms in a universal body under the control of democratic local legislatures.

4. *The Militia and Training in Virtue*

The virtue of the militia therefore rested upon and reflected the virtue of the citizenry as a whole, because they were one and the same. But the militia (pg.580) was more than a passive mirror of society; it also acted upon its members to instill civic virtue. As noted before, the virtuous citizen was expected to stand apart from the state to criticize and correct it when it began to fall into corruption. Yet, he was expected to simultaneously subordinate his particularistic interests to the good of the state as long as the state stayed on the paths of virtue.¹⁶² To do so, the citizen had to judge when he could refuse the demands of the state as corrupt, but he could not let his own separate interests cloud his judgment. Property helped the citizen to balance these conflicting responsibilities, by giving him independence of judgment as well as a stake in the well-being of the republic.¹⁶³ Service in the militia was yet another means of training the citizenry to civic virtue.

The self-sacrificial aspects of militia service were obvious. Membership was service to the state that always disrupted one's chosen round of activities and often involved hunger, cold, disease, and danger.¹⁶⁴ The militia member was expected to bear these burdens with the knowledge that he was keeping the republic safe. The experience of working together with fellow citizens could cement this perspective of self-sacrifice to the common good. Militia service required cooperation among citizens and subordination to orders, stimulated a commitment to comrades that would become a devotion to the public that they represented, and was filled with exhortation to virtue in sermons and speeches.¹⁶⁵ Many veterans of the Revolution recalled military service as the emotional high point of their lives; by the 1780's they yearned for the "rage militaire" that drew Americans together in the war.¹⁶⁶

¹⁶¹ As Akhil Amar has demonstrated, the citizen's role as juror served much the same end by giving him a direct hand in the administration of justice. Indeed, the similarities between the jury's role and the militia's are striking. Like the militia, the jury was dialogic and deliberative in considering whether to nullify the law, especially if deemed unconstitutional, *see* Amar, *supra* note 103, at 1191-95; it provided training in virtue and self-government, *see id.* at 1186-87; it was populist, *see id.* at 1187-89, and localist, *see id.* at 1186; and it functioned as a protection against tyranny, *see id.* at 1183-85.

¹⁶² *See infra* Part III.B.6.

¹⁶³ *See supra* note 71; text accompanying note 149; *infra* text accompanying notes 287-288.

¹⁶⁴ This advantage is prominent in proposals for model militias. Henry Knox, the first Secretary of War, presented to Congress a militia plan which emphasized that the conditions of service should be dreadful in order to accustom militia members to self-sacrifice. Knox, *supra* note 148, at 2088, 2100-01; *see also* Fletcher, *supra* note 110, at 20-24 (suggesting use of camps to train young men to become soldiers); POCOCK, *supra* note 44, at 201-02 (noting Machiavelli's belief that militia training induced virtue).

¹⁶⁵ *See* Knox, *supra* note 148, at 2090, 2099-2101; Fletcher, *supra* note 110, at 20-24.

¹⁶⁶ *See* ROYSTER, *supra* note 67, at 25, 31.

Militia service also served to engender virtue by inducing the experience of independent self-government. In republican theory, arms and property constituted the necessary material bases for the autonomous political personality of the citizen, who was dependent for his safety and livelihood only on the body of his fellow citizens, not on the state apparatus nor on particular private individuals.¹⁶⁷ Conscious that they directly held the reins of coercive power, the people would never accept that governors governed and citizens obeyed. As Joel Barlow explained, "A people that legislate for themselves ought to be in the habit of protecting themselves; or they will lose the spirit of both."¹⁶⁸ Thus, republican commentators denounced those supine peoples who, for (pg.581) comfort and convenience, surrendered their arms—along with their liberty—to a standing army,¹⁶⁹ and expressed admiration for the independent, "manly," civil but not servile citizen-soldier-freeholder, committed to the common good but not enslaved to the state.¹⁷⁰

5. *The Rights of Resistance and Revolution*

To entrust the means of force to the militia was thus to entrust it to the body most likely to use it in virtuous ways. This commitment of force to virtue was thought to have two important results. First, quite apart from any actual act of resistance, the knowledge that citizens possessed arms was likely to affect the behavior of both state officials and citizens. State officials would be loathe to trifle with the people's liberties, knowing that citizens had the wherewithal to defend those liberties.¹⁷¹ In contrast, republicans drew from history the lesson that when despots sought to undo a republic, they began by disarming militia members.¹⁷² Republican thinkers also believed that possession of arms changed the character of the people as well, making them more independent, more suspicious of their government, and less willing to tolerate the slightest tyranny. It was difficult and frightening to resist despots and all too easy to accept early incursions. But down that path—and not far down it—lay slavery.¹⁷³ A people armed, aware of its own empowerment, would not start down that path.

As in the case of the militia as a training ground for virtue, republicans had some first hand experience with the benefits of the militia in resisting tyranny. Traditionally, to enforce their decisions, colonial governments had to rely on the *posse comitatus* and the militia. Colonial records are full of complaints that the militia, reflecting the sentiment of the people, refused to enforce edicts perceived as unjust, or even participated in popular resistance to them.¹⁷⁴ Colonial culture accepted

¹⁶⁷ See POCOCK, *supra* note 44, at 203-04, 210-11, 385-86; CRESS, *supra* note 111, at 16-17, 23-24, 49.

¹⁶⁸ BARLOW, *supra* note 124, at 47.

¹⁶⁹ See *id.* at 45; Fletcher, *supra* note 110, at 5-6.

¹⁷⁰ See BARLOW, *supra* note 124, at 47; ROYSTER, *supra* note 67, at 28; Shalhope, *supra* note 130, at 604-07.

¹⁷¹ The most famous exposition of this idea is Jefferson's: "[W]hat country can preserve it's [sic] liberties, if their [sic] rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms ... The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants." Letter from Thomas Jefferson to William S. Smith (Nov. 13, 1787), in JEFFERSON: WRITINGS 910, 911 (Merrill D. Peterson ed., 1984); see also TRENCHARD & MOYLE, *supra* note 159, at 12.

¹⁷² See 1 ANNALS OF CONG., *supra* note 107, at 750; NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 56 (Paul L. Ford ed., B. Franklin 1971) (1888); Shalhope, *supra* note 130, at 602.

¹⁷³ See ROYSTER, *supra* note 67, at 5-7, 16.

¹⁷⁴ See MORGAN, *supra* note 78, at 164; MAIER, *supra* note 113, at 16-26; Carp, *supra* note 113, at 20.

some measure of violent resistance as a normal part of life, although those in authority never ceased to complain of that fact. If the (pg.582) governors had lost touch with the people or disregarded their wishes, it seemed natural to the people of the colonies to go outside normal channels so as to make their will directly felt: to riot, to burn royal ships in protest of impressment, to close down courthouses, to assault officials or to destroy their property, or any of the thousand other courses of action of which their not very obedient minds could conceive.¹⁷⁵

In the end, however, if the threat of force was to have any meaningful effect, the people had to be prepared to take up arms to oust tyrannical rulers and replace them with citizens committed to the common good. This right of resistance is the second general result of entrusting force to the militia. It is the *only* purpose of the Second Amendment explicitly mentioned during its discussion in Congress. Elbridge Gerry declared: "This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government."¹⁷⁶ He explained that the purpose of a militia is to prevent a standing army, and that when governments intend to invade the people's liberties, they first disarm the militia.¹⁷⁷ No one contradicted him or suggested a different, liberal purpose for the provision.¹⁷⁸

Republicans were aware of the danger implicit in vouchsafing this right of resistance in the citizenry and sensitive to the charge that they were inciting violence. They developed a number of limits on the right: It must be a product of the "body" of the people, i.e., the great majority acting by consensus; it must be a course of last resort; its inspiration must be a commitment to the common good; and its object must be a true tyrant, committed to large-scale abuse, not merely randomly unjust or sinful in private life.¹⁷⁹

An uprising that failed to meet these criteria was considered an illegitimate rebellion, rather than an act of true republican resistance. The American Revolutionaries believed that they had direct experience with the distinction. The War for Independence was resistance to tyranny, but the various uprisings against the new governments—Vermont's drive for independence, the Carolina Regulation, Shay's Rebellion, New York tenant protests, the Whiskey Rebellion, and others—were all rebellions.¹⁸⁰ Such rebellions were no better than (pg.583) tyranny, and the rebel forces little different from standing armies, inasmuch as they pursued a partial interest rather than the common good.¹⁸¹

¹⁷⁵ The study of legitimate popular disturbances in colonial and Revolutionary society has generated a substantial and growing body of historical scholarship. See, e.g., COUNTRYMAN, *supra* note 102; PAUL A. GILJE, *THE ROAD TO MOBOCRACY* (1987); MAIER, *supra* note 113; ALAN TAYLOR, *LIBERTY MEN AND GREAT PROPRIETORS* (1990).

¹⁷⁶ 1 ANNALS OF CONG., *supra* note 107, at 749.

¹⁷⁷ See *id.* at 749-750.

¹⁷⁸ Even the *Federalist Papers*, written well before the adoption of the Amendment, promised that if the central government ever used a standing army to oppress the people, "[t]o these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by [state] governments possessing their affections and confidence." THE FEDERALIST No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

¹⁷⁹ See MAIER, *supra* note 113, at 36-39; STUART, *supra* note 134, at 19-21.

¹⁸⁰ See Carp, *supra* note 113, at 32; THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION* 44-45, 48 (1986).

¹⁸¹ In particular cases, Americans disagreed whether a domestic disturbance was a rebellion or a revolution. The insurgents self-consciously saw themselves as continuing the work of the American Revolution and used republican rhetoric to describe their efforts. See SLAUGHTER, *supra* note 180, at 31-34, 39, 47-48, 54, 127-30. Other Americans believed that the rebels acted out of selfish, venal motives. SLAUGHTER, *supra* note 180, at 39, 44-45, 48, 58; see also Cress, *supra* note 128, at 40 (discussing popular distrust of venal motives of militia members). Still others, in rejecting the rebellions, began to modify the republicanism of the 1770's, emphasizing order over liberty, nationalism over decentralization, and hierarchy over democracy. See SLAUGHTER, *supra* note 180, at 133-38. All agreed, however, that some insurrections were rebellions against legitimate government.

This threat to the commonweal could come as easily from a demagogue as from a despot, and the universal militia was supposed to suppress insurrections by private groups as well as usurpations by public ministers.¹⁸² In resisting a tyrant, the militia was acting against the state apparatus, and in suppressing a rebellion it was acting for the same apparatus, but in either case it was pursuing the common good.

Traditionally, the republican function of the militia may have been limited to this right of resistance, rather than to a true right of revolution. The former is characteristic of more hierarchical forms of republicanism; the people had the right, when abused, to replace tyrants or to eliminate demagogues acting against the common good.¹⁸³ By contrast, it is yet a further step to grant the people a right of revolution,¹⁸⁴ a right to reorder society top to bottom, "to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."¹⁸⁵ But in practice, the line between resistance and revolution was not sharp; once the American revolutionaries had rejected British rule, they were of necessity compelled to put a new form of government in its place, and accordingly rewrote their state constitutions to provide for democratic government in the interest of the common good.¹⁸⁶ Thus, by war's end, American republicans had come to embrace a right of revolution along with a right of resistance.^(pg.584)

Lockean liberals also endorsed a right of revolution, so that unadorned references to such a right in the 1780's could be either liberal or republican. In theory, a liberal right to revolution might differ substantially from a republican one. According to liberals, individuals enter the social contract for their own ends, reserving certain rights of autonomy; if the government violates those rights, citizens may take up arms to insist upon the original terms.¹⁸⁷ By contrast, a republican revolution is made not for a cumulation of individual ends but for a truly common good.¹⁸⁸ In the 1780's,

¹⁸² See Cress, *supra* note 128, at 23; TRENCHARD & MOYLE, *supra* note 159, at 7; CRESS, *supra* note 111, at 9, 111; MORGAN, *supra* note 78, at 156; POCOCK, *supra* note 44, at 203-04, 210-11. New Hampshire's draft proposal for what became the Second Amendment provided: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." See Shalhope, *supra* note 130, at 608.

¹⁸³ See WOOD, *supra* note 56, at 20-23. Older republicans believed in the importance of revolution, but less in the sense of popular armed upheaval than in the sense of cyclical return to political health. See *supra* note 73.

¹⁸⁴ I use the phrase "right to revolution" because of its common acceptance, despite the fact that a *constitutional* right to revolution may be nonsensical, as if the Constitution secured a right to destroy it by arms. More appropriately, perhaps, one may speak of a *natural* right to revolution and a *constitutional* right to possess the means of revolution. The Second Amendment, then, does not protect a right of revolution (with judges deciding when and how the citizenry may revolt), but does preserve the possibility of revolution (with the citizens deciding when to implement that possibility).

¹⁸⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁸⁶ See WOOD, *supra* note 56, at 282-291. A 1788 letter by Anti-Federalist Luther Martin illustrates this unconscious conflation of resistance and revolution in the minds of the Anti-Federalists: "By the principles of the American *revolution*, arbitrary power may, and ought to, be *resisted* even by arms, if necessary." 1 DEBATES, *supra* note 154, at 382 (emphasis added).

¹⁸⁷ See JOHN LOCKE, *Second Treatise of Government*, reprinted in TWO TREATISES OF GOVERNMENT 473-77 (Peter Laslett ed., 1960).

¹⁸⁸ For example, the Massachusetts Constitution of 1780 described itself as "a social compact, by which the whole people covenants with each Citizen, and each Citizen with the whole people, that all shall be governed by certain Laws for the common good." MASS. CONST. of 1780, pmbl., reprinted in 1 AMERICAN CONSTITUTIONS 621 (Franklin B. Hough ed., Albany, Weed, Parsons & Co., 1871).

however, the line between the two was not so distinct.¹⁸⁹ Republicans may have borrowed the ideas of the social compact and the right of revolution in part from Locke's circle¹⁹⁰ before converting them into an idiom of the common good. For republicans, moreover, an important part of the commonweal was the liberty of citizens to ensure their political independence.¹⁹¹

As a result, the Anti-Federalist framers of the Second Amendment may not have thought consciously about whether they were relying on liberal or republican rights of revolution. Indeed, they may have relied on both rights without worrying about inconsistency.¹⁹² But in context, their primary loyalty seems clear. They self-consciously cast themselves as defenders of the War for Independence, a revolution made for republican principles. They gave the right to bear arms to a militia—a sacred concept in the republican tradition but one that Locke does not even mention.¹⁹³ They feared a central government created to protect Lockean accumulation of property and dominated by economic elites. And they sought to return the means of coercion to universal bodies of virtuous citizens under the direction of local democratic legislatures.^(pg.585)

6. Coping with the Paradox

The idea of the militia thus responds to the republican paradox that without a virtuous state there can be no virtuous citizens, but without virtuous citizens the state will not be virtuous. It does so by eliding the distinction between state and society. In republican thought, the militia had to be a body summoned, trained, and organized by the state. Without state sponsorship, the militia might not be "well regulated," nor could members gain experience in self-sacrificing service to the state. More importantly, it was critical that the militia be somehow universal; otherwise force would belong only to a slice of the population. But the state alone was truly universal and could constitute the militia as a universal organization. Without state supervision, the militia might be only a number of partial bodies—private armies asserting their private wills. Such an analysis reflected one horn of the paradox: to be moral, the citizen must exist in a virtuous state, which would constitute a universal militia. So in normal times, the militia was thought of as a state body.

But for republicans, there was danger everywhere, including state supervision of the militia. The state might become corrupt and seek to corrupt the militia—by dismantling it, by recruiting only from a slice of society, or by bribing its officers. In that case, the militia was expected to draw on other aspects of its character: its independence of mind and its capacity to take government directly into its hands. Members would remember that although the militia was gathered by the state, it was composed of, and identified with, the body of the people. The training in virtue acquired under a benign state would now stand it in good stead in resisting a corrupt one. Such a state of affairs could not last for long. Without the frame of a republic to hold them together, the pieces of a people would

¹⁸⁹ Thus, Carl Becker read the *Declaration of Independence* as thoroughly Lockean, see CARL BECKER, *THE DECLARATION OF INDEPENDENCE* (1942), and Gary Wills as not at all Lockean, see GARY WILLS, *INVENTING AMERICA* (1978).

¹⁹⁰ See WOOD, *supra* note 56, at 283.

¹⁹¹ Thus, Patrick Henry exhorted: "Guard with jealous attention the public liberty ... Unfortunately, nothing will preserve it but down right force. Whenever you give up that force, you are ruined." 3 DEBATES, *supra* note 154, at 45.

¹⁹² The last 20 years have witnessed explosive disagreement among historians over Locke's influence on revolutionary America. For a brief review of the disagreement, see KRAMNICK, *supra* note 84, at 35-40.

¹⁹³ Some have argued that protecting the militia may have been only one purpose of the Amendment, but I suggest that this argument rests on thin evidence. See *infra* Part III.A. Even if the argument is correct, however, protecting the militia is still the only purpose that the proponents of the Amendment bothered to mention—indicating that their central goal was republican.

become disjointed, devolving into pursuit of self-interest. Republicans hoped, however, that the militia could fill the gap for the time necessary to restore political health. This analysis reflected the other horn of the paradox: without a virtuous and independent citizenry, the state itself will never be virtuous.

Lacking a state apparatus, citizens might succumb to the corruption of atomism, yet with one, they might succumb to tyranny or oligarchy. The militia, therefore, had to be ever vigilant, like pilots of a ship, trimming their sails in response to the more pressing danger. On the one hand, should a threat come from the state, the militia was to assume the character of society—independent, aggressive, suspicious of public ministers. On the other hand, should a threat arise from private groups, the militia was to bear the aspect of the state—self-sacrificing, participatory, hostile to private power.

The militia thus helped to resolve the paradox by an impaction of all the components of a republic into itself. If the state could not have virtue without virtuous citizens, then the militia would supply a virtuous citizenry; and if citizens could not have virtue without a virtuous state, then the militia would (pg.586) provide virtuous state supervision. The danger in a right of resistance was that the criteria were not self-applying; the line between resistance and rebellion was often in the eye of the beholder. But eighteenth-century republicans felt that the safest place to commit the right to judge was to the citizen militia.

III. THE MODERN MEANING OF THE SECOND AMENDMENT

The place of the right to arms in the republican tradition is thus central and profound. I will argue in this section, however, that a modern republican interpretation of the Second Amendment presents great difficulties. In Sections A, B, and C, I argue that the republican tradition offers no guidance for judicial mediation between the competing contemporary legal claims that the Amendment only supports the modern national guard or that it also supports a private right to arms for individual self-defense. The republican tradition justifies giving arms to a universal militia of a type which does not exist today. As a result, under modern conditions, the literal wording of the Second Amendment is meaningless. On the other hand, I argue in Section D that the Amendment can serve as a regulative ideal for courts, who could try to keep its spirit alive by reading other provisions of the Constitution to serve the same ends—by protecting property as a means to political participation or by restricting the power of the army and police. Ultimately, however, these judicial strategies can offer only limited change; in any event, in republican terms, the courts are not the best fore in which to seek reinvigorated popular control. I therefore consider in the next part other, nonjudicial options for securing the ends served by the militia.

A. *Personal Right to Self-Defense*

The republican tradition does not support a personal right to own arms for self-defense. The republicans were intensely political and saw the right to arms as a political phenomenon. The contrary vision typically espoused by the advocates of a private right to arms could hardly be more different: each man's home is his castle, and he has a natural right to defend himself, his family, and

his property against threats from the outside world.¹⁹⁴ This vision, embracing frontier self-reliance and rugged individualism, is a deep part of American tradition,¹⁹⁵ but not the American *republican* tradition.¹⁹⁶ Whatever else may (pg.587) be laid at the door of republicans, they are not responsible for the National Rifle Association or its individualist vision.

As it is virtually impossible to prove a negative, I cannot claim that none of the proponents of the Second Amendment ever embraced a nonrepublican belief in the right to own arms for self-defense. Yet the dominance of the republican tradition in their thinking about the Amendment makes it unlikely that the primary concern of the provision was self-defense.¹⁹⁷ As I have argued, the discussion of the right to arms was saturated with republican concepts and rhetoric, including the language of the provision itself, with its assertion that "a well regulated militia" is "necessary to the security of a free State." The references to a popular right of resistance are countless; in contrast, the references to an individual right to arms for self-defense are quite rare.¹⁹⁸ I do not mean to argue that one could not construct a modern constitutional argument for a right to own arms for self-defense,¹⁹⁹

¹⁹⁴ See, e.g., B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 41, 61-62 (1976); Kates, *supra* note 8, at 206; Levinson, *supra* note 2, at 643 n.37, 655-57; Lund, *supra* note 16, at 117-21.

¹⁹⁵ See, e.g., DAVID B. DAVIS, *FROM HOMICIDE TO SLAVERY* 41-72 (1986).

¹⁹⁶ The frontier tradition did, however, adopt some of the cultural forms of republicanism: the republican yeoman was self-reliant, and he did have his own farm, far away from cities. But these attributes were valuable because they helped him to be a better political participant. In the 19th-century frontier tradition, that ideal slowly changed until rugged individualism became an end in itself; Americans valued those who could take care of themselves without the aid of others. See generally HENRY N. SMITH, *VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH* (1950). It is this image to which individual rights advocates seem to appeal.

¹⁹⁷ Akhil Amar and Elaine Scarry have recently advanced a similar argument. See Amar, *supra* note 103, at 1164; Scarry, *supra* note 150, at 1260-86.

¹⁹⁸ Robert Shalhope has argued that the Framers blended the right to arms for self-defense and for service in the militia. In support, he adduces a number of passages that laud the ideal of the armed citizen without specifically mentioning whether that citizen was inside the militia or outside. But, aside from the ability to resist tyranny, those passages describe only two benefits from private ownership of arms: the militia and the *posse comitatus* could help to keep order, and arms bearing was a part of a hardy, independent life that would keep Americans committed to spartan virtue, unlike the luxury-loving peoples of Europe. See Shalhope, *supra* note 130, at 604-12. Neither of these benefits directly supports a personal right to own arms for self-defense: the former assumes that the citizen will help to keep order, but as part of the militia or *posse comitatus*, not as a private individual; and while arms bearing may bring independent, virtuous character, that association says nothing about the use to which arms should be put—revolution or self-defense. Indeed, the hope that arms bearing will produce virtue in the citizenry could as easily be part of the tradition that armed service to the state trains citizens to independence and self-sacrifice.

The other historical materials commonly claimed to demonstrate an individual right to self defense are Pennsylvania's and Vermont's constitutions, which speak of the citizens' right to own arms "for the defence of themselves and of the state." See Shalhope, *supra* note 130, at 608; Hardy, *supra* note 29, at 595-96, 603. But other state provisions speak only of the "defence of the state," see Hardy, *supra* note 29, at 596-97, and the Second Amendment with its sole reference to the "militia" more resembles this category. Finally, the Senate did reject a proposal that the Amendment include the phrase "for the common defense," although it did so without explanation. Hardy, *supra* note 29, at 611. As the provision already included a purpose clause—providing for the militia—the Senate could readily have concluded that it did not need another redundant one.

¹⁹⁹ Such an argument might proceed along two lines. First, as a moral matter, since we do not now have a republican society, it is important that out-groups be able to protect themselves against an oppressive state and the terrorism of in-groups. Most saliently, Professors Cottrol and Diamond have demonstrated the historical importance of a right to arms to African Americans, see Cottrol & Diamond, *supra* note 17, at 55-56, 77-85, and have urged that from a modern African-American perspective, courts should construe it broadly. *Id.* at 88-89.

Second, as a historical matter, the Framers of the 14th Amendment were more classically liberal than the Framers of the Second Amendment. See, e.g., David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 784-85 (1991). In particular, the 1868 drafters sought to give Southern blacks the ability to protect themselves against white terrorism. See Cottrol & Diamond, *supra* note 17, at 64-67. As the Bill of Rights applies to the states only through the 14th, it may now be appropriate to read the early guarantees in a more individualistic light. See Amar, *supra* note 103, at 1201-03.

Both of these arguments depend on accepting the conversion to liberalism as correct or inevitable, but events in

or that all eighteenth-century republicans (pg.588) rejected such a right as a matter of general philosophy. Rather, I mean to argue that that right was, for them, a peripheral issue in the debates over the Second Amendment.²⁰⁰ This secondary status is critical because, as I will argue shortly, under modern conditions an individual right to arms is positively counterproductive to the goals and ideals implicit in a collective right to arms for resistance.²⁰¹ As the latter was at the center of the republicans' concern and the former on the periphery, a modern version of a republican Second Amendment would not include a private right to arms for self-defense.

The modern implications of a private right to arms differ radically, depending on whether it is a right for resistance or a right for self-defense. Modern analysts may assume that a private right to own arms automatically includes a right to own arms for self-defense, but that assumption is anachronistic.²⁰² The central issue in gun ownership for contemporary America is personal protection, and its discussion revolves around two sets of private rights or interests: the right of some individuals to be safe (or feel safe) by having guns, and the right of others to be safe (or feel safe) from those who should not have guns. In contrast, the central issue for the supporters of the Second Amendment was the allocation of political power, and its discussion revolved around two political actors, state and society, entwined in the militia.

B. *The Right to Resistance Outside of a Universal Militia*

Republicans believed that only a universal militia could safely hold arms, and the Second Amendment makes this assumption express: "A well regulated Militia, being necessary to the security of a free State, the right of the people (pg.589) to keep and bear Arms, shall not be infringed." The key issue is thus the meaning of the term "Militia." Those who support a states' rights view of the militia seek to identify the Amendment's militia with the modern national guard.²⁰³ The guard, however, is a select body, only a fraction of the population. In contrast, as advocates of the individual rights view have maintained,²⁰⁴ another meaning of militia was current in the 1780's: the

African-American history also counsel hesitance before doing so. Cottrol and Diamond point out that African Americans were successful in defending themselves against white terrorism only when they formed collective militias, not when acting as individuals. And they often felt constrained to form those militias because they could not gain admittance to the all-white—less than universal—state militia. *See* Cottrol & Diamond, *supra* note 17, at 55-57, 77-85. Guaranteeing African Americans an individual right of self-defense may be a second-best option, but the best course seems to be the creation of a truly universal militia—or its modern functional analogue.

²⁰⁰ Despite the introductory clause, the provision could guard the right to arms for multiple reasons, *see supra* text accompanying note 32, and the common good for republicans typically included individual liberties, *see supra* note 56. Among the more significant commentators, Don Kates and Nelson Lund have argued that the Framers based the right to revolution on the more fundamental right to self-defense: just as every individual has a right to resist aggression, so the people collectively have the right to resist tyranny. Kates, *supra* note 8, at 245; Lund, *supra* note 16, at 118-20. Yet even if the drafters did believe in a right to self-defense, it seems unlikely that they chose to protect it in the Second Amendment. The Amendment does not say "a well regulated militia being necessary to the security of a free state and the people having an innate right to self-defense against private parties, the right of the people to keep and bear arms shall not be infringed." Furthermore, this focus on government makes sense in context. The Framers were trying to hammer out the relationship between government and individuals, not between private parties. They had, after all, just completed a revolution and were concerned about keeping tyranny from rearing its head again.

²⁰¹ *See infra* Part III.B. There, I argue that a private right to arms for resistance is inconsistent with the militia ideal today; it is even truer, and for the same reasons, that a private right to arms for self-defense would be inconsistent with that ideal.

²⁰² The Supreme Court has so construed the assumption. *See supra* text accompanying notes 24-25.

²⁰³ *See supra* text accompanying note 28.

²⁰⁴ *See, e.g.,* Kates, *supra* note 8, at 214-16; Levinson, *supra* note 2, at 646-47; Lund, *supra* note 16, at 106.

unorganized militia included every male of arms-bearing age²⁰⁵—essentially all the citizenry at that time—and a vestige of that definition persists in the United States Code to this day.²⁰⁶ Because the Amendment describes the right to arms as a right of "the people" it seems probable that it used "Militia" in this broader sense.

The republican tradition supports this broader reading: the militia had to be universal. Any smaller body, any "select militia," suffered from the same defects as a standing army, because it was only a segment of the citizenry. The universal militia, by contrast, was the people under another name;²⁰⁷ it could not turn against the people because it was the people.²⁰⁸ As the National Guard is not universal, it cannot serve as a substitute.²⁰⁹

Republicanism would also eschew any construction of the right to arms as a right only of the state government against the federal government, rather than a right of the people against all government.²¹⁰ The militia was a forum in (pg.590) which state and people merged, in which society could check state corruption and the state could check private corruption. The right to arms is not a right of the state alone, nor a right of persons alone, but a right of the militia, which embraces both. The Amendment may give states the right to block efforts of the federal government to dismantle their militias. But it also gives the people the right to intimidate state government and ultimately to revolt.

The history of the clause supports this view: the Second Amendment was copied from right to arms provisions in state constitutions,²¹¹ and the debates at the time reveal no suggestion that the scope of the right changed when adopted into the federal Bill of Rights. But state bills of rights were not a limit on Congress' ability to tamper with state militias; they were a limit on state governments'

²⁰⁵ See Carp, *supra* note 113, at 19-20; Kates, *supra* note 8, at 215.

²⁰⁶ See 10 U.S.C. § 311(a) (1988) (unorganized militia includes all males at least 17 years of age and under 45 years of age and all female officers of National Guard).

²⁰⁷ Laurence Tribe seeks to avoid this conclusion by arguing that even if the Framers understood the militia to be universal, the militia was supposed to be "well regulated." See, e.g., TRIBE, *supra* note 25, at 299 n.6. Presumably, Tribe means to suggest that regulation may include membership restrictions. Some regulation of the militia is consistent with republicanism: the state assembled it and supervised its training. But limiting ownership of arms to one portion of society is precisely the form of regulation that the Amendment did not contemplate; more likely, the provision contemplated a requirement of universal membership. See *supra* Part II.B.3; Amar, *supra* note 103, at 1167.

²⁰⁸ In line with the requirement of citizen universality, women today would have to be included in the militia because of the 19th Amendment, even if the Equal Protection Clause might not so require under current law, cf. *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding Selective Service Act requiring male-only registration). A wholly male militia would represent only part of the citizenry.

²⁰⁹ The Guard is statutorily defined as that part of the organized state militia that is federally recognized and funded, and that is trained and has its officers appointed under Congress' militia powers. See 10 U.S.C. § 101(9)-(13) (1988). Far from universal, its present authorized strength is 600,000. See *id.* at 3225 (Supp. 1990). For some time, the guard has exhibited the characteristics of a distinct interest group. See generally MARTHA DERTHICK, *THE NATIONAL GUARD IN POLITICS* (1965). Indeed, the origin of the Guard lies in large measure in class warfare. During the great strikes of 1877, the militia had often refused to disperse strikers, so in later years the business community urged a remodeling of the militia to make it more responsive to property rights. See NELL I. PAINTER, *STANDING AT ARMAGEDDON* 15, 21-22 (1987).

²¹⁰ There is no reason not to incorporate the Second Amendment against the states. The argument against incorporation, based on the collective rights theory, is that it would be incoherent to do so. Since the Second Amendment is a right of the states, it must be a restriction on the federal government, not on the states themselves. See, e.g., TRIBE, *supra* note 25, at 299 n.6. But the premise is mistaken: the Amendment is a right of the people against government and against private factions. There is thus no reason to distinguish the Amendment from the other nine for incorporation purposes.

²¹¹ See Cress, *supra* note 128, at 29-37; HALBROOK, *supra* note 17, at 64-66, 75-76.

ability to tamper with citizens. So the state right to arms—and by implication the federal right as well—had to be a right of the people against government.²¹²

By the same token, however, those who support an individual rights view of the Amendment are mistaken in equating the people's militia and the universe of private gun owners. For one thing, the militia not only may be universal; it must be, because any smaller body would reflect only a partial interest. The threat of corruption may lurk as much in insurrection by private force as in governmental tyranny. Second, while the militia must not be dominated by the state, it also must not be wholly private.

Participation in the militia gave citizens an education in civic virtue, prompting them to associate possession of weapons with service to the republic. They also learned to be independent, but as a political body devoted to the common good, not as private individuals. They were independent not from the world, but from whatever forces were seeking at the moment to corrupt the republic—whether state ministers or popular demagogues.²¹³

Gun owners today do not comprise a universal militia. Not all citizens own guns. Some people in almost every demographic category own guns, but ownership is concentrated in a fairly distinctive group. American gun owners are overwhelmingly male²¹⁴ and married,²¹⁵ more Protestant than Catholic,²¹⁶ (pg.591) more white than black (in absolute numbers),²¹⁷ generally middle class,²¹⁸ and reside primarily in rural areas.²¹⁹ Many more people own guns in the South than elsewhere in the nation,²²⁰ and within the South, white gun owners exhibit greater hostility to blacks than do white nonowners.²²¹ Americans own guns for a variety of reasons,²²² but I have observed that those who view gun owning as political expression do so for specific reasons.²²³ Among themselves, such

²¹² See Hardy, *supra* note 29, at 594, 624 (making similar point from individual rights perspective).

²¹³ Advocates of the individual rights view do not sufficiently take account of these aspects of the militia. For example, Don Kates reviews the colonial legislation that obliged all citizens to be militia members, *see* Kates, *supra* note 8, at 215, and then asserts that the right to own arms therefore belongs to every private party, *see id.* at 217-18. But we do not oblige every citizen to be a militia member today, and that change is important.

²¹⁴ See U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1987, at 169 tbl. 2.50 (Timothy J. Flanagan & Katherine M. Jamieson eds., 1988) [hereinafter SOURCEBOOK]; JAMES D. WRIGHT ET AL., UNDER THE GUN 109 (1983); American Firearms Industry Dealer Survey (1988) [hereinafter Industry Survey] (unpublished survey, on file with author).

²¹⁵ See Industry Survey, *supra* note 214.

²¹⁶ See WRIGHT ET AL., *supra* note 214, at 108; James D. Wright & Linda L. Marston, *The Ownership of the Means of Destruction: Weapons in the United States*, 23 SOC. PROBS. 93, 95-98 (1975); SOURCEBOOK, *supra* note 214, at 169 tbl. 2.50.

²¹⁷ See SOURCEBOOK, *supra* note 214, at 169 tbl. 2.50; Wright & Marston, *supra* note 216, at 95, 97-98. While white gun owners may outnumber black gun owners in absolute terms, the relative rates of ownership among the two groups may be comparable. See WRIGHT ET AL., *supra* note 214, at 108-09. But absolute numbers, not the percentage rate, would be the critical fact should a revolution occur: more white gun owners means more white power.

²¹⁸ See WRIGHT ET AL., *supra* note 214, at 107-08; Wright & Marston, *supra* note 216, at 95-97; Industry Survey, *supra* note 214; SOURCEBOOK, *supra* note 214, at 169 tbl. 2.50.

²¹⁹ See WRIGHT ET AL., *supra* note 214, at 104-105; Wright & Marston, *supra* note 216, at 95.

²²⁰ See SOURCEBOOK, *supra* note 214, at 169 tbl. 2.50; WRIGHT, *supra* note 214, at 106-07; Wright & Marston, *supra* note 216, at 95.

²²¹ See Wright & Marston, *supra* note 216, at 98 & n.8.

²²² See *infra* text accompanying notes 226-28.

²²³ I have been unable to find statistics to support this claim, but evidence of this subculture is not difficult to find. For example, at present, my local country music station is playing a song called *A Country Boy Can Survive*: it proudly asserts that, come the revolution, rural people will be better off than now because, inter alia, they know how to use guns.

owners often wistfully talk about a revolution against the government to restore a time in which people like them—honest, self-reliant, simple people—would again have their due.²²⁴ Such people may believe that their welfare is equivalent to the common good, but it is not.²²⁵ If we have an armed revolution, it will be in the interests of these citizens, not of the population as a whole.^(pg.592)

Gun owners, moreover, have not formed a militia: they have not assembled into a collective body to acquire training in virtue or the habit of associating arms bearing with dedication to the common good. Many urban dwellers probably have little experience with guns but own one for self-defense; they associate firearms with fear of their fellow citizens, not militia sorority.²²⁶ Most gun owners use their firearms primarily for hunting,²²⁷ and these owners may feel some bond with other hunters, but only with other hunters.²²⁸ And then some—the "survivalists"—own guns precisely because they predict that a cataclysmic event, such as an invasion or a revolution, is in the offing. Among themselves, survivalists may display some qualities of a militia: they are trained, vigilant, and committed to each other. But they have no bond to the rest of the republic; indeed, they suspect that most others will, and perhaps should, perish in the coming conflagration. Despite the self-image of gun groups, then, a gun is not like an amulet; it does not have magical properties that convert its owner into a model republican citizen.

The eighteenth-century republicans were ready to face great risk, but they were far from insensible to danger. They believed in a right of resistance, but they gave it not to some random collection of individuals but to the people *as a whole and only as a whole*. My disagreement with a private right interpretation of the Amendment is not that it takes the provision too seriously, but that it does not take it seriously enough. The vision of the Amendment is not of a nation in which all may own arms but of one in which all are *in fact* armed. If only a small portion go armed, the hope of the Amendment will have failed as surely as if the government had prohibited arms bearing altogether. Corruption—domination of politics by a narrow slice of the public—can occur through the machinations not only of the state but of private parties as well. The undue political influence of the National Rifle Association is precisely the nightmare of all true republicans, all true believers in the Second Amendment.

²²⁴ Some empirical work suggests that gun ownership is largely a function of early socialization into a "gun culture" that is "best typified as rural rather than urban," "heavily masculine," and that "emphasize[s] independence, self-sufficiency, mastery over nature, closeness to the land, and so on." WRIGHT, *supra* note 214, at 112-14. Bruce-Briggs, too, suggests that gun ownership reflects a deep cultural cleavage in the nation:

[W]e are experiencing a sort of low-grade war going on between two alternative views of what America is and ought to be. On the one side are those who take bourgeois Europe as a model of civilized society

On the other side is a group of people who do not tend to be especially articulate or literate, and whose world view is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state Manhood means responsibility and caring for your own.

Bruce-Briggs, *supra* note 194, at 61. Levinson also recognizes this cultural division and argues that good republicans should include gun owners as a "voice from the margin" in constitutional dialogue. See Levinson, *supra* note 2, at 658-59. But for republicans, armsbearers are never just one more voice in the dialogue; they always have the last word.

²²⁵ Their attitudes are, however, interestingly parallel to those of some in the English Country Party in the 18th century. Both pined for a past time when the citizens of the republic were homogeneous, and the public good was therefore identical to their own good. See *supra* note 86. The Country Party was wrong then, and these gun owners are wrong now: the public good must include their good, but it must also include the good of others in equal measure.

²²⁶ See WRIGHT ET AL., *supra* note 214, at 116-17 & n.9; Wright & Marston, *supra* note 216, at 99-103.

²²⁷ See Bruce-Briggs, *supra* note 194, at 39; Wright & Marston, *supra* note 216, at 94 n.5.

²²⁸ See, e.g., Bruce-Briggs, *supra* note 194, at 41. The "gun culture," see *supra* note 224, is one that revolves around hunting. See WRIGHT ET AL., *supra* note 214, at 104-06, 112-16.

Two objections might be made to this general argument. First, the literal requirement of universality may seem wooden and extreme: if even one citizen is omitted from militia service, it would seem to doom the whole enterprise. But it is hard to believe that anyone could have seriously intended the Second Amendment to rest on such an implausible background assumption. As I will consider in the next section, republicans did seem rhetorically to presuppose literal universality, but in practice they never adopted truly universal militias. We may then understand the concept of the militia as a regulative ideal or as a symbol for a political function: republicans sought to give over the control of arms to a body constituted in such a way that we should have confidence (pg.593) that it would represent the body of the people, rather than any lesser faction. Such a body would have to be very broadly representative, potentially open to everyone, and trained in virtue. Even under these lesser requirements, private gun owners do not qualify as a militia: they still reflect particular interests²²⁹ and are still random atoms.²³⁰

Second, some might argue that if some citizens fail to own arms, they have only themselves to blame: the vision of the universal militia depends on private dedication to the state, as reflected in the civic act of firearms possession. But this response would misconceive the fundamentally political nature of gun ownership by construing it as an individual right and responsibility. The argument rests on an implicit analogy to other provisions in the Bill of Rights designed as protections for the individual against acts of state abuse, such as the Fourth Amendment. The Second Amendment, in contrast, is a constitutive or structural provision: it forecasts the relationship between the state and the people as a whole. Its essential goal is not to preserve liberal rights of individual autonomy, but to ensure that ultimate power remains with the universal militia. If the militia is less than universal, the harm falls not only on those who failed to buy guns, but on the republic as a whole, because the means of force lies in the hands of a special interest.²³¹

Republicans did not intend to leave the universality of the militia to the chance decision of every citizen to arm herself. The state was supposed to erect the necessary scaffolding on which the militia could build itself, to muster the militia and oblige every citizen to own a gun.²³² Some even argued that if the citizen could not afford a firearm, the state should supply one.²³³ Even if every private citizen did buy a gun on her own initiative, moreover, those purchases would still not generate a militia; without training in virtue and the experience of public service, citizens would be nothing more than armed but unbonded atoms.

The identification of the militia with the National Guard is thus too state-focused, but the identification of the militia with individual gun owners is too focused on private persons. In the years since the Revolution, state and society have changed so that constitutional thinking views the government and citizens as distinct and often adversarial actors. So it may seem natural to case the Second Amendment as a simple right of liberty-loving private persons to take (pg.594) up arms against

²²⁹ Levinson is clear about this point: he casts gun owners as a particular group with particular views in a culture very different from, for example, the legal establishment. *See* Levinson, *supra* note 2, at 639-42 (Second Amendment generally ignored by legal establishment).

²³⁰ I will consider in the last section the question of what institutions might more closely fill the role of a universal militia. *See infra* Part III.D.

²³¹ Similarly, Akhil Amar has argued that the function of the jury was to create popular control over the administration of justice. The beneficiary of the jury was thus not just the individual defendant but the whole community; accordingly, in a republican scheme, the defendant may not have the right to waive a jury trial. *See* Amar, *supra* note 103, at 1196-99.

²³² *See* BARLOW, *supra* note 124, at 16; Cress, *supra* note 128, at 41.

²³³ 2 ANNALS OF CONG. 1804-07 (1791).

scheming government ministers. But that description is, in my view, an oversimplification. The Amendment guaranteed the right of a state/society, unified in the militia, to resist any threat of corruption, from private parties or state officials.

C. *The Right to Resistance Inside a Militia*

1. *The Absence of a Constitutional Mandate*

The militia is so central to republican thinking that it is surprising that the proponents of the Amendment did not secure a constitutional mandate for one. Republicans themselves sensed the lack, believing that the state had an obligation to constitute a militia.²³⁴ Article I gave Congress considerable power over the composition of the militia,²³⁵ and during the debates on its adoption, Anti-Federalists expressed fear that Congress might use its new power to raise a select militia and dismantle the state militias.²³⁶ Before the ratification of the Bill of Rights, Richard Henry Lee maintained: "[T]he constitution ought to secure a genuine [militia] and guard against a select militia, by providing that the militia shall always be kept well organized, armed and disciplined, and include ... all men capable of bearing arms."²³⁷

But although some of the amendments proposed by the state legislatures included a prohibition on standing armies—Madison ignored these in drafting his version—none included a constitutional mandate for a universal militia.²³⁸ During Congressional discussion of the Amendment, Elbridge Gerry proposed that it be revised to mandate a federal duty to assemble a militia, but his motion failed without a second and without discussion.²³⁹ The Second Amendment thus emerged as a guarantee that all citizens may keep and bear arms, so that the states would have the material with which to create their militias, and (pg.595) perhaps some limited, not very clear protection for those militias²⁴⁰—but no guarantee that there would be a militia.²⁴¹

Why did the Framers fail to ensure for their posterity what they believed to be the indispensable institution of a universal militia? From early on, republicans exhibited a rather severe

²³⁴ See *infra* text accompanying notes 237, 239, and note 241.

²³⁵ See *supra* text accompanying notes 133-39. In particular, Congress has the power to organize, train, and discipline the militia, and to govern that part of the militia in federal service. U.S. CONST. art. I, § 8, cl. 16. Political leaders assumed that this provision gave Congress the right to summon a select militia. During the 1790's many federal officials proposed a less than universal militia, and though these proposals were denounced as unrepugnant, no one suggested that they were unconstitutional. See CRESS, *supra* note 111, at 116-21.

²³⁶ See *supra* text accompanying notes 140-44, 158-61, and note 158.

²³⁷ See LEE, *supra* note 153, at 169.

²³⁸ See Shalhope, *supra* note 130, at 608-10; Cress, *supra* note 128, at 29-31. One might not expect a mandate for a universal state militia in a federal constitution; such a guarantee would more naturally appear in state constitutions. But the state constitutions do not contain any such mandate. And the federal Constitution does not require that a federal militia be universal, nor does it ban federal tampering with the universality of state militias.

²³⁹ See 1 ANNALS OF CONG., *supra* note 107, at 750-51.

²⁴⁰ See Cress, *supra* note 128, at 38; Shalhope, *supra* note 130, at 610.

²⁴¹ The Republican writer Centinel complained: "It is remarkable that this article only makes the observation 'that a well-regulated militia, composed of the *body* of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one." *Centinel, Revived*, INDEPENDENT GAZETTEER, No. XXIX, Sept. 9, 1789, at 2.

slippage between rhetoric and reality.²⁴² Many states did, in a general sense, require that all citizens own arms and serve in the militia,²⁴³ but they also departed from this ideal in important ways. For one thing, as the frontier receded, serious military action moved away from the centers of population, and so states came to rely on expeditionary forces, which were drawn from volunteers—usually poor—and professional soldiers. The militia, in contrast, began to rust on the homefront, turning out primarily as an occasional police force.²⁴⁴ When it did turn out, it did not include all, or only, citizens. Rich men could purchase exemptions by paying poor men to go in their places,²⁴⁵ and even those who were not citizens of the state were subject to militia duty.²⁴⁶ The states' military forces had come less and less to resemble the military incarnation of the citizenry assembled.

During all of this time, republicans continued to insist that only a universal militia was appropriate for a true republic—but they did not follow through, and did not persuade others to follow through, on the commitment. The reason seems plain: on the one hand, they were not prepared to surrender the universal militia as a necessary concept, but on the other, they could not persuade themselves or others to undergo the massive sacrifices involved in universal service.²⁴⁷ As a result, they were left in a state of anxiety: they insisted that the militia must be the whole people, but they knew that in fact it was not.²⁴⁸ They thus left a dual legacy: to make sense, the Second Amendment requires a universal militia but does not assure that we will have one.

Over the decades, Americans have come to exploit that discrepancy. As it became plain that the *armato populato* would never become a reality, republicans began to express their sad disappointment in a population that shirked its (pg.596) civic duty to arm itself.²⁴⁹ Today, only a small portion of American citizens are enrolled in the armed forces, the National Guard, or law enforcement organizations. Technically, all males aged seventeen to forty-five are members of the unorganized militia,²⁵⁰ but that status has no practical legal significance. Such "militia members" are not required to own guns, to drill together, or to learn virtue. The statutory provision creating this "universal militia" is nothing more than a dim memory of a distant hope.

2. *The Republican Meaninglessness of the Amendment*

From the beginning, then, the republican defense of the Second Amendment sought to deny reality, because it assumed a universal militia when there was none. Advocates of the individual rights interpretation of the Amendment thus have substantial precedent for refusing to recognize that we do not have such a body. Indeed, these commentators might argue that if we really wanted to

²⁴² See CRESS, *supra* note 111, at 11-14, 65; ROYSTER, *supra* note 67, at 42-45.

²⁴³ See Carp, *supra* note 113, at 19; Kates, *supra* note 8, at 215; *United States v. Miller*, 307 U.S. 174, 179-82 (1939).

²⁴⁴ See CRESS, *supra* note 111, at 5-7; Carp, *supra* note 113, at 19-20.

²⁴⁵ See CRESS, *supra* note 111, at 5-6, 59-60.

²⁴⁶ *Id.* at 6-7.

²⁴⁷ See *id.* at 80-81, 90-91, 117-18. As one Congressman put it, thoroughly ignoring republican orthodoxy: "As far as the whole body of the people are necessary to the general defence, they ought to be armed; but the law ought not to require more than is necessary; for that would be a just cause of complaint," 1 ANNALS OF CONG. 1806 (Joseph Gales ed., 1834) (1791).

²⁴⁸ Perhaps for this reason, debates over allowing exemptions from militia service on the floor of Congress tended to be simultaneously interminable and unfocused. See, e.g., 2 ANNALS OF CONG. 1804-12 (1791).

²⁴⁹ See Remarks of Rep. Smilie, 18 ANNALS OF CONG. 2177, 2191-92 (1808); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746-47 (Boston, Little, Brown & Co., 3d ed. 1858).

²⁵⁰ See 10 U.S.C. § 311(2) (1989).

follow the example of early republicans, we would guarantee a right to arms while willfully ignoring the absence of a universal militia.

There are, however, severe problems with this approach. First, whatever the discrepancy between rhetoric and reality, republicans still clung to their insistence that the rhetoric should become reality, by the creation of universal militias. We no longer even contemplate that possibility. There is no chance that any modern legislature will impose universal militia service. Second, the gap between rhetoric and reality has grown drastically over time. In the 1780's, most citizens owned arms, but today many fewer do.²⁵¹ This change has two significant consequences: if there should be a revolution it would be for the benefit of a smaller portion of the population, and the revolution would be much less likely to be successful. The absence of a universal militia is now severe and chronic, and self-deception about its existence has become impossible.

As a result, for judges trying to interpret the Second Amendment, republicanism suggests that the Amendment, as worded, is meaningless. To make any sense, the Amendment presupposed an institution now gone. Allowing private parties to own arms would serve no republican purpose, but neither would denying them arms. For republicans, all we can really do is try to create a republic again, as I will discuss in Part IV.^(pg.597)

D. *Alternative Judicial Uses of the Amendment*

In this situation, judges might be inclined to use sources other than the republican tradition to give meaning to the Amendment. This process involves issues of constitutional interpretation that are beyond the scope of this Article, but a range of options seems possible. On the one hand, following the strictures of strict constructionists, some judges might focus only on the literal language. Unfortunately, if the commentators are any guide, that device will not yield a clear result.²⁵² Perhaps more importantly, the literal language, standing alone, is an exceedingly narrow basis for interpretation. Even the most strict constructionists would look to the original understanding in addition to the language²⁵³—but again, that intent can have no meaning today.

²⁵¹ At most, half of all households in America have guns in them, *see* WRIGHT ET AL., *supra* note 214, at 34-35, 39; Wright & Marston, *supra* note 216, at 93-94; SOURCEBOOK, *supra* note 214, at 167 tbl. 2.47. About 29% of Americans personally own a gun, SOURCEBOOK, *supra* note 214, at 169 tbl. 2.50, and these owners are demographically skewed, *seesupra* text accompanying notes 214-25.

²⁵² On the one hand, the provision includes a purpose clause—enshrining a "well-regulated militia"—So that courts might limit the right to arms to militia members. *See* Levinson, *supra* note 2, at 644; sources cited *supra* note 29. To take that course, however, we would need to know who the militia is. Absent a "plain meaning" from the face of the provision, we would normally consult its intellectual context—but that is how we got into this mess in the first place. On the other hand, the purpose clause might not be exclusive. So, based only on its language, the provision might ensure the right of arms for many purposes. *See* Hardy, *supra* note 29, at 623, 627-28; Kates, *supra* note 8, at 217 n.53. And the provision does guarantee the right of "the people" to "keep and bear Arms," so perhaps courts could read the provision to guarantee an individual right to arms. *See* HALBROOK, *supra* note 17, at 84-85; Hardy, *supra* note 29, at 629-30; Kates, *supra* note 8, at 218; Lund, *supra* note 16, at 107. That course, too, seems troubling: the purpose clause could as easily be exclusive as nonexclusive (the Second Amendment is unusual in the Bill of Rights for having such a clause, so it seems important). Levinson, too, concludes that the literal language is obscure and then goes on to look at the republican tradition. *See* Levinson, *supra* note 2, at 643-45. Other commentators argue that the language supports one view or another, but then use historical materials to amplify their position, suggesting that the language may not be clear enough to rely on alone. *See, e.g.,* Kates, *supra* note 8, at 220.

²⁵³ *See, e.g.,* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971). In the context of free speech, for instance, Judge Bork has acknowledged that text and intent together may be unclear, so that we must sometimes construct a theory of the Constitution based on principles implicit in the text and intent. *See id.* at 22-23. Some writers have, however, suggested that one can derive a meaning from the text of the Second Amendment alone. *See* HALBROOK, *supra* note 17, at 84-87; Hardy, *supra* note 29, at 622-23.

Faced with these difficulties, one might conclude that the Amendment is literally outdated, made irrelevant by events, and therefore should have no meaning at all—as if the Constitution required Congress to keep a Carolina Parrot, now extinct, as a mascot. Courts would then read the provision as a dead letter.

It is possible, however, for courts to update the Amendment in a variety of ways. This course might be the best one since the Amendment does exist and does serve a function in the scheme set up by the Constitution. One style of updating would read the Amendment, as applied to the states through the Due Process Clause, in the way that Justice Harlan read the Due Process Clause: whatever its original meaning, the Amendment has become a part of the living tradition of the American people, part of our scheme of ordered liberty.²⁵⁴ In that process, the provision has taken on a new meaning, as a liberal right to arms to secure individual autonomy against private assailants (pg.598) or even the government. Whatever one thinks about that vision, it is deeply embedded in large parts of the American psyche.²⁵⁵

Courts could, however, seek to update the Amendment in a more republican fashion, and that course has the dual advantage of being more true to the original context and, for some, more appealing because it is more republican. One way to do such updating would be for courts to order the kinds of reforms that I consider in the next part, reforms that would serve the same function as the old militia—a reconstituted militia, universal service, workplace democracy, and the like. But even if those reforms might be appropriate as legislation, judicial enforcement suffers from familiar problems. For one thing, courts are not the best institutions for supervising such massive and complicated social change.²⁵⁶ For another, even if a court viewed originalist theories dimly, it would face great obstacles in mandating workplace democracy or even a universal militia on the basis of a provision that on its face does no more than guarantee a right to arms. Such an order might prove unenforceable, as the public would likely resist it tooth and nail as illegitimate. Such a situation is not an auspicious beginning for a plan designed to create a virtuous, public-regarding populace.

There are, on the other hand, judicially manageable ways for courts to update the Amendment. The right to arms and the universal militia were significant structural elements in the polity contemplated by the Constitution and its amendments, read as a whole. With their demise, there is a hole in the fabric of the document where they used to be. To mend that hole, courts might stretch the other fibers of the constitutional fabric to cover it, by reading other parts of the Constitution in such a way as to serve militia-like functions. An updated Second Amendment would thus have no independent content but would be a shadowy gravitational presence in interpreting the rest of the Constitution. In particular, after the demise of the Amendment, the people as a body no longer have the ability to resist government outside the normal channels. So new interpretations should seek to increase the influence of the people over their government.²⁵⁷ (pg.599)

²⁵⁴ See *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

²⁵⁵ See *supra* text accompanying notes 194-96.

²⁵⁶ The logistical difficulties would be much greater than cases in which courts have declined to take over existing institutions. See, e.g., *Boston Pub. Hous. Tenants' Policy Council v. Lynn*, 388 F. Supp 493 (D. Mass. 1974). To take the example of the militia alone: a court would have to order revenue raised, units organized and trained, and regulations promulgated. And think of the logical test to determine whether the legislature has met the order: has the populace become virtuous? If ever there was a nonjusticiable standard, this is it.

²⁵⁷ I have in mind a form of constitutional interpretation similar to that proposed by Charles Black, as an "exegesis [not] of the particular textual passage considered as a directive of action ... [but] the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part." CHARLES L. BLACK, JR., STRUCTURE AND

Several examples may illustrate this idea. First, courts could use the gravitational pull of the Second Amendment to create constitutional space for legislation that might otherwise be suspect. Several of the neorepublican proposals that I consider in the next part—such as campaign finance reform or proportional representation²⁵⁸—might violate current law. Courts might conclude that these reforms are designed to serve some of the functions of the Second Amendment, and since the courts cannot enforce the Amendment, they should allow these reforms instead.

Second, courts might read the constitutional protections of property in new ways.²⁵⁹ Like the right to arms, the republican function of property rights was to ensure independent, virtuous citizens. Also like the right to arms, republican attitudes toward property rights contained a tension: on the one hand, the state should not tinker with them, so as to allow real independence; but on the other, the distribution of property needed to be universal, so that some citizens would not dominate others.²⁶⁰ If free exchange did not produce universal ownership of property, the state had to decide whether to redistribute.²⁶¹ In the case of the right to arms, the state had made that decision: it required universal membership in the militia. But in the case of property, republicans sought to avoid the conclusion that the state had a proper role in universalizing property. Instead, they hoped that the market, accompanied by geographical expansion, would take care of the matter by producing relative equality.²⁶²

To persist in such a belief today is self-deluding. Those with property dominate politics in a way that the republicans would find appalling,²⁶³ and, with the practical demise of arms as a check on government, the equal distribution of property has become especially important. In particular, republicans may have been uncomfortable with a state role to ensure universal property ownership, but they were not at all uncomfortable with a state role to ensure universal (pg.600) ownership of the means of force. With that latter role gone, however, the state function of ensuring universal popular control of the government is more constricted than contemplated by the Bill of Rights. One natural path of reexpansion is for the state to have a larger role in ensuring universal property possession.

RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969). Considered as a textual directive, the Second Amendment only guarantees a right to arms; but it also is part of a relationship between government and citizens in which the latter hold power outside the normal channels. A liberal critic might respond that the Amendment really is an isolated excrescence in a liberal text, not a part of a deep structural relationship. In this view, the provision's death or transformation into a private right only brings it into line with the liberal underpinnings of the rest of the text. In fact, however, the Constitution considered in "all its parts" is a combination of republican and liberal elements, with the Bill of Rights a careful republican hedge against the liberalism of the body of the document. *See supra* text accompanying notes 103-06; Amar, *supra* note 103; James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 341-44 (1990).

²⁵⁸ *See* Sunstein, *supra* note 10, at 1576-77; *infra* text accompanying notes 318-20.

²⁵⁹ As James Pope has argued, the Supreme Court might also read the First Amendment's right of assembly in a republican light, consistent with its heritage. *See* Pope, *supra* note 257, at 325-45. In particular, the Court might protect boycotts as a form of direct popular participation in government. *See id.* at 347-56.

²⁶⁰ *See* Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1327-35 (1987); *supra* note 71.

²⁶¹ *See* Alexander, *supra* note 71, at 300-02.

²⁶² *See id.* at 301; Michelman, *supra* note 260, at 1333-34. The reason for the different attitudes toward the two rights may be that in the case of property, ensuring universality seemed necessarily to involve invading the property rights of some to give property to others. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 205-07 (1990). In the case of arms, republicans seemed to sense no such tension: everyone could and should own a gun, and the more who did, the better for all. Thus, arms ownership seems a better symbol for republicanism than property rights.

²⁶³ *See* NEDELSKY, *supra* note 262, at 216-22.

Thus, courts could reconceive property-rights as the necessary basis for political participation, not simply as protection for private expectations.²⁶⁴ That reconception would, inter alia, involve less protection against the redistribution of traditional property rights,²⁶⁵ which have led to the present inequality of power,²⁶⁶ and more protection for newer forms of property. As Nedelsky has elaborated, traditional "property no longer provides people with the basis for independence and autonomy in the eighteenth century sense."²⁶⁷ Two centuries ago, a farmer's land or a craftsman's tools may have provided some "real independence," but the salaried employees, welfare recipients, and shareholders of today are dependent on a web of relationships.²⁶⁸ Courts might therefore place less emphasis on traditional property and more on statutory welfare and other kinds of property that provide autonomy in the modern world.²⁶⁹ The "new property"²⁷⁰ cannot provide complete independence, because it originates in an act of the legislature, is distributed through the bureaucracy, and depends on the courts for its continuing protection.²⁷¹ But traditional property, too, has depended on state support.²⁷² And complete independence was never part of the paradoxical republican ideal: we must have rights in order to direct the state, but we cannot have rights without state protection.²⁷³ (pg.601)

Third, the disappearance of the militia should create a heightened constitutional suspicion of the standing army and the police. Those bodies have, in a sense, usurped the militia's control of

²⁶⁴ See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1102-03, 1109-14 (1981).

²⁶⁵ Others have argued that the historical roots of the Takings Clause, U.S. CONST. amend. V, are liberal, see RICHARD A. EPSTEIN, *TAKINGS* (1985), and if they are right, then the Second and Fifth Amendments are in tension, growing out of different traditions. But under the argument that I advance here, judges should import some of the Second Amendment's republican meaning into the liberal Takings Clause. We might then arrive at a "hybrid" Fifth Amendment that seeks somehow to secure property as both a collection of legitimate expectations and a source of political power.

²⁶⁶ See Michelman, *supra* note 264, at 1112-13. It would also lead to greater acceptance of legislative efforts to curtail the ability of the rich to dominate the speech marketplace. See *infra* notes 318-20 and accompanying text. Michelman, *supra* note 260, at 1343-45.

²⁶⁷ Nedelsky, *supra* note 66, at 19.

²⁶⁸ See *id.* at 19-20.

²⁶⁹ See *id.* at 26-28.

²⁷⁰ Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

²⁷¹ Akhil Amar has argued, however, that the 13th Amendment, with its republican underpinnings, may impose on the legislature a duty (not judicially enforceable) to provide each citizen with the modern equivalent of 40 acres and a mule—enough property to make independent political activity possible. See Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

²⁷² See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-14 (1927); Nedelsky, *supra* note 66, at 18-19.

²⁷³ See *supra* notes 66-71 and accompanying text. Michelman notes this generative tension. Michelman, *supra* note 260, at 1334; Michelman, *supra* note 264, at 1110. Nedelsky, too, notes the tension in the nature of property rights, see NEDELSKY, *supra* note 262, at 207-08, 272-74, but she has recently rejected constitutional property as a means to reempower the people. The Madisonian tradition of protection of private property from the contract of the majority, she thinks, is too deeply entrenched in American culture. In Nedelsky's view, Madison sought to remove the people from power precisely because they might adjust the rules of the market, so that property would be more equally distributed among them. See *id.* at 203-05, 207-211. Inequality is therefore a deep and integral part of the American tradition of property, and an egalitarian redefinition of property is likely to fail for that reason. See *id.* at 246, 261, 275-76. Nedelsky prefers to move away from property as a central concept, see *id.* at 265, to achieve ends that are recognizably republican, see *id.* at 265-76. Perhaps she is right that property rights are not the most promising route for empowerment, but they could be one useful route among many. At one point, Nedelsky argues that property rights could be positively pernicious, because the old tradition of inequality is so strong in the minds of Americans that any revival would likely be regressive. See *id.* at 246. But if the tradition of venerating property rights really is that strong, then it would seem that the idea of property will always be with us, and abandoning property altogether should be no easier than redefining it.

the means of force, and they have systematic interests in making their hold more effective at the expense of the liberties of the people. Unless we revive the militia, the republican nightmare may be inevitable, as the populace stands effectively disarmed before the might of the state. But courts can at least try to restrict that tendency by applying the Constitution stringently against the military and police.²⁷⁴

This suspicion should be at its height when the standing army and the police come into contact with the general populace and seek to restrict citizens' control over their own lives.²⁷⁵ For example, the Supreme Court should not have deferred to the military's claims of necessity in the Japanese-American internment cases.²⁷⁶ Similarly, criminal procedure cases that expand the discretion of the police at the expense of individual liberties represent a troubling direction for the Court.²⁷⁷ On the other hand, resolving such cases from a (pg.602) republican perspective is not easy, because the police are viewed as seeking to control "rebels"—i.e., criminals seeking to disrupt the common good—and as deserving whatever discretion they need and are unlikely to abuse. For republicans, it may be better for some more truly popular body, like the militia, to control crime, but that is not currently an option. So in this imperfect world, the Court must walk a tightrope: it must allow the police, whom it cannot trust, to control crime, which detracts from the common good, but without allowing them to intimidate law-abiding citizens, which also detracts from the common good. One thing that the Court should not do, however, is what it seems to be doing: basing constitutional decisions on apparent confidence that the police generally act in good faith.²⁷⁸

IV. REPUBLICAN REFORM

²⁷⁴ Elaine Scarry has gone so far as to suggest that the Supreme Court should read the Second Amendment as prohibiting nuclear war. One of the purposes of the right to arms was to give the populace direct control over the decision whether to go to war: if the government declared war and called up its armed citizenry, but no one came, no war could occur. Nuclear war, however, needs no popular ratification, as war can begin almost with a politician's push of a button. *See Scarry, supra* note 150, at 1297-1301, 1309-16.

²⁷⁵ The judiciary's deference to police and military discretion over their internal matters presents a slightly different set of concerns. The principal republican fear of a standing army was the army's tendency to dominate politics and wrest freedom from the public. But discipline within the army had a degrading effect on the citizens themselves. Many republicans were concerned that soldierhood and citizenship fostered inconsistent values as the one insisted on slavish obedience and the other fostered independent judgment. If we were to have a standing army, it should be as close to an army of citizen-soldiers as possible. *See ROYSTER, supra* note 67, at 38-40. Thus, the marked deference to military judgment in *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting claim that Free Exercise Clause gave Orthodox Jewish officer the right to wear a yarmulke while on duty), was inappropriate because of the military rule's effect on Goldman himself; in effect, it sought to deny him the status of an independent citizen. *See Michelman, supra* note 1, at 12-17; *cf. Ann Scales, Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 42 (1989) (explaining that militarism normalizes oppression of women).

²⁷⁶ *See Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

²⁷⁷ *See, e.g., Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (holding that warrantless entry into home is constitutional upon permission from third party who police reasonably believed had joint authority over premises but who did not have such authority); *Horton v. California*, 110 S. Ct. 2301 (1990) (allowing warrantless seizure of "plain view" evidence even if discovery of evidence was not inadvertent); *Maryland v. Buie*, 110 S. Ct. 1093 (1990) (holding that while executing arrest warrant, police officers may execute warrantless protective sweep of entire house on reasonable suspicion of danger); *Maryland v. Garrison*, 480 U.S. 79 (1987) (holding that honest factual mistakes about premises, in drawing up or executing warrant, will not invalidate warrant or search); *Colorado v. Bertine*, 479 U.S. 367 (1987) (holding that evidence obtained during inventory search of impounded automobile may be used as basis of prosecution); *United States v. Leon*, 468 U.S. 897 (1984) (providing "good faith" exception to exclusionary rule).

²⁷⁸ *See Rodriguez*, 110 S. Ct. at 2800; *Horton*, 110 S. Ct. at 2309-2310; *Buie*, 110 S. Ct. at 1098; *Garrison*, 480 U.S. at 87-88; *Bertine*, 479 U.S. at 374-76; Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1291-97, 1303, 1311, 1316-27 (1990).

A. *Advisability*

None of the interpretations of the Amendment proposed in the last part can secure all of the ends that republicans hoped that it would. Judicial strategies can ultimately offer only limited change; moreover, in republican terms, the courts are not the best forum in which to seek popular control. In this section, I will consider whether it is desirable for modern republicans to seek a contemporary surrogate for the militia outside of the courts. Any adequate substitute must serve several functions. First, the militia reflected and induced virtue. It was universal, so as to reflect the common good; and it offered training in virtue, making citizens independent and self-sacrificing. Second, the militia increased citizen control over the government. It allowed citizens to participate directly in their own self-government, not just through the process of representation, and it consigned to them ultimate control of the means of force. The two functions served by the militia were intimately linked; republicans wanted to consign force to virtue.

1. *Virtue Functions*

In the twentieth century, the first function—the militia's connection with the common good—has become more problematic, because of the diversity and (pg.603) expansion of the citizenry. Historically, some republicans expressed a desire for a homogeneous population, so that every citizen would have the same good.²⁷⁹ When republicans occasionally acknowledged the fact of diversity, they offered a number of responses. Some argued teleologically that despite superficial diversity, humans shared the same essential nature—a civic personality—and should be encouraged to realize that nature. As a result, in the end, the population was ultimately homogeneous with regard to everything that mattered.²⁸⁰ Other republicans argued that citizens were naturally divided into three estates; the challenge of political theory was to cause each to serve the common good in its own way, with its own virtues.²⁸¹

But how do we define the common good today, when most are not prepared to believe in a homogeneous citizenry, ascribed *teloi*, or natural estates, when each individual has a right to be different, and when voices from the margin are praised, not denigrated?²⁸² Neorepublicans have tried to retain the universalism of the republican tradition while not disparaging modern diversity. They have proposed an inclusive republicanism, based on persuasive dialogue between citizens. Individuals enter this dialogue with different ends, but through conversation, they shift their self-understandings, reaching for the perspectives of others, and drawing upon a shared past of normatively authoritative recollections.²⁸³ The hope is not for a unitary common good, but for a participatory process such that "everyone subject to a law-like utterance can actually agree that the utterance warrants being promulgated as law."²⁸⁴

²⁷⁹ See *supra* text accompanying notes 84-89, note 159.

²⁸⁰ See Michelman, *supra* note 1, at 22.

²⁸¹ See POCOCK, *supra* note 44, at 68-80; *supra* text accompanying notes 72-76.

²⁸² See Michelman, *supra* note 66.

²⁸³ See, e.g., Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 360-68 (1985); Michelman, *supra* note 1, at 31-33; Michelman, *supra* note 66, at 1526-28; Sunstein, *supra* note 10, at 1566-71.

²⁸⁴ Michelman, *supra* note 66, at 1527.

If a militia-surrogate must serve this new ideal, it is more difficult to design its structure. Under the old vision of the commonweal, the task was merely to ensure that the means of power resided with the body of the people, who shared one good. Private armies might rebel against the public good, but the militia, as the rest of society, would suppress the rebellion. The situation is quite different if all of society is like the rebels, each segment with a separate interest, richly diverse and dissentient. The neorepublicans' answer is that the citizenry must be transformed through dialogic persuasion, to recognize their sameness in their difference. But that prescription is a much taller order even than giving the means of force to citizens.

It is not, however, much greater than what the older republicans, at their most optimistic, hoped of the militia. They too believed that service in the militia could transform citizens by molding them into a public-spirited, organic (pg.604) body.²⁸⁵ A modern version of the militia might induce the modern version of this civic transformation: it might bring citizens together into self-revisory dialogue. The exact nature of the transformation is different, but the essential function of the militia is similar.

The primary difference between the two visions of civic transformation is that the nature of the proposed modern transformation is much more vague than the older version. The old militia was supposed to make citizens civic-minded and critical, and both of these qualities seem familiar to us today. In contrast, dialogic self-revision is a relatively new idea. Its parameters are not yet clear, and neorepublicans tend to talk about it in tentative or general terms.²⁸⁶ Moreover, because it is a reformative ideal, it has no real world referents. No one can point to an example of the kind of dialogue that he would like to see, because none yet exists. As a result, conceptualizing modern analogues to the militia is difficult in part because the function that it is supposed to serve is not yet in sharp focus. This problem—of vagueness and incompleteness—may be a part of all neorepublicanism and even of all new intellectual movements. As I will discuss below, however, the militia ideal makes the problem especially acute. The still-vague self-revisory dialogue is supposed to reform the people so that it would be wise to commit to them possession of the ultimate means of force.

The expansion of the citizenry creates another problem besides the simple fact of diversity: the citizenry now includes members without, perhaps, the requisite material conditions for full participation. In the 1780's, only male property-holders—in some states only white male property-holders—could be citizens and thereby militia members.²⁸⁷ Today, the citizenry is vastly larger, and hence the militia would be as well. Abandoning the racial and gender based exclusivity of the militia creates no republican difficulty, because no part of republicanism affirmatively requires race or gender bias. Eliminating the property qualification, however, is not so easy. According to republican theory, only those with property can have the independent judgment necessary to be good citizens,²⁸⁸ but not all citizens today have the requisite economic independence.²⁸⁹ A republican politics may therefore not be possible with the present citizenry.

²⁸⁵ See *supra* text accompanying notes 162-70.

²⁸⁶ Michelman, for example, acknowledges: "[G]aining a secure grasp on such a possibility stretches to the limits our powers of comprehension" Michelman, *supra* note 66, at 1527.

²⁸⁷ See, e.g., WOOD, *supra* note 56, at 168-69.

²⁸⁸ See *supra* note 71, text accompanying notes 259-62; EDMUND S. MORGAN, AMERICAN SLAVERY/AMERICAN FREEDOM 381-87 (1975).

²⁸⁹ See *supra* text accompanying notes 263-73.

Again, however, it is premature to despair of remedying the situation. Property qualifications on the franchise served the same end as bearing arms: ensuring that citizens had the requisite power independently to follow the common good. As long as citizens are subject to economic tyranny by private (pg.605) actors or governmental tyranny by public ones, they cannot be virtuous. The virtue functions of the militia thus depend on the power functions of the militia: a citizenry can be virtuous only if also powerful. By the same token, even a dramatically expanded citizenry could be virtuous if it were possible to find ways to empower them through militia²⁹⁰ or property²⁹¹ surrogates.

2. Power Functions

The militia ideal sought to increase the direct control of the virtuous populace over their government, outside the normal channels of representation. In its most restrictive version, the militia's right of resistance was defensive and occasional: when tyrants abused their power, the people could remove them from office and select new rulers. But by the 1780's, the concept of the militia had become part of an ideal of constant citizen involvement in government. Anti-Federalists sought to protect local militias so that the militias could protect local legislatures, because those legislatures were more democratic than Congress. Service in the militia was thought to transform members into active citizens, committed to the public good but suspicious of government, confident in their right to disagree. As a result, citizens' conduct at the polls would reflect not fear or deference, but independent assessment of the commonweal. Militia service itself, moreover, was a form of political participation, because the militia always had to appraise the decisions of the government. If those decisions departed from the commonweal, militia members should first refuse to enforce them, then resist them, and eventually either oust the persons in office or reform the government.²⁹²

This function may be the most terrifying aspect of the militia. Many might find it better to regularize power by surrendering it to "responsible" decisionmakers. That fear is not irrational, even in republican terms, for we are caught in the problem of origins, of how to get a republic off the ground. In republican theory, only a virtuous citizen militia can be entrusted with the means of force to resist state authority, but citizens will not be virtuous until they are already participating in policymaking under a republican form of government. The problem of origins is different from that of maintaining an ongoing republic, and the appropriate approach to the two problems may be very different. If we were already in a republic, there would be little excuse for failing to entrust the means of force into the people's hands. No course is without peril; in a republic, giving arms to the people is safer than giving arms to the government.

In nonrepublican politics, however, it is right to fear even the body of the people because they may not be virtuous. We might seek to change that situation, and opportunities for the exercise of virtue may always involve some (pg.606) risk. There is, however, no reason to court disaster by rapid, wholesale change. It is not surprising that much neorepublicanism is incremental in its reform program. We may ultimately make dramatic changes, but more limited popular control may be appropriate for a less republican populace.

3. The Militia Ideal and Neorepublicanism

²⁹⁰ For possibilities, see *infra* Part IV.B.

²⁹¹ For possibilities, see *supra* text accompanying notes 264-73 (discussion of "new property").

²⁹² See *supra* Part II.B.5.

Thus broken into its constitutive functions, the militia ideal is thoroughly consistent with the rest of republicanism: it seeks to ensure that citizens pursue more than their own self-interest, and it seeks to return power to the citizenry. The ideal stresses three particular elements of republicanism. First, it is populist: control of force should belong not to army officers, bureaucrats, or judges but to the people. Second, it has some connection to decentralization.²⁹³ Third, it takes seriously the impact on the political arena of the distribution of power.

This collection of ideals should not be embarrassing to progressive republicans.²⁹⁴ Indeed, only the last is at all troubling from a progressive perspective. In Professor Brown's words, the right to arms contemplates the people "subduing with force what [they] cannot discursively persuade."²⁹⁵ She is right. Republicans recognized that sometimes reason does not work, sometimes people do evil things, and sometimes the only course is to resist with force. That view, however, does not suggest that violence should be a normal part of political life; to the contrary, for republicans, revolution was a course of last resort. Indeed, they hoped that popular arms possession would forestall the need for resistance, since demagogues or tyrants would yield in advance. Finally, since we are not in a republic, the militia ideal suggests only that we move toward (pg.607) some kind of popular reempowerment, not that we issue guns to potential murderers and rapists. This stance seems both realistic and hopeful.²⁹⁶ Neorepublicans should celebrate the Second Amendment, not be embarrassed by it.

Have I missed something essential about the militia by reducing it to virtue and power, rather than by talking about martiality and gender? Perhaps. Republicans' use of metaphors of masculinity to describe militia members, and the centrality of guns, danger, physicality, and male-bonding themes in recollections of militia service suggest that, for many, the militia may have offered rich

²⁹³ In part, this connection is only a restatement of the first feature: the Second Amendment protected state militias because they were closer to the people. Today, the connection between the two is more complicated. The advantages of localism are still real, but decentralization also risks some reduction in universality, since localities are often demographically skewed compared to the nation as a whole. Two centuries ago, this skewing may have been less significant, because the relevant point of comparison was the state community, the location of most important decisions. With the rise of a national culture and a national government, too much decentralization could create a kind of geographically defined, select militia. The goal should therefore be to decentralize power, but to broadly inclusive bodies. For suggestions on how to do so, see BENJAMIN R. BARBER, *STRONG DEMOCRACY* (1984); Kathryn Abrams, *Law's Republicanism*, 97 *YALE L.J.* 1591, 1606-08 (1988).

²⁹⁴ In a recent article, James Gray Pope emphasizes the populist strain of republican politics. He argues that the Constitution presupposes that in normal times, politics-as-usual consists of deals between interest groups. But in "republican moments," the people should be able to take a direct hand in their government, outside of the normal channels, to engage in serious discussion of the common good. See Pope, *supra* note 257, at 310-12.

Pope's vision of republican politics shares the militia ideal's dedication to popular empowerment, but differs in imagining that republican politics can occur only in "moments." Indeed, Pope suggests that even if the Second Amendment protects a right of resistance, that right "does not provide an adequate home for popular republican politics" because the people could take up arms only under the rarest of circumstances. See *id.* at 328. But as I have argued, the purported benefits of universal arms possession extended to politics-as-usual, not just moments of crisis: the people would never accept a passive role in government, and government would rarely become corrupt, because both knew that the people *could* revolt. See *supra* Parts II.B.5, IV.A.2.

²⁹⁵ Brown, *supra* note 6, at 664.

²⁹⁶ Indeed, I can imagine only one group of neorepublicans who would resist this aspect of the militia ideal: those who would disarm everyone—citizenry, police, and military. But that option only pushes the analysis back a step: if we eliminate guns, the state will presumably still employ some method of force to keep order—tear gas or nightsticks or muscle—and we must still decide whether we can more safely vest the population with greater control over that use of force.

emotional rewards for the same reasons that hunting trips and team sports do.²⁹⁷ No doubt, many republicans became attached to the militia more from these personal experiences than from any theoretical commitment. Nevertheless, the republicans did not make these experiences a part of their conscious analysis of the Second Amendment. They were, in a sense, the accidents rather than the essence of the militia in republican thought.²⁹⁸ In any event, we can take what we like from the militia ideal and reject the rest. But just as we should not accept the "macho" aspects of the militia just because they cover an admirable core, so we should not reject the core because it comes wrapped in "macho" packaging.

B. *Reform Possibilities*

I discuss below several structures that might serve as militia-surrogates under modern conditions. Because of space constraints, this discussion of far-reaching, controversial reforms is necessarily sketchy and suggestive. In particular, I analyze only how well these structures might realize the old militia functions; I do not purport to consider their overall wisdom. But to the extent the militia is a worthy icon, good militia surrogates should command our attention as well.

1. *A Universal Militia*

The most obvious way to secure the functions served by the old militia would be to reconstitute a universal militia along republican lines. Conditions (pg.608) have so changed, however, that the new militia could not generate all of the benefits of the old—although it might produce some. Significantly, this new body would have to coexist, for security reasons, with a professional army. The technology of war is so advanced that exclusive reliance on an amateur force is not an option. Even many colonial republicans assumed that a small standing army could be consistent with liberty if the militia were sufficiently vigorous.²⁹⁹ Modern military technology, however, would make even a vigorous militia less of a threat to an oppressive government than in the eighteenth century.³⁰⁰ To make the right of resistance a real one, we would have to guarantee a private right to possess launchers and attack helicopters.

The clear objection to creating such a right builds on Brown's: it may be dangerous to give small arms to unvirtuous citizens; it seems suicidal to give them weapons of mass destruction. How then do we assure that the militia is virtuous? It would have to be universal, so that all of the interests of the people would be represented. But republicans assumed that the people would be a homogeneous group with a single set of interests, perceptions, and desires. In contrast, a modern militia would be a reflection of modern America—divided and driven by self-interest. Without some

²⁹⁷ See, e.g., ROYSTER, *supra* note 67, at 4-5, 10-13. Jean Bethke Elshtain, for example, has argued that the tradition of armed civic virtue has all too often drawn the populace together in a nationalist dream of military glory rather than in service to fellow citizens. See Jean B. Elshtain, *Citizenship and Armed Civic Virtue: Some Critical Questions on the Commitment to Public Life*, in *COMMUNITY IN AMERICA* 47, 50-55 (Charles H. Reynolds & Ralph V. Norman eds., 1988).

²⁹⁸ See Scarry, *supra* note 150, at 1289-90 n.100 ("[T]hrough the vocabulary can easily be read as gendered, it would in the long run be an error to read the idiom narrowly since the language ... belongs to 'resistance' whether ... male or female.").

²⁹⁹ See CRESS, *supra* note 111, at 278-93.

³⁰⁰ Professor Levinson argues that even rifles in private hands can exercise a check against a modern army, because they will change government's calculus in deciding whether and how to oppress the populace. See Levinson, *supra* note 2, at 648-50. This checking function is a substantial advantage, but it still falls short of republican hopes that the body of the people would have the power not just to check government but to overthrow it when circumstances warranted.

change in society, the effect of mandatory militia service is only too easy to predict. Citizens would experience service as one more demand by a distant and alienating bureaucracy, and those alienated citizens would be in possession of very dangerous weapons.

As noted before, one proposed neorepublican method of instilling virtue is citizen participation in self-revisory political dialogue. A revived militia seems to be a promising forum for such dialogue. Part of the folklore of America depicts the army as a melting pot in which young men from different backgrounds come to know and understand each other.³⁰¹ Military history suggests that the primary source of combat bravery is intense commitment to fellow soldiers³⁰²—a good basis for discussion and self-revision. Potentially, something of the same sort might occur in a militia. The main business of a militia is certainly not political discussion, but war and police activity. Nevertheless, (pg.609) linking the use of arms in public service to political dialogue might remind citizens that they ultimately control the state.

A revived militia is therefore an attractive option only if it can provide an opportunity for dialogic self-government. To do so, the militia must have something to talk about, which raises the troubling question of its relationship to the civil government. During normal times, a republican militia is an arm of the state and takes its orders from elected representatives. At the same time, such a militia must exercise independent judgment in reviewing those orders: it might decline to support a tyrant, take up arms to overthrow the government, or put down civil insurrection on its own initiative. In such cases, the militia would offer great scope for dialogue; members would decide how to use the means of force for the commonweal after careful, self-revisory discussion.

That course might make many readers uneasy. The idea of a militia setting policy and enforcing it with force is terrifying. Modern citizens might feel much more comfortable with a militia trained never to question its orders from a civil government. That fear suggests how far we have come from the eighteenth-century world, but it is not an irrational fear, even within republican terms. Republican governments are not suitable for all peoples at all times, and we are not now the stuff of which republics are made. That does not mean, however, that we are paralyzed. It does mean that we must ask how we can best inculcate the values and develop the institutions essential to the vitality of a healthy republic.

A truly independent militia should be a late republican reform, if indeed conditions ever warrant one. Much of neorepublican reform is deliberately incremental. An independent militia would be a drastic and very high risk change. If other reforms first create a virtuous citizenry, it may then be time to consider a freestanding militia. In the interim, the most advisable alternative is having a militia under orders from the civil government but vested with ministerial discretion over daily operations. Such a highly "tamed" militia would closely resemble universal civic service, which I consider in the next section.

An obedient militia still leaves control over the means of force in the hands of government, and, to that extent, it falls short of the function served by the old militia. But since we do not currently have a republic, we must choose among options, none of which match the ideal. The

³⁰¹ This bit of folklore is a recurrent theme in novels and movies. For examples, see PHILIP CAPUTO, *A RUMOR OF WAR* (1977); SUSAN F. SCHAEFER, *BUFFALO AFTERNOON* (1989); and Neil Simon's film *BILOXI BLUES* (Universal 1988). Kenneth Karst notes the same phenomenon. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. REV.* 499, 501 (1991). Karst argues that the military's present exclusionary policies involve the symbolic removal of women, gays, and lesbians from power, and thereby deny them equal citizenship, *see id.* at 500, a view with which republicans would agree.

³⁰² *See, e.g.*, GERALD F. LINDERMAN, *EMBATTLED COURAGE* 234-36 (1987). At this time, American combat officers are appearing every night on the evening news to explain that, in the heat of battle, soldiers do not fight for Mom and Apple Pie: "They fight for their buddies." REID MITCHELL, *CIVIL WAR SOLDIERS* 17-18 (1988).

question is thus whether it is more advisable to trust the government or the people with direct control of the means of force. The argument for trusting the government is largely prudential. Government abuses its control of the means of force, but we live with those abuses daily. In contrast, we do not know how great the abuses of an independent but unvirtuous militia might be, but they are potentially much greater. The government is subject to influence by public opinion and electoral control. To be sure, republican theory recognizes that such attenuated controls may be insufficient to resist tyranny; hence, the belief in a popular right of (pg.610) revolution. Nevertheless, such controls are not negligible and form a valuable check on government misconduct. If at some future point citizens habitually engage in self-modulating political discourse, we may come to trust them more than we trust the government with the means of force. Presently, however, it seems wise at first to move incrementally. Moreover, the overall purpose of the militia was to give the people the ability to control their own destiny. Vesting them with the control of force is the ultimate means to this end, but there are less extreme steps to empower the people short of giving them guns.

The militia ideal thus highlights what may be the besetting vice of neorepublicanism: its utopian, somewhat out-of-focus quality. It starkly suggests how far, if we take the intellectual inheritance seriously, we must go: reforming the character of the people so thoroughly that they should have guns so as to be able to overthrow the government. To many, even those sympathetic to neorepublicanism, that ideal may seem very utopian under present conditions. To respond that reformation will occur through self-revisory dialogue may not offer much solace given how relatively vague and incomplete that idea still is. And the intermediate steps on the way—some of which I discuss below—are really a number of separate ideas which may or may not, taken together, work a revolution in the character of the citizenry. The militia ideal thus suggests that we approach neorepublicanism carefully, not because it is violent or sexist, but because it is so hopeful.

Utopianism, however, may be the besetting sin of any new collection of ideas that seeks to change deep trends in modern social development. It may be appropriate to repeat the obvious: without some utopianism, abolitionists, women suffragists, and civil rights leaders would never have been able to get out of bed in the morning. If we do not try, we will never know.

2. *Universal Service*

Another alternative, currently much discussed,³⁰³ is universal public service, not necessarily military, for a term of years in youth. The promised benefits of this course mirror some of those anticipated for the old militia. Service would bring together people from different classes, occupations, and ways of life into a common experience that could offer a basis for dialogue allowing self-revision through empathy with others.³⁰⁴ And service to others and the state, such as feeding the elderly, working in disadvantaged areas, or (pg.611) rebuilding our infrastructure, might promote self-sacrifice, reduce self-absorption, and provide exposure to different folks and ways.³⁰⁵

³⁰³ See WILLIAM F. BUCKLEY, JR., *GRATITUDE* (1990); CHARLES MOSKOS, *A CALL TO CIVIC SERVICE* (1988); NATIONAL SERVICE (Williamson M. Evers ed., 1990).

³⁰⁴ AMITAI ETZIONI, *AN IMMODEST AGENDA: REBUILDING AMERICA BEFORE THE TWENTY-FIRST CENTURY* 160 (1983); BUCKLEY, *supra* note 303, at 28-30.

³⁰⁵ Amitai Etzioni, *Comments*, in NATIONAL SERVICE, *supra* note 303, at 154; Tim W. Ferguson, *Comments*, in NATIONAL SERVICE, *supra* note 303, at 72-73; Don Wycliff, *Discussion*, in NATIONAL SERVICE, *supra* note 303, at 260; MOSKOS, *supra* note 303, at 4-6; BUCKLEY, *supra* note 303, at 8.

Service plans are not without their problems, the most significant being the specter of totalitarianism if service is mandatory. None of the programs currently proposed by Congress or the Administration require service. Instead, they offer incentives like college aid, salaried jobs, or tax benefits.³⁰⁶ But such financial incentive mechanisms might greatly reduce class-mixing in service, since primarily the less affluent would join.³⁰⁷ A coercive service program, however, has great problems as well, and not just for liberals or libertarians. We are close to the center of the republican paradox. On the one hand, republicans endorse mandatory service. Without state supervision the militia could not be either universal or trained to virtue. On the other hand, one should be suspicious of the state as well, because state supervision could easily become indoctrination under a corrupt apparatus.³⁰⁸ The ideal would be to use the state mechanism to convene the people into dialogue, but the people's judgment would then become independent of the state. At its best, universal service might capture this balance, offering opportunity for civic education from fellow citizens, not from state exhortation.³⁰⁹

As some visible politicians³¹⁰ and pundits³¹¹ now support various service plans, we may have a chance to evaluate this option. With luck, it might provide militia-like training in virtue, and so it is probably a necessary component (pg.612) in any militia-surrogate.³¹² But it has one major limitation: it would not give the people any direct control over general policy. Even if a service plan were designed to promote maximal citizen control, participants could decide only whom they served and how; they would not control the means of force and could not check the government. If the population is not virtuous, that result may be for the good, but it does not secure the functions of the old militia.

3. *Direct Participation*

³⁰⁶ See NATIONAL SERVICE, *supra* note 303, at xix-xx.

³⁰⁷ See Benjamin R. Barber, *Discussion*, in NATIONAL SERVICE, *supra* note 303, at 80.

³⁰⁸ Some modern opponents of universal service stress this danger. See JOHN W. CHAMBERS, *DRAFTEES OR VOLUNTEERS* 561 (1975); Virginia Postrel, *Comments*, in NATIONAL SERVICE, *supra* note 303, at 217; BUCKLEY, *supra* note 303, at 48-49. The concern has an analogue in republican tensions over a wartime draft during the Revolution: Americans had a duty to fight for their country (part of virtue was self-sacrifice), but making them do so seemed inconsistent with their status as free citizens (another part of virtue was independence). See ROYSTER, *supra* note 67, at 66-69.

³⁰⁹ Jed Rubenfeld offers an analogy to the danger inherent in mandatory service. Privacy rights exist, he suggests, to prevent government from taking over and standardizing the lives of citizens by forcing them into certain roles and directing their daily lives. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989). Universal service, with its avowedly educational function, poses a risk of this standardization "of treating individuals as mere instrumentalities of the state, rather than as citizens with independent minds who themselves constitute the state." *Id.* at 790. Republicanism offers, however, a more benign but more paradoxical militia, in which citizens are both creatures and creators of the state, in which education occurs not through state indoctrination but through dialogic interaction with diverse citizens. William F. Buckley captures this balance well: "The state needs at once to be used, to 'work,' and to be kept at bay; and the eternal question, of course, is, how to bind the citizen to the state without being bound by it?" BUCKLEY, *supra* note 303, at 55.

³¹⁰ The roster of those on record supporting the idea in the abstract includes Senators Sam Nunn, Charles Robb, Edward Kennedy, and George Mitchell. See NATIONAL SERVICE, *supra* note 303, at xvii.

³¹¹ Among others, the redoubtable William F. Buckley, see BUCKLEY, *supra* note 303 ("taste-model for the rich"), Mickey Kaus, *First Serve*, NEW REPUBLIC, Dec. 31, 1990, at 36 (reviewing BUCKLEY, *supra* note 303), and Charles Peters, editor of *Washington Monthly*, see NATIONAL SERVICE, *supra* note 303, at xvii.

³¹² As Akhil Amar observes, public education might also offer the training in public virtue that the militia, the jury, and the church were supposed to provide, see Amar, *supra* note 103, at 1208-10, and I endorse that conclusion. From a republican perspective, however, public education has limits as well. Unlike universal service, public education offers little class mixing as long as neighborhoods remain fairly homogeneous; and like universal service, it offers little opportunity for direct control of government.

Thus, neither a safe militia nor universal service offers the chief benefit of the old independent militia—direct control by the people of their government. But neorepublicans have offered many other options to increase direct participation by the people in their government.³¹³ Frank Michelman has suggested that a republican politics could occur

in the encounters and conflicts, interactions and debates that arise in and around town meetings and local government agencies; civic and voluntary organizations; social and recreational clubs; schools public and private; managements, directorates and leadership groups of organizations of all kinds; workplaces and shop floors; public events and street life; and so on.³¹⁴

Writing before the republican revival in the legal academy, Gerald Frug analyzed the way that liberalism historically disempowered intermediate organizations as threatening individual autonomy;³¹⁵ in recognizably republican language, he sought to reempower them in order to increase the control of citizens over their lives.³¹⁶ Professor Sunstein has offered a variety of options. Campaign (pg.613) finance reform might "improve political deliberation and ... promote political equality and citizenship" by making it possible for people without wealth to participate in the republican dialogue.³¹⁷ Proportional representation of groups, although it may presuppose entrenched interests, might serve republican ends by ensuring that the dialogue includes voices that might not otherwise be heard.³¹⁸ These forms of popular empowerment paradoxically depend on state support, but that fact makes the analogy to the militia even closer. The state raised the militia to ensure universal access to the means of force, just as the state would regulate campaign finance to promote universal access to the means of communication. But the result of these activities was empowerment

³¹³ Some early neorepublican scholarship focused on opportunities for dialogue among government officials. Frank Michelman argued that the Court could engage in the kind of republican dialogue that the citizenry ideally should carry out. *See* Michelman, *supra* note 1, at 74. Cass Sunstein argued that the Court could adopt measures that would prompt republican dialogue within the legislature. *See* Sunstein, *supra* note 10, at 1576-89. The Second Amendment, in contrast, would direct the attention of republicans not to the Court or legislature, but to the people.

³¹⁴ Michelman, *supra* note 66, at 1531.

³¹⁵ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1087-89 (1980).

³¹⁶ *See id.* at 1068-73, 1120-54. Indeed, in some ways Frug's description of the medieval city is strikingly similar to the republican view of the militia. It was "neither the state nor the individual, neither political nor economic, neither public nor private, yet [it had] autonomy protected against the power of the central state." *Id.* at 1081. It "established the rights of a group that could not be distinguished from the rights of the individuals within the group [A] strict identity [had been] established between [the] individual interests and the town's interest as a whole." *Id.* at 1084. But the town was such a universal body only for a certain class: it was created by and for merchants. *See id.* at 1083-85.

More recently, Kathryn Abrams has called for "[r]ecovering the popular strain in republican theory," Abrams, *supra* note 293, at 1608, by reviving local government, *see id.* at 1604-06. Sunstein would also reinvigorate intermediate organizations, with a new federalism or workplace democracy. *See* Sunstein, *supra* note 10, at 1578.

³¹⁷ Sunstein, *supra* note 10, at 1577. Similarly, Jennifer Nedelsky has suggested that a properly regulated public, rather than privately owned press, might increase the power of the people by assuring greater access. *See* Nedelsky, *supra* note 66, at 14-15.

³¹⁸ *See* Sunstein, *supra* note 10, at 1588-89. Professor Levinson notes the same republican ambivalence about proportional representation but concludes that republicans would likely end up rejecting it. On the one hand, proportional representation would ensure a fairer reflection of society as a whole, *see* Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't it Go Away?*, 33 UCLA L. REV. 257, 262-63, 265, 270 (1985), but it would also produce "institutionalized selfishness and partiality," rather than a commitment to the common good, *id.* at 275.

of the body of the people against both the government and private factions with disproportionate power,³¹⁹ such as corporate speakers.³²⁰

Any of these options might promote some of the virtues of the militia by giving the people a direct hand in their government. In toto, they may not promote popular control as fully as did the militia because none gives possession of the means of force to the people. The echo of Levinson's warning should therefore remain in our ears: one cannot trust a government that holds all the arms. But it is important to remember that the republican militia was a regulative ideal, not a practical reality. The militia was never truly universal. The young nation always had a standing army; the people were never wholly in control and perhaps never could be. Moreover, we need not adopt all of (pg.614) historical republicanism. We should seek opportunities for the people to become virtuous, but we can be discriminating in choosing among those opportunities. Empowerment can take forms other than arms bearing, and it seems wise to try those other forms first.

V. CONCLUSION

The Second Amendment is not an embarrassing relic of an outdated scheme of ideas. It guarantees a right to arms for reasons that are an integral part of neorepublicanism. Use of arms in a militia was a form of communal cooperation, characterized by self-sacrifice and independent judgment. The academic left may be uncomfortable with gun ownership in modern America, but it should not eschew the functions that the right serves.

The right to arms belonged to all, but as a collective right, a right of the universal militia and not of separate private individuals. Republicans feared government and sought to give the people ways to resist it, but they also feared the self-interest that lurked in each individual's breast. They feared the militia less than either private persons or the government because they identified the militia with the body of the people—a rhetorical construct that by definition could not betray the common good because the common good was its good. That construct was utopian and artificial even at the time. Militia members had separate and different interests, and the militia never truly represented the whole body of the people. But as a regulative ideal, the concept of the militia offers a guide to interpreting the Second Amendment.

The Amendment expresses a hope that the means of force could be vested in those who would express universal good. But with the passage of two centuries, it has become increasingly difficult to identify such a body. We have no modern analogue of the universal militia. Private gun owners represent a partial interest, and so does the National Guard. By the same token, it has become increasingly difficult to identify a "common" interest among radically heterogeneous citizens. The

³¹⁹ In response to Professor Frug, Professor Ellickson has argued for empowering homeowner associations and not cities, on the grounds that membership in the former, but not the latter, is voluntary. Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1519, 1521-23 (1982). But Ellickson's objection, with its exclusive focus on individual volition, is solidly in the liberal tradition. Indeed, Ellickson gladly, if ironically, describes himself as a "Prisoner of Liberal Thought." *Id.* at 1521. For republicans, independence and rights are one horn of the dilemma in producing a healthy society, but self-sacrifice and state organization are the other. In response to Ellickson, Professor Alexander has brought this latter horn into focus. He argues that the state should intervene to prevent homeowners' associations from becoming exclusive. As they become too exclusive, such associations come to resemble—in republican terms—self-interested factions that wield disproportionate power; the state's invasion of these nodules of privilege actually promotes community and empowerment. See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 4-7, 55-61 (1989).

³²⁰ In fact, from a republican perspective, the government might actually guarantee access rights to the means of communication as a means of popular empowerment, and not merely to restrain dominant speakers. The analogy to the old republican proposals to give each citizen a gun seems very close as a functional matter. See *supra* text accompanying note 233.

modern promises and problems of the Second Amendment are thus the promises and problems of neorepublicanism generally. To effectuate the Second Amendment, we must find a way to create a republican politics in a liberal state. The right to arms is no anomaly within republicanism but a reflection of its deepest commitments. And the goal of the Amendment will have been served if neorepublican reform succeeds.

The right to arms, however, should focus our attention on certain features of republicanism. Neorepublicanism dwells largely on the hope that we can do better than to pursue self-interest and to stand on our rights. But republicanism balanced hope against fear, and the Second Amendment reflects this balance. It takes seriously the idea that force lies at the root of politics. Neo-republicanism should never become so theoretical that it forgets to worry about the distribution of power, or so organicist that it forgets to fear the government, ^(pg.615) or so optimistic that it forgets to fear private persons. Republicanism insists that, in a democracy, one must at some point find a way to trust the people, but this trust must not be naively given. Eventually, the people should reacquire direct control of the means of force, but only when the right structures offer them an opportunity for virtue.

At the same time, the militia ideal itself is wildly hopeful in the long run, because it projects a time when the people hold the ultimate means of force. To some, the right to arms may therefore suggest how little relevance neorepublicanism offers to today's world. Because we do not now have a universal militia, the Amendment has little or no direct meaning for judges. At most, it can influence the interpretation of other provisions. And as a regulative ideal, the militia may seem even more specious: working toward a time when the people should hold the means of coercion may seem like working toward the impossible. Skepticism may be appropriate; it is important to be realistic about the possibility of social change. But if skepticism becomes so deep that we can no longer dream the dreams of democracy, it becomes only a prescription for paralysis. Even contemplating the militia ideal may thus depend on some measure of faith to triumph over terror, seeing the state of humankind and still hoping for republican redemption, despite our inability to control our own destinies.