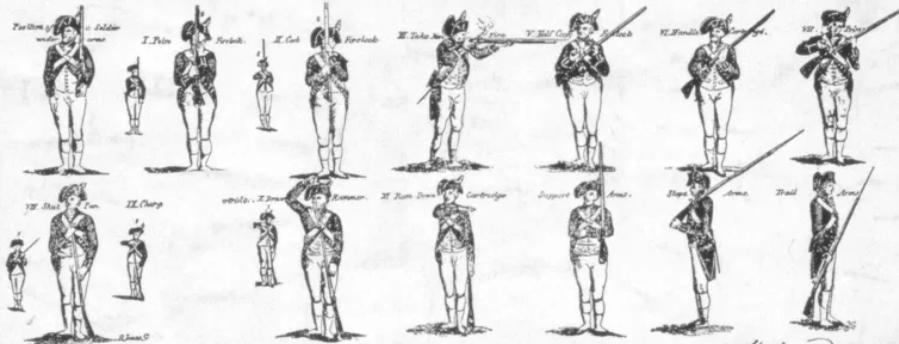


TO ALL BRAVE, HEALTHY, ABLE BODIED, AND WELL
 DISPOSED YOUNG MEN,
 IN THIS NEIGHBOURHOOD, WHO HAVE ANY INCLINATION TO JOIN THE TROOPS,
 NOW RAISING UNDER
GENERAL WASHINGTON.
 FOR THE DEFENCE OF THE
LIBERTIES AND INDEPENDENCE
 OF THE UNITED STATES,
 Against the hostile design of foreign enemies,

TAKE NOTICE,



THAT *Wednesday* *Tuesday, Wednesday, Thursday, Friday and Saturday* at *Spotswood* on *county* attendance will be given by *company in* *State* *of* *Virginia* *for* the purpose of receiving the enrollment of *such* youth of spirit, as may be willing to enter into this HONOURABLE service.

The ENCOURAGEMENT at this time, is truly liberal and generous, namely, a bounty of TWELVE dollars, an annual and fully sufficient supply of good and handsome clothing, a daily allowance of a large and ample ration of provisions, together with sixty dollars a year in gold and silver money on account of pay, the whole of which the soldier may lay up for himself and friends, as all articles proper for his subsistence and comfort are provided by law, without any expence to him.

Those who may favour this recruiting party with their attendance as above, will have an opportunity of hearing and seeing in a more particular manner, the great advantages which these brave men will have, who still embrace this opportunity of spending a few happy years in viewing the different parts of this beautiful continent, in the honourable and truly respectable character of a soldier, after which, he may, if he pleases return home to his friends, with his pockets FULL of money and his head COVERED with laurels.

GOD BLESS THE UNITED STATES.

WE THE PEOPLE RESERVE THE RIGHT TO RECLAIM AND RESTORE OUR CONSTITUTIONAL REPUBLIC FORM OF GOVERNMENT. IN THE EVENT THAT OUR LIBERTY, LAW AND JUSTICE IS USERPED, IGNORED AND VIOLATED BY TYRANNICAL FORCES, WE WILL USE ALL LEGAL AND PEACEFUL MEANS IN WHICH TO ACHIEVE THIS BEFORE LAST RESORT TO ARMS.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — THAT WHENEVER ANY FORM OF GOVERNMENT BECOMES DESTRUCTIVE OF THESE ENDS, IT IS THE RIGHT OF THE PEOPLE TO ALTER OR TO ABOLISH IT, AND 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.

REVOLT OF THE MASSES: ARMED CIVILIANS AND THE INSURRECTIONARY THEORY OF THE SECOND AMENDMENT

COLONEL CHARLES J. DUNLAP, JR., USAF*

“A little rebellion now and then is a good thing.”

—Thomas Jefferson**

“There is a feeling out there that if the government goes too far,
there is going to be shooting someday.”

—Civilian militia leader, Catron County, NM, October 1994***

“If you say violence is an acceptable way to make change, you are
wrong.”

—President William Clinton, May 1995****

I. INTRODUCTION

With as many as 100,000 people in forty-five states organizing themselves into self-styled militias much like the Catron County group,¹ the

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** As quoted in *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 265 (Robert Debs Heinl, Jr. ed., 1966).

*** Quoting Hugh McKeen, a county commissioner in Catron County, New Mexico, an area reported to be “a bastion of anti-Washington sentiment and where residents are organizing their own armed militia.” See George de Lama, *For Militias, Invaders of U.S. Are Everywhere*, *CHICAGO TRIBUNE*, Oct. 31, 1994, at 1.

**** *Excerpts From Clinton's Commencement Speech*, *N.Y. TIMES*, May 6, 1995, at 9 (Clinton delivered the commencement address at Michigan State University on May 5, 1995, in which he condemned the preaching of civilian militias who “dare . . . suggest that we in the freest nation on earth live in tyranny.”

1. *Id.* Note, however, that statistics on militia membership vary widely. For example, the Christian Science Monitor places the number of members at about 10,000 nationwide. See Sam Walker, “Militias” *Forming Across US To Protest Gun Control Laws*, *CHRISTIAN SCIENCE MONITOR*, Oct. 17, 1994, at 1. Some militias claim as many as eight million adherents, though membership is reported to be waning following the bombing of the Oklahoma City Federal building. See Mark Potok, *Militias Find Bombing Has Repercus-*

troubling specter of armed defiance of government emerges. Indeed, with the main suspect in the April 19, 1995 bombing of the Federal building in Oklahoma City reportedly linked to "extremist" civilian militias, the groups "suddenly are no longer seen as largely harmless, weekend warriors donned in camouflage and battle fatigues."² Reportedly, these groups are "linked in a fervent fear, if not paranoia, about what they see as Uncle Sam's encroachment on their property rights and right to bear arms."³ They insist that the Second Amendment⁴ gives them the constitutional right to bear arms "to battle the American government, if necessary."⁵ One militia leader maintains that "[t]here are three methods to effect change . . . [t]he jury box, the ballot box, and the cartridge box. No one in a right-thinking mind would choose the last one, but we must be prepared for all contingencies."⁶

Such beliefs highlight what is perhaps the most intriguing argument supporting the right to bear arms, what might be called the "insurrectionary"⁷ theory of the Second Amendment. Simply stated, the proposition

sions, USA TODAY, April 28-30, 1995, at 1A-2A.

2. Tom Kenworthy & George Lardner Jr., *The Militias: Guns and Bitter*, WASH. POST, May 4, 1995, at A23.

3. de Lama, *supra* note ***, at 1. Militia members have a variety of beliefs including the fear that the United States is drifting toward world government. See Mike Tharp, *The Rise of Citizen Militias*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 34; see also Jill Smolowe, *Enemies of the State*, TIME, May 8, 1995, at 62-63 (describing various militias and their beliefs). Many militias find common cause in that they are "laying the groundwork for massive resistance to the federal government and its law enforcement authorities." See Kenworthy & Lardner, *supra* note 2, at A23 (citing survey conducted by the Anti-Defamation League of B'nai B'rith). According to some militia advocates, the "first and foremost reason for a militia is to collectively exercise a fundamental right: to keep and bear arms." See Carl D. Haggard & Nancy E. Haggard, *A Well-Regulated and Legal Militia*, SOLDIER OF FORTUNE, May 1995, at 46, 47. A controversy erupted when several of these groups learned that Marines at Twentynine Palms Marine Corp Air-Ground Combat Center were asked on a survey if they would fire upon "U.S. Citizens who refuse or resist confiscation of firearms banned by the U.S. government." The question turned out to be merely part of a graduate student's project aimed at studying unit cohesion and whether Marines understood the difference between lawful and unlawful orders. See Margaret Roth, *Harmless Question or a Plan for Tyranny*, AIR FORCE TIMES, Nov. 21, 1994, at 25.

4. The Second Amendment states: "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.

5. Tharp, *supra* note 3, at 34-35. See also *infra* note 50 and accompanying text (discussing judicial holdings that membership in unorganized, sedentary, or nongovernmental militias does not provide Second Amendment protection).

6. David Knight of the self-styled "Michigan Militia" as quoted by Walker, *supra* note 1, at 14.

7. There are technical distinctions between insurrections, rebellions, and civil wars. See 45 AM. JUR. 2D *Insurrection* §1 (1969). An "insurrection" is defined as a "rising against civil or political authority, but as something more than a mob or riot." A "rebellion" is a

holds that the possession of firearms by individuals serves as the ultimate check on the power of government. The concept postulates that the Second Amendment was intended to provide the means by which the people, as a last resort, could rise in armed revolt against tyrannical authorities. A critical corollary to the theory is the premise that masses of armed civilians could subdue any professional standing army that might support a despotic regime, or itself seize power.⁸

This Article will briefly examine the source of the theory, the effect of various historical facts upon it, and its continuing viability in both a practical and abstract sense. In short, this piece will attempt to determine to what extent the Second Amendment still represents a legally valid and militarily sound means to resist tyranny.

II. BACKGROUND

A. *The Revolutionary Heritage*

In *Scales v. United States*,⁹ Justice William O. Douglas remarked in his dissent that “[b]elief in the principle of revolution is deep in our traditions.”¹⁰ The “right of revolution,” Justice Douglas explained, “is a part of the fabric of our institutions.”¹¹ As Justice Douglas suggested, the belief traces its origin to the nation’s beginnings. Colonial Americans, steeped in the social contract theories of John Locke,¹² asserted in the

conflict which is “void of all appearance of justice.” A “civil war” is an armed clash which achieves the status of lawful armed conflict within the meaning of international law. *Id.* For the purposes of this Article those terms, together with “uprising,” “resistance movement,” “insurgency,” and related expressions are used interchangeably unless otherwise stated.

The use of the word “insurrectionary” title of this Article was partly inspired by Dennis Henigan. See Dennis Henigan, *Arms, Anarchy, and the Second Amendment*, 26 VAL. L. REV. 107 (1991). Ironically, Henigan found it “startling” that anyone should assert a “generalized constitutional right of all citizens to engage in armed insurrection against their government. This ‘insurrectionist theory’ of the Second Amendment, in the judgment of this writer, represents a profoundly dangerous doctrine of unrestrained individual rights which, if adopted by the courts, would threaten the rule of law itself.” *Id.* at 110.

8. I have written an article that uses a fictional military coup as a means to discuss current military affairs issues. See Charles J. Dunlap Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992-93, at 1.

9. 367 U.S. 203 (1961) (upholding a Smith Act conviction for active membership in the Communist party).

10. *Id.* at 268.

11. *Id.* at 269.

12. A “social contract” is the political theory that contends that an unwritten agreement with reciprocal obligations exists between the members of a society and the State. John Locke argued that “moral principles and obligations existed before the creation of the State, so that men could change the State if it failed to uphold these principles” THE

Declaration of Independence a right to change government. In that document Americans forthrightly proclaimed the Lockean philosophy that governments were formed to secure "certain unalienable rights" and that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government."¹³

B. *The Problem of Standing Armies*

The Framers knew that exercising the right to alter or abolish an oppressive government is no easy task when such authorities can call upon a full-time standing army for protection. Colonial Americans had a deep distrust of professional militaries.¹⁴ Their English heritage, and especially their awareness of the excesses of Cromwell's New Model Army,¹⁵ taught them that standing armies could be tools of a tyrannical monarch or a rogue military commander.¹⁶ Their apprehension gained a solid a posteriori basis

HARPER DICTIONARY OF MODERN THOUGHT 578 (Alan Bullock & Oliver Stallybrass eds., 1977). See also John Locke, *Concerning Civil Government, Second Essay*, in 35 GREAT BOOKS OF THE WESTERN WORLD 23, 73-81 (Robert Maynard Hutchins ed., 1952) (discussing the social contract that exists between citizens and the State); MASTERPIECES OF WORLD PHILOSOPHY 269 (Frank N. Magill ed., 1990) (discussing the impact of Locke's philosophy on the Declaration of Independence); Burton M. Leiser, *John Locke*, in GREAT THINKERS OF THE WESTERN WORLD 223-27 (Ian P. McGreal ed., 1992) (arguing that "Locke's doctrine had an enormous influence on the founding fathers of the United States of America and contributed significantly to both the American and the French Revolutions").

13. IX THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Ironically, exciting domestic insurrections is one of the abuses by the British Monarch that document enumerates. See *infra* note 18.

14. See RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, 3-9 (1975) [hereinafter KOHN, *EAGLE AND SWORD*].

15. See generally William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 9-13 (1992); see also Caleb Carr, *The Troubled Genius of Oliver Cromwell*, MIL. HIST. Q., Summer 1990, at 82 (arguing that Cromwell's military genius is underrated).

16. One colonial era commentator observed that the threat of a standing army extended beyond mere manipulation by a despotic civilian government:

The liberties of a people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power, which they may see proper to exercise, but there is great hazard, that an army will subvert the forms of the government, under whose authority, they are raised, and establish one, according to the pleasure of their leaders.

"Brutus" X, *That Dangerous Engine of Despotism, A Standing Army*, N.Y.J., Jan. 24, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION 86 (Library of America ed., 1993).

when British regulars were used to quell the spreading dissatisfaction with colonial rule.¹⁷

The Framers had other, very practical reasons for shunning standing armies, not the least of which was their enormous expense. Indeed, Britain's clumsy efforts at taxing the colonists to defray the cost of troops stationed in America helped instigate the Revolution. As one historian observed: "The American Revolution, like so many rebellions and insurrections throughout modern history, originated as a revolt against taxes levied to support an army."¹⁸ America's own troops were scarcely less a burden. During the Revolution the continual struggle to find money for the military strained the fledgling Continental Congress.¹⁹

Another key reason for opposing standing armies was a European-based societal contempt for the kind of person who served in eighteenth century militaries. Soldiering was a horrifying affair of close-range collisions of musket fire and human flesh. Brutal discipline was needed to steel men for this terrifying experience.²⁰ Not surprisingly, armies filled their ranks with society's outcasts; only the most desperate tolerated the cruel conditions.²¹ It was obvious to the early Americans that a force so composed was vulnerable to nefarious exploitation by the leaders upon whom its existence depended. Quartersing such soldiers in colonists' homes became yet another catalyst for the Revolution.²²

17. See generally Fields & Hardy, *supra* note 15, at 25-26.

18. BRUCE D. PORTER, WAR AND THE RISE OF THE STATE 249 (1994) (citation omitted).

19. See John Shy, *Logistical Crisis and the American Revolution: A Hypothesis, in FEEDING MARS: LOGISTICS IN WESTERN WARFARE FROM THE MIDDLE AGES TO THE PRESENT* 161 (John A. Lynn ed., 1993) (arguing that the logistical dilemmas of the Revolution were an important influence on the Constitution). By the end of the Revolution, over \$10,000,000 in pay and pensions was owed veterans. See PORTER, *supra* note 18, at 253.

20. Because muskets were inaccurate except at relatively close range, soldiers were often obliged to advance shoulder-to-shoulder to within a few dozen yards of their enemy. Along with the savage fusillades of musketry that followed, the ranks would also be ripped by withering cannonade. Primitive or non-existent medical care resigned those not killed outright to an agonizing death. See generally KOHN, EAGLE AND SWORD, *supra* note 14, at 2.

21. Military historian John Keegan reported:
[N]o pre-1789 society considered soldiering a calling for any but the few. War was rightly seen as too brutal a business for any except those bred to it by social position or driven to enlist by lack of any social position whatsoever; mercenaries and regulars alike, poor, jobless, often criminally outcast, were judged fitted for war because peaceful life offered them nothing but equivalent hardship.
JOHN KEEGAN, A HISTORY OF WARFARE 364 (1993).

22. See David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 26-28 (1971). See also PORTER, *supra* note 18, at 250 (noting that the "mere phrase ['standing army'] was an anathema

C. *The Debate on the Constitution*

When the inadequacy of the Articles of Confederation necessitated the drafting of the Constitution,²³ limiting the role of a standing army was a dominant aim.²⁴ Some sought to obviate its despotic potential by eliminating it altogether and relying solely on state militias for the nation's defense. Others doubted the military wisdom of that strategy and insisted on a modest full-time army.²⁵ James Madison and the Federalists argued that the oppressive potential of a small standing army could be offset by vast state militias numbering as many as 500,000 armed citizens.²⁶ The Supreme Court in *Perpich v. Department of Defense*²⁷ explained the controversy and the compromise that resulted:

On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national Army and also to organize "the Militia."²⁸

Nevertheless, to the Anti-Federalists a constitution that concentrated authority in a central government featuring a standing army of any size was unacceptable. They believed that the federal government was so militarily powerful²⁹ that individual rights needed explicit protection. Noah Webster's claim that "[b]efore a standing army can rule, the people must be

conjuring up images of continental despotism, of British redcoats quartered in civilian homes.").

23. See PORTER, *supra* note 18, at 253 (arguing that the inadequacy of the Articles of Confederation related mainly to its deficiencies concerning national security).

24. See generally Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES 1789-1989 61 (Richard H. Kohn ed., 1991) [hereinafter Kohn, *The Constitution and National Security*].

25. See generally Fields & Hardy, *supra* note 15, at 31-32 (discussing concerns about the militia's capability viz-a-viz the military threats).

26. THE FEDERALIST No. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961).

27. 496 U.S. 334 (1990).

28. *Id.* at 340.

29. For example, the Constitution forbade states to maintain military forces and gave Congress sole authority to "raise and support [a]rmies," U.S. CONST. art. I, § 8, cl. 12, provide for a navy, *id.* art. I, § 8, cl. 13, and make rules for both. *Id.* at cl. 14. Congress also had extensive authority over the militia, being able to call it forth to execute laws, "suppress insurrections, and repel invasions." *Id.* at cl. 15. Congress also controls "organizing, arming, and disciplining" the militia, as well as governing any part of it while in federal service. *Id.* at cl. 16.

disarmed"³⁰ seemed hollow absent a specific guarantee that the people would not, in fact, be disarmed.

The linchpin of the scheme to counterbalance the potentially dangerous standing army was an armed citizenry, a force Webster considered superior to any body of regular troops that could be raised in the United States.³¹ But how could the Anti-Federalists be assured that the people would have the means to check the power of the standing army? The addition of the Bill of Rights was meant to redress that perceived asymmetry and others. Among the solutions the Framers devised to ensure that state-based militias remained effective and free from federal encroachment was the Second Amendment.³² In this amendment, both the Federalists and the Anti-Federalists sought to assure formally that the states would retain sufficient military potential to defeat, if necessary, the forces of an overreaching central government.

III. CONSTITUTIONAL ANALYSIS

A. *The Purpose of the Second Amendment*

The Second Amendment's "obvious purpose," the Supreme Court declared in *United States v. Miller*, was "to assure the continuation and render possible the effectiveness of . . . [militia] forces."³³ *Miller* established the Court's unequivocal conclusion that the underlying purpose of the Second Amendment is martial in nature³⁴—a significant obstacle to those who

30. Fields & Hardy, *supra* note 15, at 35 (quoting Noah Webster, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 43 (1787)).

31. *Id.*

32. Historian Richard H. Kohn explained:

[P]recisely because the militia served as a powerful check against an arbitrary and tyrannical national government, opponents of the Constitution worried that the new government's influence over the state forces would lead to their neglect, or worse yet, a concerted effort to enfeeble them in order to render the states impotent. That is the primary reason why opponents of the Constitution insisted, in ratifying conventions and afterwards, on amendments to guarantee the right of citizens to bear arms. The final check on standing armies, in the minds both of the framers of the Constitution and opponents of the new system, was civil war.

Kohn, *The Constitution and National Security*, *supra* note 24, at 85. See also DAVE R. PALMER, 1794: AMERICA, ITS ARMY, AND THE BIRTH OF THE NATION 134, 141 (1994) (arguing that the Second Amendment "sought to alleviate the widespread concern that Congress in its zeal to regulate the militia might emasculate it. The ability of a state to maintain a strong militia was secured by this vested right to bear arms.").

33. 307 U.S. 174, 178 (1939).

34. This view comports with Kohn's analysis of the purpose of the Second Amendment. See Kohn, *The Constitution and National Security*, *supra* note 24, at 85.

argue that the Second Amendment was intended to serve crime control and sporting purposes.³⁵ *Miller* did not, however, detail exactly how the Second Amendment intended to “render possible” the effectiveness of the militia, and this uncertainty continues to generate debate.

The controversy is largely over whether the Framers meant the right to bear arms to apply exclusively to organized state militias tasked with resisting possible federal tyranny (the collectivist theory) or whether they wanted it to apply to the people in an individual sense (the individual rights theory).³⁶ Proponents of the collectivist theory cite the Amendment’s prefatory phrase discussing a “well regulated militia” as evidence that the right to bear arms exists only in that context. Individual-rights advocates argue vociferously that the Amendment’s subsequent phrase regarding the “right of the people” clearly supports their theory.³⁷

The debate is complicated by the remarkable dearth of Supreme Court jurisprudence related to the Second Amendment.³⁸ Filling the vacuum are

35. The Framers understood the value of firearms for hunting and for a *posse comitatus* and for personal protection against crime. For example, the minority of the Pennsylvania state convention that voted to adopt the Constitution offered a proposal for an amendment that explicitly cited “the defence of themselves” and the “purpose of killing game” as supporting a right to bear arms. See Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 62-63 (1989) (citing EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 32, 50-56 (1957) and quoting PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788 422 (1888)). Nevertheless, although beyond the scope of this Article, the evidence supporting the idea that the specific purpose of the Second Amendment was also to guarantee the right to bear arms for hunting and crime control purposes is unpersuasive. *But cf.* Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 117-21 (1987). The main purpose of including the right to bear arms in the Constitution “was to preserve a substantial degree of military power in the citizenry at large, so as to prevent tyranny—not to protect hunters.” See Glenn H. Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647, 665 (1994) (contending that the Tennessee Constitution had a similar main purpose). It is of course true, as Professor Kates points out, that “where the right specified is to have a gun for one purpose, however, one who lawfully has it for that purpose may properly use it for such other purposes as hunting or the defense of his life or another’s.” Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 245 (1983).

36. For a brief discussion of the individual rights/collective rights debate in the context of *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983), see ELLEN ALDERMAN & CAROLINE KENNEDY, *IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION* 93-103 (1991). For a listing of four post-1980 law review articles supporting the collectivist interpretation and thirty-four articles supporting the individual rights view, see WAYNE LAPIERRE, *GUNS, CRIME, AND FREEDOM* 237-40 (1994).

37. See generally LAPIERRE, *supra* note 36.

38. Besides *Miller*, no other twentieth century case substantively discusses the Second Amendment. For recent discussions of the Supreme Court’s reluctance to address the Second

volumes of analysis of the Framers' original intent. Although only one of several means of constitutional inquiry,³⁹ it has come to dominate Second Amendment discussion.⁴⁰ But original intent analysis, problematic under the best of circumstances,⁴¹ is further hampered by the relatively paucity of historical documentation⁴² directly related to the Framers' intent regarding the Second Amendment.

No Federal court this century has endorsed the individual rights view. When Second Amendment issues arise courts ordinarily support the collectivist theory.⁴³ Noting that the Supreme Court has never held that the Second Amendment is incorporated into the Fourteenth and made applicable to the states,⁴⁴ many courts have concluded that the Second Amendment only prohibits the federal government from infringing upon the states' right to arm and train militias.⁴⁵ Some courts, like the Eighth Circuit in *United States v. Hale*,⁴⁶ have found it unnecessary to resolve the collectivist versus individual rights conundrum by finding that the appropriate inquiry was whether or not an individual's possession of a firearm was related to the preservation or efficiency of a militia.⁴⁷

Still, synergies exist between the collectivist and individual rights views. The collectivists are correct in asserting that the fundamental purpose of the

Amendment see, e.g., William Van Alstyne, *The Second Amendment and The Personal Right to Arms*, 43 DUKE L.J. 1236, 1239 n.10 (1994); Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or Is the Supreme Court Just "Gun Shy"?*, 22 CAP. U. L. REV. 641 (1993). What makes the absence of Supreme Court jurisprudence particularly surprising is that military affairs are such a central feature of United States history. See generally GEOFFREY PERRET, *A COUNTRY MADE BY WAR* (1989) (exploring the sociological impact of military conflict on American life).

39. For a brief discussion of the various approaches to constitutional interpretation, see generally Philip Bobbitt, *Constitutional Interpretation*, in THE OXFORD COMPANION TO THE SUPREME COURT 183 (Kermit L. Hall ed., 1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643 (1989) (citing PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982)).

40. See, e.g., Kates, *supra* note 35.

41. See, e.g., Kohn, *The Constitution and National Security*, *supra* note 24, at 61-63.

42. In part this may be the result of the Framers' penchant for secrecy. See Gregory D. Foster, *The Intellectual Legacy of Our Constitution*, in THE CONSTITUTION AND NATIONAL SECURITY 22-23 (Howard E. Shuman & Walter R. Thomas eds., 1990) (discussing Washington's efforts to keep the deliberations of the Constitutional Convention secret).

43. See ALDERMAN & KENNEDY, *supra* note 36, at 100.

44. See *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876).

45. See ALDERMAN & KENNEDY, *supra* note 36, at 100; Robert J. Cottrol, *The Second Amendment*, in THE OXFORD COMPANION TO THE SUPREME COURT 763 (Kermit L. Hall ed., 1992); Quinlan, *supra* note 38, at 663-76 (all discussing the incorporation issue).

46. 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993).

47. *Id.* at 1020.

Second Amendment is to support the well regulated militias of the States.⁴⁸ However, notwithstanding judicial decisions to the contrary, the individual rights advocates are also correct in asserting that the Amendment was designed to “render possible” such “well regulated militias” by ensuring that there were ample numbers of armed citizens from which to form them.⁴⁹

Thus, courts, such as the Eighth Circuit, that lean towards collectivist theories by insisting that the individual’s firearm possession be directly linked with an organized and governmentally-recognized militia do not seem to appreciate sufficiently the often ad hoc and somewhat muddled nature of military formations in the colonial era.⁵⁰ The Framers’ experience led them to presuppose a populace that not only possessed firearms, but was familiar with their use. While the Second Amendment certainly encourages—largely for technical, military reasons—the formation of well regulated militias, the Framers did not contemplate disarming citizens simply because they were not presently members of one.⁵¹

Rather, the Second Amendment reflects the Framers’ desire to ensure that the federal government could never deprive the states of sufficient armed manpower to support a select—i.e., well organized—militia unit whenever the states chose to form one.⁵² In essence, the well regulated

48. See Keith A. Ehrman & Dennis Henigan, *The Second Amendment in The Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 57 (1989).

49. Compare Van Alstyne, *supra* note 38, at 1248-49 (contending that militias were to be drawn from the people as a whole).

50. See *Hale*, 978 F.2d at 1020 (citing *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978)) (holding that membership in unorganized or non-governmental militias is not sufficient to engage Second Amendment privileges); *United States v. Warin*, 530 F.2d 103, 105-06 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976) (finding that hypothetical or sedentary militias do not trigger Second Amendment rights). That the Framers would have made such distinctions is not apparent. Professor Peter Malowski explained that “[t]he military experiences of the colonial, Revolutionary War, and early National periods revolved around a ‘dual army’ of citizen-soldiers and regulars, with the phrase ‘citizen-soldiers’ embodying a confusing melange of common militia, volunteer militia, and nonmilitia volunteers.” Peter Malowski, *To the Edge of Greatness: The United States, 1783-1865*, in *THE MAKING OF STRATEGY* 213 (Williamson Murray et al. eds., 1994).

51. See generally David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994) (arguing that the Second Amendment intended to enable both individuals and individuals acting collectively to resist tyranny); Stephen P. Halbrook, *The Right of the People or Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 6 J. FIREARMS & PUB. POL’Y 69, 127-29 (1994) (arguing that the Second Amendment did not intend to limit the right to bear arms to persons in actual militia service).

52. In *Hale*, the Eighth Circuit noted:

When the Second Amendment was ratified in 1791, the state militias functioned as both the principal units of military organization and as an implicit check on federal power. These militias were comprised of ordinary citizens who typically were required to provide their own equipment and arms. The Second Amendment prevented federal laws

militia was to be drawn from the people at large.⁵³ Furthermore, the people would not be obliged to seek weapons from a federally-controlled armory; instead, they would equip themselves with their own personal weapons. In this way, the repressive instincts of an all-powerful government could be bridled by the people from whom, by Lockean reasoning, all authority to govern was derived.

To eighteenth century Americans, ensuring that the people as a whole were armed appeared to be a sensible military strategy. When the Constitution was drafted, many households already owned weapons for self-protection and hunting purposes,⁵⁴ thus relieving the government of much of the expense of arming a fighting force. In addition, confidence existed in the military capabilities of the armed civilians. Although that conclusion was disputed by contemporary military experts,⁵⁵ the United States Supreme Court in *Miller* observed that “the common view [was] that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.”⁵⁶

B. *The Second Amendment and the Insurrectionary Theory*

Given the perceived fighting potential of armed civilians, it is not surprising that early commentators considered the Second Amendment a realistic means of resisting tyranny. The celebrated Justice Joseph Story in his classic *Commentaries on the Constitution* argued that the Second Amendment serves “as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance,

that would infringe upon the possession of arms by individuals and thus render the state militias impotent.

978 F.2d at 1019 (citation omitted). See also *infra* note 80 (discussing select militias).

53. Oft quoted in this regard is Virginian George Mason who, during the Constitution's debates, rhetorically asked “Who are the militia? They consist now of the whole people, except a few public officers.” Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 63 (1989). Similarly, Professor Van Alstyne cites this passage: “The meaning of the [Second Amendment] undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose.” Van Alstyne, *supra* note 38, at 1247 (quoting THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 270-71 (1880)). See also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (suggesting that the phrase “the people” as used in the Second Amendment “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”)

54. See *supra* note 35 and *infra* note 98 and accompanying text.

55. See *supra* note 25 and *infra* note 105 and accompanying text.

56. 307 U.S. 174, 179 (1939).

enable the people to resist and triumph over them."⁵⁷ Such interpretations suggest that the Second Amendment is intended to provide the people with the military potential to resist tyranny originating in government in general, not just that of the federal authorities.⁵⁸

It is difficult, nonetheless, to find support in the Constitution for the notion that the Second Amendment is a license for the people to resist and triumph over government at any level by means of force and violence.⁵⁹ To the contrary, the Constitution is replete with provisions intended to quell uprisings. For example, Congress is empowered to call out the militia—the very force envisioned to resist usurpations of power—to suppress insurrections and rebellions.⁶⁰ Significantly, treason is the only crime the Framers believed important enough for the Constitution to condemn explicitly.⁶¹ In defining the crime, for example, the Constitution expressly lists “levying war” against the United States as a manifestation of the offense.⁶² Thus, the theory that the Second Amendment contemplates armed confrontations against the government is seriously undermined.

Congress has likewise enacted a series of laws, the majority of which have withstood constitutional attack, that criminalize conduct aimed at fostering violent opposition to government authority.⁶³ Though First Amendment considerations limit the power to restrict speech only to that speech which is intended to present an imminent threat of the overthrow of government,⁶⁴ little doubt exists that the state may, consonant with the Constitution, take reasonable measures to protect itself from such an overthrow.

The Declaration of Independence is also a doubtful source of support for the proposition of a right to rebel.⁶⁵ Though listed in the United States Code as part of the General Law of the United States, the contemporary legal import of its specific provisions is unclear.⁶⁶ In the pre-Civil War era

57. Quoted in Levinson, *supra* note 39, at 649 (citing 3 JOSEPH STORY, COMMENTARIES § 1890 (1833)).

58. See generally David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 581-84 (discussing the right to revolution and the Second Amendment in the context of republicanism).

59. See Engdahl, *supra* note 22, at 35-42 (discussing the Framers' concerns about rebellions and insurrections).

60. U.S. CONST. art I, § 8, cl. 15.

61. *Id.* art. III, § 3.

62. *Id.* See also 70 AM. JUR. 2D *Sedition, Subversive Activities, and Treason* § 87 (1987).

63. See generally U.S. CONST. art. III, §§ 1-3.

64. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

65. In fact, one of the deprecations that King George III supposedly committed against the colonists was that “he has excited domestic insurrections amongst us” See THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

66. See William M. Wiecek, *Declaration of Independence*, in THE OXFORD

when the rights of states to challenge federal authority were debated, Daniel Webster opined that the Declaration of Independence did not establish a right to rebel.⁶⁷ During this period, many Southerners argued that secession was not an act of revolution but rather a legal right of sovereign states implicit in the Constitution.⁶⁸ Others, wrote historian James M. McPherson, chose to “fall back on the right of revolution” for intellectual support for their actions.⁶⁹

Clearly, however, the Civil War itself militates against the insurrectionary theory. A nineteenth century writer contended that the Civil War taught Americans “that ‘the sacred right of insurrection’ is as much out of place in a democratic state as in an aristocratic or a monarchical state.”⁷⁰ Ironically, Abraham Lincoln spoke of the right of revolution in his first inaugural address. He acknowledged the right but did not rely on the Second Amendment or any other provision of the Constitution. In Lincoln’s view, the prerogative exists only in an extraconstitutional sense. He explained that whenever the people “shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember, or overthrow it.”⁷¹

Lincoln further maintained that “[i]t is safe to assert that no government proper, ever had a provision in its organic law for its own termination.”⁷² In *Dennis v. United States*,⁷³ the Supreme Court expressed a similar view:

Whatever theoretical merit there may be to the argument that there is a “right” to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy.⁷⁴

Like Lincoln, the Court in *Dennis* endorsed the notion of a right to rebellion. If, for example, the “existing structure of the government” fails to provide for “peaceful and orderly change,” then presumably Lincoln and

COMPANION TO THE SUPREME COURT 222-23 (Kermit L. Hall ed., 1992).

67. *Id.* at 223.

68. *See generally* JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 239-46 (1988).

69. *Id.* at 240.

70. Orestes A. Brownson as quoted in *THE MACMILLAN DICTIONARY OF POLITICAL QUOTATIONS* 619-20 (Lewis D. Eigen & Jonathan P. Siegel eds., 1993). Professor Kates argues that the collectivist or states rights analysis “renders the [Second] [A]mendment little more than a holdover from an era of constitutional philosophy that received its death knell in the decision rendered at Appomattox Courthouse.” Kates, *supra* note 35, at 212.

71. Abraham Lincoln, *First Inaugural Address—Final Text* (March 4, 1861), in *IV THE COLLECTED WORKS OF ABRAHAM LINCOLN*, at 269 (Roy P. Basler ed., 1953).

72. *Id.* at 264.

73. 341 U.S. 494 (1951).

74. *Id.* at 501.

the Supreme Court would endorse a right to rebellion. Thus, if a right of insurrection traceable to the Second Amendment exists at all, it arises validly only when the Constitution's scheme for peaceful and orderly change is somehow improperly abridged or illegally foreclosed. In short, as long as the ballot box and the jury box are available, there is no right of recourse to the cartridge box.

But it may be correctly inferred that the Framers foresaw that in extreme circumstances armed citizens might need to rise up against tyranny. Such a drastic situation raises key questions about the Second Amendment: if despotic leaders emerge and the Constitution's design is nefariously compromised,⁷⁵ does the Second Amendment still provide a realistic means by which to resist tyranny? Can armed civilians, either as part of a well regulated militia or as individuals formed into ad hoc militias, still check the power of a tyrannical standing army?

V. MILITARY EFFECTIVENESS OF THE ARMED CIVILIAN

A. *Armed Civilians as Citizen-soldiers: Myth or Reality?*

"Nations live on myths," says military historian Allan R. Millett, "and none is more precious ... than the notion of the people in arms springing to the defense of their homeland."⁷⁶ To many Second Amendment activists that concept is no myth; they insist that armed civilians can effectively spring to the defense of their homeland and the freedoms it implies. They are convinced that they can do so even in the face of determined modern armies. Typical is the recent statement of Wayne LaPierre, the chief executive officer of the National Rifle Association:

The twentieth century provides *no example* of a determined populace with access to small arms having been defeated by a modern army. The Russians lost in Afghanistan, the United States lost in Vietnam, and the French lost in Indo-China. In each case, it was the poorly armed populace that beat the "modern" army. . . . Modern nations like Algeria, Angola, Ireland, Israel, Mozambique, and Zimbabwe only exist because guerrilla warfare can triumph over modern armies.⁷⁷

75. See generally Levinson *supra* note 39, at 647-48 (text and accompanying notes).

76. Allan R. Millett, *The Constitution and the Citizen-Soldier*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES 1789-1989* 97 (Richard H. Kohn ed., 1991).

77. LAPIERRE, *supra* note 36, at 19-20. See also Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L. J. 309, 316 n.23 (1991) (citing Afghanistan as an example of privately-armed citizens against an organized army); Dan Gifford & Dave Kopel, *Should Jews Think Twice About Gun Control*, JEWISH JOURNAL, Apr. 6, 1993, at 23 (citing Afghanistan, Vietnam, Nicaragua, Algeria, and Israel); Kates, *supra* note 35, at 270-71 (citing Vietnam, Afghanistan, Israel,

To the student of military affairs, trying to link the cited conflicts with a Second Amendment discussion is all but meaningless. Waging war, guerrilla⁷⁸ or otherwise, is a complicated endeavor involving much more than mere access to arms. The outcome of such conflicts often depends upon political⁷⁹ and social factors. Moreover, a civilian who simply possesses arms is not necessarily a warfighter of any kind. Thus, relating access to small arms to competency to wage war requires assumptions wholly apart from the purview of the Second Amendment. Draftees, guerrilla fighters, citizen-soldiers such as the National Guard,⁸⁰ and organized militiamen receive at least rudimentary military training, an

Ireland, Algeria, Angola, Rhodesia, and Cuba); Levinson, *supra* note 39, at 656 (citing Northern Ireland and the occupied territories of Israel); Lund, *supra* note 35, at 115 (arguing that “a relatively poorly armed nation with a small population” recently defeated the United States, apparently in reference to Vietnam); Reynolds, *supra* note 35, at 668 (arguing that whenever the United States comes “up against irregulars with light arms, from Vietnam to Lebanon to Somalia, [the U.S.] has basically gotten [its] clock[] cleaned”).

LaPierre also states: “In China, Cuba, and Nicaragua, the established leaders, Chiang Kai-shek, Battista, and Somoza lost.” LAPIERRE, *supra* note 36, at 20. In Cuba and Nicaragua, the insurgencies were not opposed by modern armies comparable to those that exist in the United States today. Moreover, in China the battle between Chiang Kai-shek’s Nationalists forces and Mao’s Communist forces was hardly a guerrilla struggle—both sides fought with tanks, artillery, aircraft, and hundreds of thousands of troops. See generally R. ERNEST DUPUY & TREVOR N. DUPUY, *THE HARPER ENCYCLOPEDIA OF MILITARY HISTORY* 1423-31 (4th ed. 1993).

78. Guerrilla warfare is but one method of waging war. It can be defined as “[m]ilitary operations conducted by irregular forces operating within territory nominally controlled by the enemy (often the country’s government), whether independently or as an adjunct to regular military operations elsewhere.” EDWARD LUTTWAK & STUART L. KOEHL, *THE DICTIONARY OF MODERN WAR* 265 (1991).

79. For example, it was the political backlash in France from the brutality with which the French military waged its counterinsurgency war, not any defeat by armed civilians, that caused France to abandon Algeria. See ALISTAIR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954-1962* 335-40 (1977) (describing how French military success did not lead to a political solution).

80. The National Guard is not the lineal heir to the unorganized militia of the Framers’ day. Organized state militias from which the National Guard descends were considered select militias. See Fields & Hardy, *supra* note 15, at 1-2. The unorganized militia still exists in law. See 10 U.S.C. § 311 (1988) (An unorganized militia consists of all men between the ages of 18 and 45, and females who are National Guard officers.). However, state militias died out as effective organizations in the nineteenth century and were not revived until the National Guard was established. See Millet, *supra* note 76. Recent efforts to revive state militias that are organizationally separate from National Guard units, and distinct from self-styled civilian militias, have been problematic. See Ed Connolly, *Scandals of the State Militias*, *THE NATION*, Mar. 18, 1991, at 338. Nevertheless, some call for a revival of state-sponsored militias. See Christopher Hitchens, *Minority Report*, *THE NATION*, Jan. 24, 1994, at 78; Reynolds, *supra* note 35, at 670-72.

obvious martial benefit that armed civilians do not acquire through the Second Amendment.

Still, the implications of LaPierre's contentions and those holding similar views must be addressed.⁸¹ The resolution of this point is not just an academic exercise; it is critical in determining the extent to which government, especially federal government, can constitutionally limit the right to bear arms. As with other constitutional rights, the application of the Second Amendment is subject to a balancing of competing individual and societal interests.⁸² If, as the Framers envisioned, armed civilians can still serve credibly as a bulwark against tyranny, then few restrictions on the right to bear arms are justifiable.

B. *The Origin of the Legend*

The notion that armed civilians are capable of subduing a highly sophisticated military such as that of the United States touches on cherished American ideals. Affection for the concept of armed civilians becoming citizen-soldiers is as old as the United States itself.⁸³ During the Revolution, civilian militias fighting behind field fortifications, and frontier marksmen armed with long-range hunting rifles, initially held regular British forces at bay.⁸⁴ Additionally, partisan warfare occurred at various times throughout the war.⁸⁵ The remembrance of gallant Minuteman stands at Lexington and Concord and the exciting exploits of Francis "Swamp Fox" Marion's South Carolina irregulars still shape Americans' opinion of the efficacy of the citizen-soldier in the nation's first war.⁸⁶

The idea of armed civilians readily serving as combatants is especially attractive to Americans because it legitimizes the nation's traditional

81. See generally LAPIERRE, *supra* note 36.

82. Commentators persuasively argue that restrictions on Second Amendment rights should be subject to the same kind of balancing of competing interests to which First Amendment rights are subjected. See, e.g., David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 633-37 (1986). See also *infra* note 200.

83. See generally ELIOT A. COHEN, *CITIZENS AND SOLDIERS* 117-25 (1985) (discussing the ideological origins of the citizen-soldier concept).

84. See Craig Roberts, *Shirtmen to the Rescue*, MIL. HIST. Q., June 1991, at 10 (discussing the effectiveness of frontier shirtmen in buying time for the training and raising of an American army).

85. See, e.g., RICHARD M. KETCHUM, *THE WINTER SOLDIERS* 385 (1973); RUSSELL F. WEIGLEY, *THE AMERICAN WAY OF WAR* 18-39 (1973).

86. See WEIGLEY, *supra* note 85, at 17 (discussing Francis Marion and partisan warfare). Cf. Malowski, *supra* note 50, at 213 ("Following the Revolution the image of virtuous citizen-soldiers defending their local communities remained a powerful rhetorical symbol, but the common militia's actual military utility virtually disappeared.").

antimilitarism⁸⁷—a propensity traceable to suspicions about standing armies—by inferring not only that professional soldiers are unnecessary, but that the costly development of their supposedly specialized skills is essentially wasteful. It also patronizes latent American chauvinism by suggesting that the country's enemies are no match for the innate capabilities of the ordinary American citizen.

The historical record of armed amateurs is, however, much less sanguine. Reliance on civilian militias during the Revolution soon proved to be "militarily disastrous."⁸⁸ George Washington and other Revolutionary leaders quickly demanded the formation of a European-styled Continental Army when it "became obvious that the militia was no match for trained British regulars."⁸⁹ Armed civilians organized into citizen militias did not determine the Revolution's military success as many believe. Rather, it was the Continental Army "trained to meet the British on their own terms"⁹⁰ and the vital assistance of France's military professionals that proved decisive.⁹¹ The romantic, if inaccurate, image of the martial qualities of the armed civilian has proven to be a tragic one. Dunnigan and Macedonia contended that the American Revolution "began the dependence on the ill-trained citizen-soldier and all its attendant costs in terms of losing the first battles of future wars."⁹²

Despite harsh lessons on the battlefield,⁹³ the view that the ordinary civilian is easily converted into an effective soldier continued well into the twentieth century. When Cold War political exigencies required America to maintain its first large, peacetime standing army, a vestige of the citizen-soldier survived as the full-time military was supplemented by short-term conscripts. But when conscription ended in 1973, America developed an all-volunteer defense organization⁹⁴ which became, to the surprise of many, the world's most devastatingly effective fighting force.

87. For a discussion of antimilitarism in American society see Charles J. Dunlap Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994).

88. PORTER, *supra* note 18, at 249.

89. JAMES F. DUNNIGAN & RAYMOND M. MACEDONIA, *GETTING IT RIGHT: AMERICAN MILITARY REFORMS AFTER VIETNAM TO THE GULF WAR AND BEYOND* 25 (1993).

90. *Id.*

91. See generally BARBARA W. TUCHMAN, *THE FIRST SALUTE* (1988) (discussing the role of France, especially the French navy, in the military success of the Revolution).

92. DUNNIGAN & MACEDONIA, *supra* note 89, at 25.

93. See generally AMERICA'S FIRST BATTLES, 1776-1965 (Charles E. Heller & William A. Stofft eds., 1986).

94. For a discussion of the end of the draft and the impact of social change on the military see Charles Moskos, *From Citizens' Army to Social Laboratory*, WILSON Q., Winter 1993, at 83.

The astounding success of America's regulars⁹⁵ during the Gulf War highlights the fact that draftees—who are, as previously noted, better trained and equipped than the typical armed civilian—can no longer effectively confront professional armies, even when the civilians significantly outnumber the regulars. Like the collapse of Argentina's sizeable conscript forces in the face of Britain's highly-regarded professionals during the 1982 Falklands War, the crushing of Iraq's huge and well-armed conscript army demonstrates that the actual fighting of modern war is too sophisticated for anyone but the full-time professional to master.⁹⁶

C. *The Armed Civilian and Revolutions in the Art of Warfare*

The dismal combat record of amateur soldiers in recent clashes with professional militaries illustrates that warfare has changed fundamentally since the Second Amendment was drafted.⁹⁷ When the Framers considered using armed civilians to confront a despotic standing army, they were living "in an age when the weapon likely to be found in private hands, the single shot musket or pistol, did not differ considerably from its military counterpart."⁹⁸ Even more important was the way in which the Framers conceived of using the masses of civilians.⁹⁹ Presaging the "nation at arms" strategy of the Napoleonic era, the Framers assumed that the military principle of mass would negate any deficiencies in quality. They believed that fire from masses of militiamen would overwhelm the arguably more accurate shooting of smaller numbers of regular forces.¹⁰⁰

Modern technology has changed that equation. Military historian John Keegan maintains that "high technology weapons make large numbers of

95. See *infra* note 96.

96. Though the United States depended upon highly-motivated citizen-soldiers of the National Guard and Reserves for vital support services during the Gulf War, none of their ground combat maneuver units were deployed. General Thomas Kelly, then Director of Operations for the Joint Staff, said that part-time soldiers simply did not get enough training time to be ready for modern combat. Grant Willis, *A New Generation of Warriors*, NAVY TIMES, Mar. 16, 1991, at 12. More recently, the General Accounting Office (GAO) concluded that "[w]ith just 36 days of training a year, it's impossible that National Guard brigades could step into a wartime role with such short [90 day] notice." See Bill Gertz, *GAO Pans the Bottom-Up Review*, WASH. TIMES, Feb. 3, 1995, at A22.

97. See generally Andrew F. Krepinevich, *Calvary to Computer: The Pattern of Military Revolutions*, THE NAT'L INTEREST, Fall 1994, at 30; James R. Fitzsimonds & Jan M. Van Tol, *Revolutions in Military Affairs*, JOINT FORCE Q., Spring 1994, at 24.

98. Cottrol & Diamond, *supra* note 77, at 315.

99. See *supra* notes 24-26 and accompanying text (discussing Madison's reference to a 500,000 man militia). At the time the Constitution was ratified, professional armies rarely numbered more than a few thousand troops.

100. Madison conceived a militia that was ten to twelve times the size of the standing army. See *supra* note 26.

soldiers irrelevant.”¹⁰¹ Since at least the 1920s, America has sought “to substitute firepower for manpower” in the hopes of limiting casualties.¹⁰² So successful has been the effort to use modern weaponry to leverage the combat power of small numbers of soldiers that Professor Keegan contends that masses of poorly trained combatants now “simply clutter up the battlefield.”¹⁰³ According to Keegan, the Framers’ concept of mass warfare is obsolete:

Indeed, when one looks back over the era of mass warfare, what is striking is how short it was—lasting only from the French Revolution to the end of the Second World War. The idea on which it was based, “every citizen a soldier,” looks increasingly far-fetched; in truth, most people in Western societies make bad soldiers.¹⁰⁴

Even in the late eighteenth century, however, the military value of masses of armed civilians was suspect. General Washington did not believe that armed civilians, even when organized into partially-trained militias, could ever match the combat power of professional militaries:

No militia will ever acquire the habits necessary to resist a regular force . . . The firmness requisite for the real business of fighting is only to be obtained by a constant course of discipline and service. I have never yet been witness to a single instance that can justify a different opinion, and it is most earnestly to be wished that the liberties of America may no longer be trusted, in any material degree, to so precarious a dependence.¹⁰⁵

Contrary to the inferences of LaPierre and his adherents, twentieth century military history shows that the courage and determination of armed civilians can no longer overcome the discipline, training, and weaponry of professional soldiers. During World War II—the source of much mythology about civilian resistance movements springing to the defense of their homeland after their national armies fell to the Wehrmacht¹⁰⁶—heroic civilians provided valuable intelligence and occasionally effective sabotage

101. John Keegan, *The Warrior's Code of No Surrender*, U.S. NEWS & WORLD REP., Jan. 23, 1995, at 47.

102. See Wayne K. Maynard, *Spears vs. Rifles: The New Equation of Military Power*, PARAMETERS, Spring 1993, at 51.

103. Keegan, *supra* note 101, at 47.

104. *Id.*

105. *Dictionary of Military and Naval Quotations* 192 (Robert D. Heinl Jr. ed., 1966); see generally Thomas Fleming, *George Washington, General*, MIL. HIST. Q., Winter 1990, at 39-40.

106. See Ted Morgan, *When the Maquis Stood and Fought*, MIL. HIST. Q., Winter 1990, at 104 (discussing two World War II battles that ended disastrously for French maquis [partisans] “but were pumped up into great heroic actions that the resistance could be proud of”).

when acting in support of conventional allied forces.¹⁰⁷ But when the guerrillas bore arms directly against the troops of the Third Reich, the military effectiveness of armed civilians typically ranged from "slight"¹⁰⁸ to "disastrous."¹⁰⁹ One expert notes that "[b]ravery did not compensate for lack of heavy weapons and inadequate training against German regulars."¹¹⁰

There was no shortage of bravery when over a million courageous citizens of Warsaw, Poland, revolted against Nazi tyranny in 1944. The German Army, despite being drained by five years of war, was nevertheless able to crush the uprising, killing over 215,000 Polish civilians and Underground Army members in the process.¹¹¹ Although some partisan groups elsewhere in Europe and Russia were able to avoid destruction by retreating to remote forests and mountains, none succeeded in overthrowing Nazi rule.¹¹²

Advocates who insist that the Second Amendment is still a viable check on tyranny often suggest that lightly-armed civilians could defeat modern armies by mounting a guerrilla war, selectively pointing to various twentieth century conflicts as evidence of the same.¹¹³ In reality, however, no insurgents armed only with the sort of personal weapons contemplated by the Second Amendment have prevailed, in a military sense, over any authentically modern army.

D. Second Amendment-Weaponry and Modern Conflicts

The kind of armament protected by the Second Amendment is actually quite limited. As Second Amendment scholar Don B. Kates concludes, the reference to the *bearing* of arms shows that the Framers intended to protect only those personal firearms that could be physically carried.¹¹⁴ Crew-served weapons, such as heavy machine guns and artillery, are not, therefore, covered by the Second Amendment.

107. See, e.g., GORDON WRIGHT, *THE ORDEAL OF TOTAL WAR* 149 (1968).

108. *Id.*

109. See KENNETH MACKSEY, *WEAPONS AND MILITARY TECHNOLOGY* 158 (1993).

110. *Id.*

111. See WINSTON CHURCHILL, *MEMOIRS OF THE SECOND WORLD WAR* 846-53 (Bonanza Books abridged ed. 1978) (1959) (writing that the Soviets misled the Polish Underground Army into believing that the uprising would coincide with a major Soviet offensive). See also Marshall Brent, *Why Didn't the Soviets Take Warsaw?*, *MIL. HIST. Q.*, Spring 1994, at 80 (contending that the Soviets were unable to take Warsaw and that the delay was not intended to destroy the anti-communist underground).

112. MARTIN VAN CREVELD, *TECHNOLOGY AND WAR* 302-03 (rev. ed. 1991).

113. See generally MICHAEL CARVER, *WAR SINCE 1945* 12-43, 83-100 (1981) (discussing the twentieth century conflicts where insurrectionary movements have been successfully suppressed such as the British did in Borneo, Malaya, and Kenya).

114. See Kates, *supra* note 35, at 219-20, 261.

Furthermore, the Supreme Court indicated in *Miller* that to enjoy Second Amendment protection, the weapon must have “some reasonable relationship to the preservation or efficiency of a well-regulated militia.”¹¹⁵ In the Framers’ day, militia armament included little more than a musket and bayonet.¹¹⁶ Thus, weapons other than those that are descendants of the ordinary military equipment of a militia are beyond the Amendment’s scope.¹¹⁷ Simply because a weapon is capable of being physically borne by an individual does not mean that it is covered by the Second Amendment either. Weapons typically limited to specially-trained regular military formations are not militia arms and are not protected by the Second Amendment.¹¹⁸ Excluded from Second Amendment coverage, therefore, are such devices as grenades and rockets which even in colonial times were the province of elite regular army units.¹¹⁹

Unlike eighteenth century warfare, modern warfighting, including guerrilla warfare, is not organized around the firepower of the personal

115. 307 U.S. 174, 178 (1939).

116. As evidence of the Framers’ understanding as to what constituted militia weapons, the Militia Act of 1792 required every able bodied male to “provide himself with a good musket or firelock” as well as a bayonet. Horsemen required pistols. 1 Stat. 271 (1792).

117. 307 U.S. at 178; see also Williams, *supra* note 58, at 557 (arguing that *Miller* limits the scope of the Amendment to arms suitable for use by militia).

118. See *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943) (discussing *Miller* and noting that all kinds of small arms were used by commando units during World War II). The mere fact that a weapon might be used by an elite regular army unit does not mean that it is a weapon appropriate for use by lightly-trained militia. Commentators have misread *Miller* to suggest that a weapon need only be used by some part of the military to qualify for Second Amendment protection. See, e.g., Levinson, *supra* note 39, at 654-55. In support of their assertion, they cite the Court’s comment in *Miller* that “[c]ertainly it is not within judicial notice that this weapon [a sawed-off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense.” 307 U.S. at 178. As used in *Miller*, judicial notice of a fact does not equate with a finding of Second Amendment protection. Rather, it is simply a condition precedent to evaluating whether or not a weapon so defined bears, as the Court said in *Miller*, “some reasonable relationship to the preservation or efficiency of a well regulated militia.” *Id.* Even in the Framers’ day, not every military weapon was ordinary militia equipment. Consequently, the arms mentioned in the First Militia Act were limited to those kinds of weapons that the ordinary citizen would likely possess and know how to use without specialized training resident in full-time military units. See *infra* notes 119-21. Moreover, it is unlikely that the Framers intended to place volatile, militarily-unique weapons and armament in citizen’s homes. See *infra* note 184.

119. Though grenades existed in the eighteenth century, there is no evidence that they were a militia weapon; indeed, these dangerously volatile weapons were carried, if at all, only by specially designated grenadier units within the standing armies. See Harry F. Tracy, *Grenadier’s Elite Status*, MIL. HIST. Q., Aug. 1986, at 18; see also Hardy, *supra* note 82, at 636 (contending that restricting the possession of weapons that the Framers could not have foreseen “does no violence to the freedoms the Framers sought to protect”).

weapons carried by individual combatants. As a result, virtually all insurgencies that achieved any modicum of success in the twentieth century have relied on the kind of lethal arms that are beyond the scope of Second Amendment protections. For this reason the 1989 Russian withdrawal from Afghanistan cannot be cited as an example of a poorly armed populace defeating a modern army. To the contrary, the often half-hearted Russian military effort enjoyed success until the United States furnished Stinger anti-aircraft missiles to the mujahideen rebels.¹²⁰ Though man-portable and operated by a single individual, the cumbersome Stinger¹²¹ is not part of the personal arms issue of individual soldiers of any professional army, let alone a militia.

The Vietnam conflict is also frequently cited as an example of a poorly armed populace that defeated a superpower. Military analyst and Vietnam veteran Colonel Harry G. Summers finds that many Americans still erroneously believe that "the war was lost to pajama-clad Viet Cong guerrillas, armed only with primitive weapons and revolutionary fervor."¹²² According to Summers and most military experts, that conclusion could not be more wrong. It was, instead, a massive "North Vietnamese, 22 division, cross-border blitzkrieg, supported by tanks, missiles, and heavy artillery—not Viet Cong guerrillas—that finally overwhelmed South Vietnam in the spring of 1975."¹²³

The war's armed civilians, the Viet Cong, were effectively destroyed (largely by American soldiers) during the Tet offensive of 1968.¹²⁴ Militarily, United States forces never lost a battle to Viet Cong or North Vietnamese troops.¹²⁵ In fact, North Vietnamese strategy always contemplated that the revolutionary effort would require an invasion of the south

120. See generally John Loudermilk, *Hind Hunter*, MOD. WARFARE, Nov. 1989, at 12 (discussing the adverse effect of the Stinger missile on Russian air mobility and firepower).

121. The Stinger missile system is five feet long and weighs over thirty-three pounds. THE DICTIONARY OF MODERN WAR 567 (Edward Luttwak & Stuart L. Koehl eds., 1991). By comparison, the M16 assault rifle is just over three feet long and weighs only eight pounds. *Id.* at 367.

122. Harry G. Summers, *Troops Equal to Any*, VIETNAM, Summer 1988, at 21.

123. *Id.*

124. See C. James Novak, *Turning the Tide in Vietnam*, RETIRED OFFICER, Feb. 1995, at 52 ("Enemy troop losses were estimated at between 30,000 and 50,000, and the ranks of Viet Cong insurgents had been decimated."). The North Vietnamese leaders who planned the offensive knew that if it failed, as it did, the bulk of the Viet Cong would be destroyed. As the Viet Cong were mostly from the South, their destruction would eliminate a force which "increasingly opposed northern domination." See DUNNIGAN & MACEDONIA, *supra* note 89, at 91; see also Capt. Ronnie E. Ford, *Window of Opportunity*, VIETNAM, Feb. 1995, at 38 (indicating that the North Vietnamese intended to defeat the United States psychologically rather than militarily by the Tet offensive).

125. See generally EDWIN P. HOYT, AMERICA'S WARS & MILITARY EXCURSIONS 470-77 (1987).

by conventional military forces.¹²⁶ Notably, it was only after the last troops of America's modern army departed in 1973 that North Vietnamese regulars accompanied by main battle tanks were able to sweep into Saigon.

Nor were the French defeated in Vietnam by guerrillas simply armed with Second Amendment-type weaponry. The cataclysmic event of France's colonial war was its 1954 defeat at the battle of Dien Bien Phu. One of the most dramatic sieges in the history of warfare, it was won not by small arms, but by the prolonged effect of colossal artillery barrages.¹²⁷ By the end of the battle, Viet Minh artillerymen had fired more than 130,000 rounds from over 200 heavy cannons and mortars.¹²⁸ Highlighting the use of non-Second Amendment weaponry, the final insurgent assault was preceded by a bombardment by Soviet-built Katyusha multiple-rocket launchers.¹²⁹

Similarly, France was not militarily defeated in Algeria.¹³⁰ Stung by its withdrawal from Vietnam, French forces innovatively employed technology to counter the insurgents: helicopters located and destroyed guerrillas in the desert, and electronic fences backed by mine fields limited rebel movements.¹³¹ In addition, French paratroopers successfully used torture to obtain key information from captured insurgents.¹³² "In strictly military terms," an expert concludes, "the Algerian war ended in defeat for the Front for National Liberation."¹³³

These conflicts teach that twentieth century insurgencies do not, in fact, rely on light, Second Amendment-type armament. Even more important for Second Amendment purposes, the uprisings neither depended upon, nor were facilitated by, an individual right to bear arms. In virtually all of the purported successes, there was no such right. Rebels routinely obtained weapons from outside sources or captured them from government troops.¹³⁴ Thus, if one accepts the proposition that such struggles were

126. David T. Zabecki & Richard P. Montpelier, *Unlimited Expense Account*, VIETNAM, Fall 1988, at 43, 47.

127. See Janos Radvanyi, *Dien Bien Phu: Thirty Years After*, in *THE PARAMETERS OF WAR* 67 (1987); ROBERT B. ASPREY, *WAR IN THE SHADOWS* 891-92 (1975).

128. COL. J.D. MORELOCK, *THE ARMY TIMES BOOK OF GREAT LAND BATTLES* 262 (1994); see also WILLIAM SEYMOUR, *GREAT SIEGES OF HISTORY* 297-318 (1991) (discussing Dien Bien Phu and General Vo Nguyen Giap's failure to repeat his victory fourteen years later against the Americans at the siege of Khe Sanh in 1968).

129. See Radvanyi, *supra* note 127, at 67.

130. Charles Townsend, *Guerrilla War*, in *THE WORLD ATLAS OF WARFARE* 261 (Richard Holmes ed., 1988).

131. *Id.*

132. *Id.*; see also Home, *supra* note 79, at 335-40 (describing how French military success did not lead to a political solution).

133. GERARD CHALIAND, *REVOLUTION IN THE THIRD WORLD* 69 (1989).

134. For example, Richard Reeves noted that the "Viet Cong mostly used weapons captured from [the Army of the Republic of Vietnam]." RICHARD REEVES, *PRESIDENT*

successful, then the real lesson is that the protections of the Second Amendment are apparently unnecessary. The point is that civilians determined to resist their government have historically been able to procure weapons without the benefit of any constitutional provisions that ensured them a right to keep and bear arms.

E. *Weaponry of Modern Armies*

It is a mistake, of course, to dismiss the potential military problem presented by eighty million¹³⁵ Americans armed with 222 million firearms.¹³⁶ But to a modern military, the numbers are not quite as daunting as they might seem. Millions of weapons that are inoperable, antique arms of little or no combat value, and weapons in possession of those who cannot or will not operate them in a combat environment would be discounted from those figures.¹³⁷

Moreover, almost none of the remaining weapons would have much effect against the tens of thousands of tanks and armored vehicles possessed by the United States military. It is difficult to overestimate the shock effect of tanks and armored vehicles on combatants armed only with Second Amendment-type weaponry. Even the trained soldier will falter in the face of an armored attack if inadequately armed.¹³⁸ Thus, the rapid deployment of Soviet armor quickly suppressed the Hungarian uprising of 1956, and a similar use of Chinese tanks crushed the student rebellion in Tiananmen Square in 1989.

The shock effect of heavy weapons is not a particularly new phenomenon in the American experience. Shay's Rebellion, a 1787 Massachusetts debtor's revolt and one of the few domestic insurgencies in United States history, collapsed in the face of such arms. During the first and only battle of the rebellion, the commander of the government forces, after firing a warning barrage,

then ordered the fieldpieces aimed and fired directly into the midst of the rebels. Again the guns roared. Men fell mangled. Four crumpled forms lay dead or dying when the smoke dissipated. The survivors, unprepared to stand up to artillery, broke and ran. The only battle of the rebellion was over. For all of their numbers and anger, the Shaysites had never

KENNEDY: PROFILE OF POWER 608 (1993).

135. Robert Davis & Haya El Nasser, *NRA Sees a Change: 'Our Agenda is Now'*, USA TODAY, Dec. 28, 1994, at 2A (quoting Wayne LaPierre of the National Rifle Association).

136. *Id.* at 1A (no source cited).

137. For example, some guns are inherited by non-users.

138. See RICHARD HOLMES, *ACTS OF WAR: THE BEHAVIOR OF MEN IN BATTLE* 226-27 (1985) (describing the panic that can occur among soldiers when weapons expected to stop tanks fail).

developed the discipline and will necessary to make a fighting force effective.¹³⁹

Without the ability to counter heavy weapons, even a well-manned insurgency cannot win a pitched battle against forces so equipped.¹⁴⁰ It was the lavish use of heavy weapons, for example, that enabled the Russian Army—a force so decayed it can no longer be considered modern by United States standards¹⁴¹—to drive rugged Chechen rebels from their capital of Grozny in early 1995.¹⁴²

F. *The Cost-Benefit/Deterrence Theory*

Some commentators contend that it would not be necessary for armed civilians to win a pitched battle or, for that matter, to actually defeat a modern army at [a]ll.¹⁴³ They argue that it is only necessary to make an insurgency too costly for the professionals to suppress. In this way, it is assumed, armed civilians could deter tyranny by making the price of seizing power too high.¹⁴⁴ Essentially, Second Amendment advocates propound a sort of cost-benefit/deterrence theory. Supporters point to the fact that Switzerland, where militiamen kept their personal weapons in their homes, was not invaded during World War II as evidence of utility of this cost-benefit/deterrence theory. One commentator claims that “the Germans were afraid to invade in both world wars, knowing as they did that every man was armed.”¹⁴⁵

Actually, the Germans had little regard for Swiss military capabilities. Hitler sneered at the militiamen, ridiculing them for “playing at soldiers.”¹⁴⁶ The Swiss saved themselves not by making the Germans fear them, but by producing arms and munitions for the Nazis, assistance that

139. Palmer, *supra* note 32, at 81-82.

140. For example, Geoffrey Perret argued that the mountain howitzer was the “gun that won the West.” PERRET, *supra* note 38, at 140. Perret noted that “[t]ime and again a single howitzer firing canister saved heavily outnumbered troops from annihilation. Indians were rightly terrified of a weapon that could kill twenty men at half a mile.” *Id.*

141. See generally William Matthews, *An Army of ‘Toy Soldiers,’* AIR FORCE TIMES, Jan. 30, 1995, at 16; Bruce B. Auster, *Cold, Underfed, Underpaid, Unprepared and Over There*, U.S. NEWS & WORLD REPORT, Jan. 9, 1995, at 37; Fred Hiatt, *A Military Machine Showing Its Rust*, THE WASH. POST NAT’L WEEKLY ED., Jan. 23-29, 1995, at 14 (all describing the decrepit state of Russian forces sent to Chechnya).

142. See generally Steve Levine & Karen Breslau, *Dire Tales of a Dirty War*, NEWSWEEK, Feb. 13, 1995, at 40 (“Russia’s wholesale bombardment of Chechnya’s capital, Grozny, was the most brutal military offensive by a big power in recent history.”).

143. See, e.g., Lund, *supra* note 35, at 115; Levinson, *supra* note 39, at 657.

144. See, e.g., Kates, *supra* note 35, at 270-71; Lund, *supra* note 35, at 122.

145. LAPIERRE, *supra* note 36, at 170.

146. MARTIN GILBERT, THE SECOND WORLD WAR: A COMPLETE HISTORY 225 (1989).

gained importance as German factories came under increasing air attack.¹⁴⁷ Significantly, the Swiss today are abandoning their strategy of masses of static militiamen in favor of a smaller, more modern, and more mobile force.¹⁴⁸

The cost-benefit/deterrence theory seems to draw strength from the record of independence movements that arose in the Third World after World War II. In many cases a European colonial power, though not militarily defeated, nonetheless concluded that the expense of waging a counterinsurgency war made retaining control of a foreign territory a poor investment.¹⁴⁹ But the considered decisions of Western democracies fighting colonial wars are questionable models from which to suppose the actions of domestic tyrants that the Second Amendment aims to resist. Tyrants rarely engage in or are deterred by the rational calculations that underpin the cost-benefit/deterrence theory.¹⁵⁰

Moreover, conflicts like those waged by colonial powers in the post-World War II era do not, according to Professor Eliot A. Cohen, “engage the full energies of a World Power’s armed forces or population.”¹⁵¹ Cohen surmised that “[r]ather than summon up all its physical and emotional resources to win such wars, a World Power will often accept compromise or even a limited defeat.”¹⁵² Suffice to say, tyrants—especially those engaged in a domestic usurpation of power—are loathe to accept compromise or limited defeat.

Unlike a foreign power battling to retain a colony, a domestic insurrection against dictatorial authorities would summon all the resources of the native government under attack. For this reason a guerrilla war aimed at expelling a foreign occupier is altogether different from one directed against internal usurpations of power. Plainly, it is one thing to withdraw from a former colony, and quite another to capitulate in a civil war. Opponents fight civil wars so brutally because they know that there is, literally,

147. See GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II* 397 (1994). Switzerland’s putative neutrality protected their arms factories. *Id.* But see COHEN, *supra* note 83, at 72 (arguing that the number of forces the Germans planned to use to invade Switzerland reflected a “healthy respect for the ability of the Swiss to fend off a conventional assault”).

148. Brooks Tigner, *Swiss Revise Military Posture*, *DEFENSE NEWS*, Jan. 9-15, 1995, at 4, 28.

149. See ASPREY, *supra* note 127, at 856-57. One textbook example is British operations against Jewish insurgents in Palestine after World War II. Shortly after Winston Churchill warned Parliament that no interests in Palestine were worth the eighty million pound cost, Britain terminated its UN mandate there. *Id.*

150. Typically, tyrants are convinced of their own omnipotence and are, in any event, grossly indifferent to the suffering of their people and even the military forces supporting them; Hitler is the archetype, Saddam Hussein the current paradigm.

151. COHEN, *supra* note 83, at 31.

152. *Id.*

nowhere to go. Consider that the Civil War remains America's most bloody and destructive war.¹⁵³

Civil wars graphically illustrate the most serious flaw in the cost-benefit/deterrence theory: the armed civilians expected to oppose domestic tyranny would presumably make the very same kind of rational cost-benefit calculation and, assuming the absence of megalomania in the population at large, are more likely to do so. But such calculations may not have the patriotic effect Second Amendment advocates desire. How many gun owners, for example, would choose to cast their lot with the forces of tyranny? The weapons-related crime statistics suggest that enormous numbers of civilians already use their guns for malevolent purposes.¹⁵⁴

Further, how much suffering will casualty-sensitive Americans of the late twentieth century be willing to visit upon themselves and their families before submission becomes the preferable, or only, option? Make no mistake about it, modern armies are exquisitely adept at wreaking misery on resisting peoples. Regular military forces have historically been able to disproportionately inflict casualties on insurgent forces and the populaces that support them. For example, for every German soldier killed in suppressing the Warsaw uprising, more than twenty Poles died.¹⁵⁵ Similarly, in Algeria seven insurgents died for every French soldier killed.¹⁵⁶ Even inept Russian forces of 1995 managed to kill more than four times the number of Chechens than they themselves lost.¹⁵⁷

History also shows that the United States military has been effective—sometimes brutally so—in crushing insurrections. Native American resistance,¹⁵⁸ as well as uprisings in the Philippines, Cuba, Nicaragua, Haiti, and Mexico were all suppressed with relatively low losses among United States troops.¹⁵⁹ In the attack on United States Rangers in Moga-

153. See generally CHARLES ROYSTER, *THE DESTRUCTIVE WAR* (1991) (discussing the sheer violence with which the Civil War was waged).

154. See generally Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 ST. LOUIS U. PUB. L. REV. 243 (1993) (discussing the use of handguns in crime). See also *infra* note 165 and accompanying text (discussing the potential for law-abiding gun owners to support a despotic regime that shrouds itself with a veneer of legality).

155. See *supra* note 111 and accompanying text.

156. R. ERNEST DUPUY & TREVOR N. DUPUY, *ENCYCLOPEDIA OF MILITARY HISTORY* 1314 (Rev. ed. 1977).

157. See Steven Erlanger, *A Famous Victory*, N.Y. TIMES, Feb. 10, 1995, at A4 (citing Russian officers' estimates of deaths five times higher than the 907 officially reported, as well as estimates of twenty thousand Chechen deaths by Sergei N. Yushenkov, head of the Russian Parliament's defense committee).

158. See WEIGLEY, *supra* note 85, at 153-63 (arguing that the United States military waged a campaign of annihilation against native Americans).

159. See, e.g., Milt Machlin, *Sunday Morning Ambush*, MIL. HIST. Q., Aug. 1987, at 27 (discussing a bloody attack by insurgents armed only with sword-like bolos where an isolated United States army unit was overrun). However, despite the insurgent victory, the

dishu in October 1993, Somali gunmen killed eighteen Americans, but at the price of hundreds of Somali lives.¹⁶⁰

Perhaps the best example of how regular military forces can suppress even highly-motivated armed civilians is the Boer Wars of the late nineteenth and early twentieth century. Tough, dedicated, and well-armed, "Boer fighting-men basically were farmers formed into commandos to defend their perceived homeland and way of life—every one of them a superb marksman."¹⁶¹ Despite a lack of discipline, the Boer farmers fought a brilliant guerrilla campaign and were sometimes able to prevail over British regulars. But ultimately—and what happens ultimately is what counts—they were defeated. During the Second Boer War the "British burned [Boer] homes, slaughtered their cattle and destroyed their crops. [The British] invented the first modern concentration camp and herded the families of Boer guerrillas into them."¹⁶² By destroying the Boer base of support, the British effectively ground down resistance.

To succeed, a guerrilla movement needs secure bases from which to operate.¹⁶³ Che Guevara, the famous Marxist revolutionary, was eventually hunted down and killed when he tried to communize Bolivia without first establishing a secure base.¹⁶⁴ Though troubling to conceive, a despotic regime strong enough to gain power in a large, diverse nation like the United States would probably be clever enough to shroud its actions with a pretense of legality. The net effect is that millions, including gun owners, who consider themselves law-abiding citizens might be misled into supporting such a government. Thus, the armed civilians attempting to conduct a guerrilla war in the United States might well find themselves battling not only security forces, but their fellow citizens as well.¹⁶⁵

Furthermore, industrialized countries like the United States have pervasive information technologies and elaborate intelligence systems that

technological differences were revealing: some 250 insurrectionists were killed in the attack which claimed the lives of just 36 United States soldiers. The Americans, however, were armed with modern Krag-Jorgensen rifles. Such lopsided body counts typified the conflict. *Id.* at 29, 33. See generally HOYT, *supra* note 125, at 297-329 (discussing various United States military responses to insurrections in overseas areas).

160. The Washington Post quoted an unnamed intelligence officer who estimated the Somali death toll at 350. John Lancaster, *Mission Incomplete, Rangers Pack Up*, WASH. POST, Oct. 21, 1993, at A1.

161. See William Weir, *Advantage Sought on High Ground*, MIL. HIST. Q., Aug. 1986, at 34.

162. *Id.* at 40.

163. See ARCHER JONES, *THE ART OF WAR IN THE WESTERN WORLD 680-81* (1987).

164. See Michael Roberts, *Ambush in the Red Zone*, MODERN WARFARE, Sept. 1989, at 34.

165. See also *supra* note 154 and accompanying text, indicating that in addition to those who might support a despotic regime because they are deceived about its legitimacy, there are those who would support it for nefarious reasons.

leave few places for armed resistance groups of any significance to hide. In our electronically bureaucratized society, financial transactions, transportation arrangements, communications, and all the other components of an insurgency movement are subject to monitoring and discovery by determined security forces.¹⁶⁶ Historian Martin van Creveld has concluded that such factors create a situation where “successful guerilla warfare [can] no longer be waged in any of the more highly developed continents.”¹⁶⁷

In addition, modern militaries, and particularly the United States military since Vietnam, have developed sophisticated counterinsurgency instruction programs. Today, the United States fields 46,000 elite troops specially trained in such warfare.¹⁶⁸ Ingenious counterinsurgency techniques combined with new technologies¹⁶⁹ enable contemporary military forces to subdue the most intransigent opponents. For example, by the time the Palestinians gave up trying to destroy Israel militarily, Israeli security forces had reduced the *intifadah* to little more than bands of stone-throwing children.¹⁷⁰ The Irish Republican Army—sometimes cited by Second Amendment activists as an example of the effectiveness of armed civilians in the face of a modern army—gave up armed resistance in 1994, after twenty-five years of struggle.¹⁷¹ The IRA not only failed to dislodge the British army but succeeded only in earning the antipathy of their own people.

G. Armed Americans and Modern Insurgents

Unlike armed civilians organized into ad hoc combat formations, modern security forces have the advantage of a developed sense of unit cohesion and fighting spirit. Regardless of how well motivated, armed civilians simply cannot replicate the esprit and unit pride that sustains the professional in the psychological crucible of combat. In particular, history shows that twentieth century Americans profit greatly from the psychological preparation for

166. Compare Vic Sussman, *Policing Cyberspace*, U.S. NEWS & WORLD REP., Jan. 23, 1995, at 55 (discussing the capabilities to acquire information through computer technology).

167. VAN CREVELD, *supra* note 112, at 302-03.

168. See DOUGLAS C. WALLER, *THE COMMANDOS: THE INSIDE STORY OF AMERICA'S SECRET SOLDIERS* 33 (1994).

169. See generally JOHN P. HOLMS & TOM BURKE, *TERRORISM* 212-46 (1994) (discussing counterterrorism resources).

170. STEPHEN C. PELLETIER, *HAMAS AND HIZBOLLAH: THE RADICAL CHALLENGE TO ISRAEL IN THE OCCUPIED TERRITORIES* 21 (1994) (“Violence continues, mostly in the form of rock-throwing attacks. . . . The rock attacks are the work of children, some as young as 8 or 9 years. . . . Children have always been involved in the *intifadah*, but not until recently have they taken charge.”).

171. See generally Simon Winchester, *Eternal Argument*, MIL. HIST. Q., Aug. 1994, at 34.

combat that professional militaries typically achieve. As one illustration, Colonel Summers relates a study of two divisions who fought side-by-side during World War II in the North African campaign.¹⁷² "The regular division," Summers reports, "suffered almost no 'battle fatigue.'"¹⁷³ But the reserve division, composed of soldiers recently drawn from civilian life, was almost incapacitated. "The only variable was unit pride," says Summers.¹⁷⁴

The psychological aspect of conflict makes comparisons of various late twentieth century conflicts with a potential insurgency in the United States especially suspect. Second Amendment advocates are profoundly mistaken if they equate armed American civilians with the warrior cultures emerging in places like Afghanistan, Somalia, Chechnya, the Balkans, and elsewhere. Such peoples, according to Professor Keegan, are psychologically distinct from Western societies in that "they are brought up to fight, think fighting honorable and think killing in warfare honorable."¹⁷⁵ Military analyst Ralph Peters paints an even darker picture of what he calls the "new warrior class."¹⁷⁶ Peters describes them not as soldiers, but rather as:

erratic primitives of shifting allegiance, habituated to violence, with no stake in civil order. . . . men who have acquired a taste for killing, who do not behave rationally according to our definition of rationality, who are capable of atrocities that challenge the descriptive powers of language, and who will sacrifice their own kind in order to survive. . . . [They are men] for whom treachery is routine.¹⁷⁷

Such warriors are completely inapposite to the kind of democratic patriot disposed to resist tyranny that the Second Amendment visualizes. To confront the new warrior class, United States and other Western armies selectively recruit and intensively develop elite units that cultivate a warrior spirit in strictly disciplined and controlled conditions. If armed civilians, without the benefit of a specialized training scheme, were to attempt to somehow match the fierceness of the new warriors, they would likely convert themselves into the very tyrants they supposedly would be fighting to defeat.

In short, whatever success the new warrior cultures enjoy, they do not create a model for advocates of the military capabilities of armed civilians in this country to emulate; the paradigm simply has no counterpart in the traits of the people who comprise the populace of industrialized nations like

172. Harry G. Summers, *Noble Casualty of Defense Reductions*, WASH. TIMES, Dec. 16, 1994, at 25 (citing study by Carl Menninger).

173. *Id.*

174. *Id.*

175. Keegan, *supra* note 101.

176. Ralph Peters, *The New Warrior Class*, PARAMETERS, Summer 1994, at 24.

177. *Id.* at 16, 24.

the United States. Merely putting weapons into the hands of a willing civilian does not a soldier, or warrior, make.

H. Terrorism and the Second Amendment

It is true that insurgencies that resort to terrorism continue to vex security forces.¹⁷⁸ But the weapon of choice for the terrorist is not the kind of armament the Second Amendment seeks to protect; rather, it is the bomb.¹⁷⁹ Besides not being an ordinary militia weapon, it is inconceivable that the Framers would have countenanced any device with the express aim of causing significant noncombatant casualties.

The eighteenth century was the age of limited war with its attendant restraints on unchivalrous behavior.¹⁸⁰ According to political scientist Bruce D. Porter, the eighteenth century was an era "more mindful of the need to avoid civilian casualties."¹⁸¹ Colonial Americans were also sensitive to noncombatant casualties. The Declaration of Independence deprecates King George III for failing to protect noncombatants from Indian attacks.¹⁸² Moreover, given the Framers' English heritage, it is unlikely that they would seek constitutional protection for the means by which a Guy Fawkes-like¹⁸³ strategy could be implemented.¹⁸⁴

A more practical problem in employing terrorism as a means of insurrection is that it has "yet to win a victory anywhere."¹⁸⁵ Professor van Creveld points out that while "great damage may be done by striking at well-chosen pinpoint targets," it is unlikely that a modern country would be disabled.¹⁸⁶ Developed countries, he notes, have "multiple, redundant,

178. See generally HOLMS & BURKE, *supra* note 169.

179. See generally *id.* at 160-82.

180. See generally CHRISTOPHER DUFFY, *THE MILITARY EXPERIENCE IN THE AGE OF REASON* 12-13 (1987).

181. PORTER, *supra* note 18, at 108.

182. THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

183. Guy Fawkes was a seventeenth century Catholic who was caught attempting to blow up parliament and the Protestant King James I. The anniversary of his capture is still celebrated in England. See WINSTON S. CHURCHILL, *HISTORY OF THE ENGLISH SPEAKING PEOPLES* 151 (1957).

184. As Professor Kates noted:

[A]ccording to Blackstone and Hawkins, the common-law right [to keep and bear arms] did not extend to "dangerous or unusual weapons" whose mere possession or exhibition "are apt to terrify the people." Naturally, it would terrify the citizenry for unauthorized individuals to possess weapons that could not realistically be used even in self-defense without endangering innocent people in adjacent areas or buildings.

Kates, *supra* note 35, at 261.

185. John Shy & Thomas W. Collier, *Revolutionary War*, in *MAKERS OF MODERN STRATEGY* 815, 858 (Peter Paret et al. eds., 1986).

186. VAN CREVELD, *supra* note 112, at 307-08.

communication and transport networks” that are extremely difficult to destroy.¹⁸⁷

Another terroristic tactic that could be employed is assassination. Though the elites in dictatorial regimes would no doubt take extraordinary measures to protect themselves, armed civilians equipped with Second Amendment-type weaponry could, theoretically, launch such attacks. Like the effect of isolated bombings, however, Professor van Creveld doubts the effectiveness of assassination in an industrialized country like the United States. He notes that modern nations are “complex organizations, and the vast technological systems on which they rest, can absorb isolated attacks.”¹⁸⁸ Furthermore, van Creveld contends:

Indeed, one of the most important hallmarks of modernity is precisely the fact that political and other organizations are no longer dependent on a single person and that, consequently, little can be accomplished by eliminating him. As countless examples from the assassination of Kennedy to that of Anwar Sadat show, in today’s developed world a leader who is killed or incapacitated will promptly be replaced by another.¹⁸⁹

V. THE POWER OF THE UNARMED CITIZENRY

Paradoxically, unarmed citizens have been most problematic for governmental authorities in the United States during the last half of the twentieth century.¹⁹⁰ The civil rights struggles of the 1960s were won not by force of arms, but by peaceful protest and civil disobedience.¹⁹¹ Where the government tried to use force against unarmed resisters, the results were often counter-productive. The spectacle of fire hoses and police attack dogs employed against civil rights protesters galvanized public opinion against discriminatory practices. Similarly, when National Guardsmen fired upon

187. *Id.*

188. *Id.* at 305.

189. *Id.* *But see* HERBERT L. ABRAMS, “THE PRESIDENT HAS BEEN SHOT,” CONFUSION, DISABILITY, & THE 25TH AMENDMENT (1994) (discussing potential difficulties of Presidential succession).

190. Indeed, the success of nonviolence in social transformations predates the last half of the twentieth century. Peter F. Drucker observed:

Chroniclers of the rise of the industrial worker tend to highlight the violent episodes—especially the clashes between strikers and the police, as in America’s Pullman strike. The reason is probably that the theoreticians and propagandists of socialism, anarchism, and communism . . . incessantly wrote and talked of “revolution” and “violence.” Actually, the rise of the industrial worker was remarkably *nonviolent*. Peter F. Drucker, *The Age of Social Transformation*, THE ATLANTIC MONTHLY, Nov. 1994, at 59.

191. *But see* Cottrol & Diamond, *supra* note 77, at 349-58 (noting that armed volunteers sometimes protected civil rights workers).

unarmed students during an anti-war protest at Kent State University in 1970,¹⁹² the tragedy became an important influence in reversing policy on Vietnam.

Conversely, armed resistance has a dismal record of success in American history. Indeed, it has rarely been necessary to use the military to subdue the few attempts that have arisen in recent years. Suppression of such armed groups as the Black Panthers, white supremacist organizations, and Middle Eastern terrorists was accomplished by orthodox police forces with little resort to the extensive combat capabilities of the military. Similarly, even the relatively well-armed followers of David Koresh in Waco, Texas, were devastated by law enforcement authorities who, despite the use of a weaponless armored vehicles, were lightly equipped by military standards.

Armed actions, even in support of philosophies with which many Americans have sympathy, are frequently viewed by the public with hostility. Thus, shootings by anti-abortion activists have done more to undermine the movement than any pro-choice endeavors. In this regard the Waco incident is illustrative.

Though government authorities may have acted improperly and even unlawfully during the raid,¹⁹³ public opinion polls nonetheless found overwhelming support for the forceful way in which the government dealt with Koresh's armed resistance to Bureau of Alcohol, Tobacco, and Firearms agents.¹⁹⁴

The power of an unarmed citizenry is not idiosyncratic with the American experience.¹⁹⁵ India achieved its independence via the nonviolent tactics of Mahatma Gandhi. Similarly, communism in Europe and the Soviet Union ended not by force of arms, but by generally peaceful social transformation. The latter phenomenon is particularly instructive because it took place in the face of vast military machines built by the totalitarian regimes. Incongruously, it appears that a despotic state may even be strengthened by an armed insurrectionary movement. Professor Porter explained:

192. See MICHAEL MACLEAR, *THE TEN THOUSAND DAY WAR* 296-98 (1981).

193. See Paul H. Blackman, *The Tragedy at Waco*, 6 J. ON FIREARMS & PUB. POL'Y 165 (1994).

194. *As Millions Cheered*, THE PROGRESSIVE, June 1993, at 8. Similarly, following the Oklahoma City bombing on April 19, 1995, in which an individual associated with civilian militias is the main suspect, a poll found that 80% of Americans described members of such organizations as "dangerous" and 63% described them as "a threat to our way of life." See Smolowe, *supra* note 3, at 60 (citing an April 27, 1995 Time/CNN telephone poll of 600 adult Americans).

195. See generally GENE SHARP, *MAKING EUROPE UNCONQUERABLE* (1985) (discussing the history of the success of nonviolent civilian-based defense and proposing an expanded scheme for the defense of Europe).

The keeping up of perpetual civil war [is] another key to power of the totalitarian states. . . . The mobilization of hatred help[s] to maintain the revolutionary ardor necessary for the totalitarian movements to thrive. Indeed, if tangible domestic enemies could not be readily identified it would have been necessary to invent them.¹⁹⁶

Thus, to the extent that the Second Amendment is aimed at providing the masses with a means of resisting tyranny by force, it no longer retains credibility. Indeed, the revolutions in warfare have rendered obsolete the notion of armed civilians checking the power of modern, professional militaries.

VII. SUMMARY AND CONCLUSIONS

No system of government can allow for its own demise by violent overthrow. While a theoretical basis for the Second Amendment might guarantee access to firearms by other than the professional armies of the federal government, the Second Amendment does not sanction armed revolt by the citizenry. That right exists, if at all, only when the Constitution's system for peaceful change ceases to function; it does not arise where a group—armed or otherwise—simply dislikes or disagrees with a particular government decision or policy.

Furthermore, possession of small arms, including assault-type weapons, does not meaningfully check the combat power of advanced military establishments like those of the United States. To suggest that civilians equipped with Second Amendment-type weapons are any match for modern security forces invites murderous confrontations that armed civilians will inevitably lose. Military action today is a complex blend of intricate tactics, high-tech communication systems, and powerful weaponry far beyond the wildest imagination of the Framers.¹⁹⁷

Paradoxically, it is the very complexity of modern warfare that may provide the defense against tyranny that the Framers hoped firearms would produce. The sophistication of today's equipment and soldiers ensures that armed amateurs cannot prevail against a determined modern force; that same sophistication militates against such a force becoming, especially in the United States, a tool of despotism.

Modern militaries are no longer manned by the uneducated and blindly-obedient dregs of society that populated the standing armies of the Framers' era. Warfighting in the late twentieth century demands an independent-thinking, even cosmopolitan force. For example, the proliferation of computer-supported weapons and information systems requires increasingly educated and intelligent soldiers capable, even at low levels, of making and communicating key decisions. This leads one analyst to observe that "[a] smart, educated, coordinated military team in a totalitarian regime is a true oxymoron."¹⁹⁸

196. PORTER, *supra* note 18, at 202.

197. Technology continues to enhance the capabilities of the professional soldier. See generally John G. Roos, *The 21st Century Land Warrior*, ARMED FORCES J., Feb. 1995, at 18.

198. Captain John W. Bodnar, USNR, *The Military Technical Revolution*, NAVAL WAR

Nevertheless, the Framers' teaching remains a valid one: be vigilant. Though it is doubtful that anyone in today's armed forces harbors any thoughts of usurping power, ensuring firm civilian control of the military remains of vital importance. But to do that effectively does not require civilians keeping and bearing arms. Rather, it demands strengthening the institutions expected to exercise civilian control and limiting the military's involvement in other than traditional warfighting activities.¹⁹⁹

Removing the Second Amendment from the Constitution is neither necessary nor desirable as some have suggested.²⁰⁰ Instead, it should be subject to the same balancing test that has been successfully used in reconciling conflicting interests with respect to other amendments.²⁰¹ Most of the focus of Second Amendment debate relates to the wisdom of using firearms as a means of crime control.²⁰² It may be that a court pondering a gun control measure and considering the Framers' intent will conclude that given the de minimis combat capability of armed civilians, the aim of resisting government tyranny is outweighed by society's interest in resisting the tyranny imposed by the criminal element of the armed citizenry. This methodology, while clearly displeasing to Second Amendment absolutists, will also not satisfy gun control advocates because the approach requires case-by-case analyses of each gun control measure.

Repealing the Second Amendment would not end constitutional arguments over gun control.²⁰³ But more fundamentally, the Constitution has proven itself to be a remarkably prescient and dynamic document—a balancing of competing interests today may be upset by tomorrow's circumstances. The Second Amendment, standing as it does for the quintessential American virtue of individual responsibility, still serves as an important reminder of the Framers' healthy suspicion of governmental power. In the final analysis, that may be its most meaningful legacy.

COLLEGE REV., Summer 1993, at 20.

199. See generally Dunlap, *supra* note 87, at 390-92 (discussing recommendations to improve civilian control of the military).

200. See Dan Peterson, *Our Second Amendment Under Fire*, AM. LEGION MAG., Jan. 1994, at 24 (discussing a House Joint Resolution proposing the repeal of the Second Amendment).

201. See *supra* note 81 and accompanying text. Cf. Henry J. Abraham, *First Amendment Balancing*, in THE OXFORD COMPANION TO THE SUPREME COURT 300-01 (Kermit L. Hall ed., 1992).

202. See generally *Dueling over Gun Control*, WILSON Q., Summer 1994, at 125-26 (a survey of recent articles on gun control).

203. For example, a right to bear arms may reside in the Ninth or Tenth Amendment.