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## Guns, Democracy, and the Insurrectionist Idea

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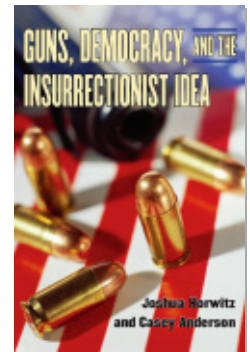
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## CHAPTER FOUR

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# THE FOUNDING

Insurrectionist propagandists often try to tie their theoretical account of the relationship between guns and government to historical episodes in which, they claim, egregious violations of human rights or even mass murder could have been avoided if only the victims had been armed. With regard to the founding of the United States, they claim that our forefathers wisely chose to guarantee a right of insurrection as a check on the excesses of centralized power, with the result that our system has kept the inevitably oppressive tendencies of government under control. In this chapter, we argue in favor of a competing interpretation of the period surrounding the framing of the U.S. Constitution and point out why the Insurrectionist account of the relationship between guns and democratic government was as untenable at the time the Constitution was adopted as it is today.

Any firearms regulation, according to the Insurrectionists, is at odds with the tradition of respect for freedom that our founders bestowed on us. In the eccentric lexicon of the Insurrectionists, a self-styled “pro-freedom” faction is amply justified in defying not only the most modest forms of firearms regulation but any public policy choice they find contrary to their conception of liberty. This interpretation of the meaning of the Second Amendment casts some of our greatest statesmen in the role of conspirators seeking to deprive our government of the tools it

needs to function effectively. By advancing the myth that America was founded at least in part on the idea that government is an alien force, the Insurrectionists are trying to legitimize values that are fundamentally hostile to the survival of democracy not only as we have known it but also as our founding fathers knew it.

In fact, the bizarre teaching that the state should be kept as weak as possible to prevent it from oppressing its citizens endangers both citizens' physical safety and individual liberties. As we discuss later in this chapter, most human beings prefer living under government—in some cases, even highly imperfect governments—because anarchy sets the stage for chaos and violence, failing to protect freedom in any meaningful sense. Contemporary Somalis and Iraqis, though abundantly armed, are constantly endangered. They have no freedom worthy of the name—no freedom to move about, no freedom to conduct commerce, no freedom to express themselves in the public sphere. More precisely, they cannot exercise these freedoms without risking their lives, though no government is trying to repress them. Without security, in short, there is no freedom. The United States has succeeded as a free and orderly society not because it is armed to the teeth but in spite of it. Our system of government sustains itself, as Abraham Lincoln knew it must, by ballots instead of bullets. Our vibrant democracy allows room for private gun ownership, yet Insurrectionist ideology denigrates at every opportunity the cultural and institutional safeguards that make it possible.

When this country was born, did our founders bestow on us a special legacy of continuous armed confrontation with a sovereign state? The Insurrectionists insist that the Second Amendment enshrines virtually unlimited rights for every American to own and carry firearms and that those rights form an integral part of the constitutional bulkhead that holds tyranny at bay. Let the Europeans and Asians give up their guns, they say, but for Americans, let private gun ownership endure as a guarantor of freedom.

The Insurrectionist argument that “freedom is not free” appeals to the noble sentiment that sometimes our ideals require sacrifice, including a willingness to die to defend political liberty. For the Insurrectionists, violent crime fueled by easy access to firearms by drug dealers and street gangs is simply one of the sacrifices we have to make to keep our

society free. Even if a gun control law might make citizens safer by, for example, requiring background checks on all firearms purchases at gun shows so that convicted felons would have difficulty getting access to weapons, the Insurrectionists would say the law is a bad bargain if it limits citizens' ability to fulfill their responsibilities under the Second Amendment.

The question, then, is whether American history teaches that widespread and unregulated individual access to firearm ownership protects Americans from government tyranny (even if it is anathema to democratic values), and if so, whether that notion is embodied in and protected by the Second Amendment. In other words, is the antidemocratic effect of the Insurrectionist claim an unfortunate but inescapable consequence of the Second Amendment, much as the inadmissibility of evidence in criminal trials is sometimes an inescapable result of the Fourth or Fifth Amendment? The answer depends on the meaning of the Second Amendment and to some extent on the intent behind our constitutional framework more generally. If Americans are guaranteed an individual right to own firearms to perpetually prepare for armed conflict with the state or federal government, then almost any gun law that operates to identify gun owners or restrict access to certain types of firearms, such as assault rifles, is unconstitutional. Automatic weapons might be unsuitable for hunting or fighting off burglars, for example, but they are arguably well adapted to the demands of guerrilla warfare against the government. Nobody would try to take on the U.S. Marines (or even the local police department) armed only with a musket. By the same token, background checks—or even licensing and registration—for firearms purchases do not interfere with law-abiding citizens' ability to acquire and keep guns for target shooting and self-defense, but they might give the government access to information about gun owners that could be used to locate and disarm them during an outbreak of political violence. Conversely, if our guarantees extend to us only the right to participate in a well-regulated and state-sponsored militia—or even the individual right to own a gun for self-defense—then most gun laws are valid and democratic values and institutions take precedence over the martial fantasies of the Insurrectionists.

The Insurrectionists claim that the Second Amendment gives self-

anointed patriots the right to resist and even attempt to overthrow the U.S. government by force if they think the country is flirting with tyranny. However, only a gross misreading of our law and our history would conflate the prerogative of the individual to attack the United States, which is in fact insurrection, and the “natural right” of revolution, which never inheres in an individual or even in an individual state.

The Constitution, then, recognizes no right to insurrection. If there is a natural law right to revolution, then no one in the founding generation, except the most radical Antifederalists, would have viewed this right as belonging to individual citizens. The right to revolution, if it exists at all, is a right of the states, and mustering a militia requires keeping track of who is armed, mandates certain types of weapons while prohibiting others, and demands extensive training of members. Any understanding of the right to keep and bear arms that bars the state from effectively using extensive regulation to organize its militia is unsupported. There is no denying that ours is a nation born of a collective revolution, but our founders were quick to squelch any suggestion that insurrection might be a legitimate form of recourse for any disgruntled constituency in the new democracy. The founders did not bequeath to us a tradition of endless armed political violence or endless preparation to carry out such violence. Far from it. They tried to create a government where change was peacefully played out inside a democratic structure. A firearms free-for-all, therefore, is not an inescapable legacy of our founding but is rooted, at least in part, in Insurrectionist mythology.

## Guns and the Revolution

Firearms hold a prominent place in our nation’s history. The United States of America was the end result of a revolution that succeeded by force of arms. George Washington’s Continental Army and the state militia forces under his direction used firearms along with other implements of eighteenth-century warfare to expel the British from the original thirteen colonies, paving the way for a new nation. Of course, Washington was helped by the French army and navy, sent under the authority of Louis XVI, in the decisive battle of Yorktown; stumbling and inept British military leadership; and his mastery of the colonial

terrain. The fact remains, though, that firearms played an important role in winning American independence.

From the time we are in elementary school, Americans learn about the brave men who formed the companies of Minutemen at the battles of Lexington and Concord and who offered the British their first taste of defeat at the hands of the colonists. Even today, the link between these original citizen-soldiers and their guns has been carefully preserved at a host of Revolutionary War battlefields, monuments, and museum exhibits. Appropriating this history in service to their ideological agenda, the Insurrectionists declare that firearms are an integral part of America's revolutionary history and that had the colonists not been well armed, the revolution would have sputtered. The principle they derive from this experience is that even today, every American has a part to play in protecting our freedoms, gained as they were through violent revolution, by stockpiling private arms.

This oversimplified account misses the point that the American Revolution was not an individual undertaking or the project of a group of disaffected zealots who failed to persuade their fellow citizens of the merits of their cause. The men who declared a new country and then fought to establish it did so collectively on behalf of a broad set of political interests that were denied representation by the British government. The Minutemen who fired the first shots of the American Revolution in April 1775 predated the formal declaration of American independence by more than a year. While they are often depicted as a group of farmers<sup>1</sup> "who responded to a spontaneous call to arms," the reality is that the Minutemen were part of a collective structure that dated to 1645.<sup>2</sup>

The Minutemen were part of the militia tradition, based on the English system that was modified to meet the requirements of the early American condition.<sup>3</sup> Based on the need for quick mobilization to respond to threats from Native Americans on the western frontier, "a specific portion of the militia, well trained, well equipped, and set aside as a ready force" was created.<sup>4</sup> This select portion of the militia was known by various names over the colonial years but by the time of the fighting at Lexington and Concord was known as the Minutemen. These men, far from waiting in anonymity for an opportunity for action,

were mustered regularly and provided with arms and gunpowder by their towns. Each town was responsible for its militiamen as part of an overall command controlled by the royal authorities.<sup>5</sup>

In the fall of 1774, with a standing British army occupying Boston and General Thomas Gage limiting the power of town meetings, the Massachusetts colonists dismantled the king's militia and developed their own militia on the old framework. Towns collaborated through a provincial congress to organize their militia and Minuteman companies. "Towns, not individuals, decided to fight,"<sup>6</sup> and fight they did. When the British under Gage attempted to seize common stores of gunpowder and arms, they faced a combined force of Minutemen and regular militia numbering fourteen thousand men, who had been called out on a few hours' notice.<sup>7</sup> As all American schoolchildren learn, the British took massive casualties and had to fall back all the way to Boston.

An obvious, essential truth about the first battle of the war is often lost, and not only on the Insurrectionists. This nascent revolution was no spontaneous uprising of individuals feverishly reacting to British provocations. It was the deliberate and thoughtful action of a people, working collectively through their local governments, to rebel against a political system that denied them representation. As John R. Galvin notes, "It is ironic that the militia and the minute men, who together wrested their army from the control of the Crown, doubled it in size, equipped it with 20,000 muskets and 10,000 bayonets, and trained it secretly all one winter, are praised as an example of soldiers who fought well with no organization, no equipment, no training, and no planning."<sup>8</sup>

Not all of the colonial militia organizations shared such glorious success or were as effective as the Massachusetts militia. Both Washington and his military protégé, Alexander Hamilton, observed the militias at close quarters during the war and generally thought them worse than useless as a fighting force.<sup>9</sup> As Washington famously stated about the militiamen, they "come in, you cannot tell how; go, you cannot tell when, and act, you cannot tell where, consume your provisions, exhaust your stores, and leave you at last at a critical moment."<sup>10</sup> The militias' effectiveness and focus varied from state to state. The South Carolina militia, for example, was so focused on its role as a slave patrol that it lost its usefulness as a military force.<sup>11</sup>

One thing stayed constant: the militia was not a group of individuals banding together on an ad hoc basis. It was fully a creature of the community. Historian Saul Cornell notes, "Colonists who bore arms did not act as isolated individuals, but rather acted collectively for the common defense, and did so within a clear set of legal structures established by colonial and British law."<sup>12</sup> The community thus had no compunction about regulating the use and storage of firearms or membership in the militia. After independence, the "regulations could be quite intrusive, allowing government not only to keep track of who had firearms, but also requiring citizens to report to muster or face stiff penalties."<sup>13</sup> As one would expect, blacks and Native Americans remained outside the militia structure, but in colonial America, so were "white servants and apprentices, and free white men on the move."<sup>14</sup> In short, at the dawn of American Revolution, firearms played a role in fighting British tyranny but did so only within the context of the institution of a well-regulated militia, which was wholly controlled by and accountable to the community through a legislative body.

The right to resist tyranny served a political function, so it could be exercised only within a structure provided by a sovereign—as in a militia—and was understood as a political or structural right. Voting is a good example of this type of right. Each citizen in a democracy has an individual right to vote, but not without limits. An individual, for example, cannot vote any time he or she pleases or at any place he or she chooses but can vote only at the intervals and in the manner established by the legislature or constitution.

The right to arms for self-defense, conversely, was a natural right modified and limited by centuries of common law and was seen as an individual right. The right to self-defense was not open-ended, either, and the common law imposed an obligation on an individual who felt threatened to take advantage of reasonable alternatives to violent confrontation with an aggressor. But when that same individual had his or her back to the wall, he or she was allowed to "turn on his assailant." By contrast, revolution, which is an effort to deliberately pit one political unit against another, is a decision that a citizen has no legal authority to make.<sup>15</sup> As Cornell points out, "Without legal authority, a group of armed citizens acting on their own was little more than a riotous mob."<sup>16</sup>



This does not mean that colonial Americans frowned on private ownership of firearms, only that the right to use firearms to defend against tyranny was, as Lord Blackstone, the eminent legal thinker, put it, "a public allowance, under due restrictions."<sup>17</sup> Blackstone categorized the right to bear arms as a necessarily "auxiliary" right to protect the great rights of life, liberty, and property. Professor John Goldberg outlines Blackstone's four other auxiliary rights: "(1) the right to parliamentary government; (2) the right to clear limits on the royal prerogative; (3) the right to apply to the courts of justice for redress of injuries; (4) the right to petition the King, or either house of Parliament, for redress of grievances." Goldberg clarifies that these were rights that Englishmen enjoyed to protect their primary rights and that the king was bound by the customs of England's unwritten constitution to provide a structure under the appropriate conditions for their exercise.<sup>18</sup>

After the fighting broke out in Massachusetts and the Crown's authority had disintegrated, a new government needed to be formed. But as historian Gordon Wood observes, "The Massachusetts Congress was reluctant 'to assume the reins of civil government' on its own authority and perhaps thereby to disrupt the unity of the colonies. Therefore in May 1775, Massachusetts applied to the Continental Congress for the 'most explicit advice, respecting the taking up and exercising the powers of civil government,'" and other colonies followed, seeking "the sanction of the Congress to form governments."<sup>19</sup> This revolutionary movement's purpose was not a return to the state of nature but, as John Adams put it, "to glide insensibly, from under the old Government, into a peaceable and contented submission to new ones."<sup>20</sup>

At each step on the march to Independence, the delegates to the Continental Congress and similar revolutionary bodies sitting in the colonies (soon to be states) cloaked their actions in laws, deliberation, and collective decision making. Revolution was not a private grievance and could not be executed individually. The American Revolution did not rest on the backs of citizens disgruntled about a tax law or land-use issues. This revolution was the work of a people intent on protecting their collective liberty. Relying on Adams, Wood argues, "No specific acts of the government against the people could sanction revolution. Only 'repeated, multiplied oppressions,' placing it beyond all doubt

'that their rulers had formed settled plans to deprive them of their liberties,' could warrant the concerted resistance of the people against their government."<sup>21</sup> The actions taken by the Americans were carried out as a whole people.

Yes, some British loyalists opposed the stance taken in Philadelphia, but the decision had legitimacy because it rested not on private grievance but rather on collective oppression and was advanced by the people as a whole. Ron Chernow quotes Alexander Hamilton to show that the "American Revolution had succeeded because it was 'a free, regular and deliberate act of the nation' and had been conducted with 'a spirit of justice and humanity.' It was, in fact, a revolution written in parchment and defined by documents, petitions, and other forms of law."<sup>22</sup>

Our founding document, the Declaration of Independence, thus expresses the idea of revolution in a context of legal change and collective action. The Insurrectionists often refer to the Declaration as a statement of first principles.<sup>23</sup> Daniel Polsby and Don B. Kates Jr. take this argument a step further, calling the Declaration a "code of revolutionary procedure" and arguing that by applying this code, it is easy to distinguish the Timothy McVeighs of the world from the founders. While Polsby and Kates acknowledge that revolution is never a private right, they concoct an individual right of self-defense against government tyranny out of this most public right.<sup>24</sup> This is little better than sophistry. While revolutionary in nature, the Declaration of Independence is not an individualized call to arms to vindicate personal grievances. The signers were no anarchists; they yearned not to create perpetual revolution but to form the basis for a new government that could vigorously protect liberty.

The Declaration includes a laundry list of wrongs inflicted by the king on the colonists. These complaints are not individualized but apply to the people as a whole and affect their most fundamental liberties—liberties that they had come to expect as British citizens. The grievances detailed include, "He has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures"; "He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the

Rights of the People"; and "He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers." Such a litany shows the total breakdown of representative democracy as understood by eighteenth-century Englishmen and the total inability of any forum provided by the Crown to vindicate the colonists' rights. Seen through modern eyes, these grievances make a compelling case for a change of government. What is remarkable about the document, though, is that it is not a bill of rights or a plea for individual protection. It declares with great lucidity that liberty is best protected in a representative system.

We all know Thomas Jefferson's majestic phrase from the Declaration, "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." But we are less familiar with the next phrase, which clearly indicates the early American view that representative government best protects liberty: "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." Jefferson noted not only that the people have the power to abolish oppressive government but that the object was "to institute new Government" with enough energy to protect the people by "organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."

The founders were not a collection of antigovernment zealots seeking to undo the oppressive yoke of government. They believed that representative government is the protector of individual liberty. The Declaration itself shows the intent to give government the "power" to protect liberty. Wood documents that getting rid of government was not the point of the revolution. "Liberty," good Whigs continually emphasized, "does not consist in living without all restraint"; "without the pooling of each man's liberty into a common body, no property would be secure."<sup>25</sup> The men who signed the Declaration of Independence were not seeking to get rid of laws altogether. They simply wanted to live under laws initiated by them or by their elected representatives. Far from seeking a return to the state of nature, where factions had to have arms and where might made right, they wanted a government that

would be both representative and energetic. Unfortunately, the new state governments and the Articles of Confederation came nowhere close to giving the government enough power to protect the people's liberties. In a few years, the founders realized that the government needed much more authority to curb the excesses of the states and their citizens.

The path to independence that started at Lexington and Concord was sealed with the British defeat at Yorktown. The path took many unexpected and dangerous turns, and even in victory, a number of deep flaws in the new confederation of states were exposed. All of these flaws stemmed from a lack of central government power. As Americans went about the business of setting up new state governments, they grappled with how states should work together. They understood that fighting the British could not succeed on a state-by-state basis but needed coordination. Yet in the process of shedding the oppression of a distant government, citizens were not enthusiastic about pledging allegiance to a national government that could seem equally remote in the days when the fastest communication was by horseback or sailing ship. As a result, the compact between the states, documented in the Articles of Confederation, left Congress without the basic mechanisms to administer a country. Lacking the authority to tax or recruit troops, Congress was without much of the power of contemporaneous European countries, against which it was forced to compete for military and commercial supremacy. The Articles left the new Congress completely dependent on the state governments.<sup>26</sup>

This arrangement severely hampered the war effort. In 1776, the colonists had no professional fighting force. From the beginning, Washington never had enough troops or supplies to prosecute the war effectively. In accordance with the republican ethic against a standing army, most of the Massachusetts militiamen that locked up the British in Boston were volunteers uninterested in extended military service in the Continental Army.<sup>27</sup>

Under the Articles of Confederation, Congress had the authority to decide on the number of troops needed, but the states could decide whether to fill the requests. States that turned to the draft when volunteerism failed, as it often did, gave potential draftees the option of find-

ing substitutes or paying fines, and "the men hired were generally those most in need of the money, that is, at the economic bottom of society."<sup>28</sup> Washington's army, then, consisted of fighters who were there solely for the money as well as untrained state militias and short-term enlistees, at least in the beginning. Washington had no faith in the militia units that came in and out of his army and remained concerned about the quality of his army throughout the war. "A year before the decisive victory at Yorktown, [Washington] wrote that 'I most firmly believe that the Independence of the United States will never be established till there is an Army on foot for the war.'"<sup>29</sup>

In addition to the lack of a professional army, Washington was hampered by shortages resulting from the inability of Congress, which had no power to directly levy taxes, to collect the necessary revenues for the war. The suffering of Washington's troops in the winter of 1777–78 is well known, but it is worth reflecting on how a country that had abundant resources and was generally prosperous could let thousands of its revolutionary soldiers slowly die from malnutrition and exposure. As Wood sees it, "The war with Britain had scarcely begun before the nature and tendency of American behavior was frighteningly revealed. The self-sacrifice and patriotism of 1774–75 soon seemed to give way to greed and profiteering at the expense of the public good."<sup>30</sup> The public virtue that had characterized the years leading up to independence quickly seemed to dissipate. It was not that the new country was too poor to support an army but that "the financial demands of a centralized army recruited in this way were simply too great for the fiscal system to handle; it was not a problem of war being too much for available resources."<sup>31</sup> Congress was incapable of arranging the necessary logistical support for the war effort, forcing Washington literally to scavenge the land for food and clothes, even resorting to cattle rustling to support his troops in some meager way. In addition, the lack of a reliable revenue source made it difficult to borrow money, float currency, or even pay the troops and officers.<sup>32</sup>

Fortunately for the Americans, the British, after initially underestimating the broad-based support for the rebellion, changed course and tried to encourage social division within the colonies by arming Cherokee Indians, encouraging slaves to turn against their masters, and arm-

ing and activating the loyalist minorities. This strategy ultimately backfired by "providing the motivation for continued American resistance when the initial enthusiasm seemed to have burned out." With the help of the French, who were determined to turn a "colonial war into a global war," a conflict that could have dragged on even longer shuddered to a merciful conclusion.<sup>33</sup>

## The Articles of Confederation

The war accomplished its objective of driving the British and their oppressive policies out of the former colonies, yet it was nearly a disaster. Government bankruptcy caused a crisis in the latter part of the war that pushed the administration of the effort down to the state and local levels. This weakness was not lost on Washington and his brethren who served in the war. They had been forced to cope with Congress's inability to support a real army and learned firsthand what happens when a government is too weak to efficiently sustain a military campaign. Washington warned his departing troops that "unless the principles of the federal government were properly supported and the powers of the union increased, the honour, dignity, and justice of the nation would be lost forever."<sup>34</sup> In December 1783, as Washington made his way to the temporary capital in Annapolis, where the Continental Congress was still in session, to resign his commission as commander in chief, he was honored with many galas and feasts. At Wilmington, Delaware, after listening to thirteen toasts, he offered his own: "Competent powers to Congress for general purposes."<sup>35</sup>

After the war, the military weakness created by the unworkable division of power between Congress and the states persisted. Under the Articles of Confederation, Congress was unable to protect the "union's commercial and territorial interests,"<sup>36</sup> and the Continental Army was reduced to eighty men. In 1787, as the Constitutional Convention got under way, a mere seven hundred men were in the military service of the new nation.<sup>37</sup> The men who gathered to draft a new constitution understood that the union desperately needed to strengthen its military and fiscal powers.<sup>38</sup> John Shy maintains that "the harsh realities of a protracted war, more than anything else, explain the difference between

the euphoria at Philadelphia in 1776, when Congress declared independence, and the hard-headedness of many of the same men, when eleven years later, in the same city, they hammered out a federal constitution."<sup>39</sup> But other serious issues also brought these men back to Philadelphia.

If the Articles of Confederation hamstrung the Congress, the state governments were not in much better shape. It was not that their constitutions left the state legislatures powerless; in fact, fear of monarchy and centralized power in general had allowed the drafters of the state constitutions to create legislatures with almost no executive or judicial checks and balances. The accumulation of all powers in the legislatures, even though they were thoroughly democratic in the purely majoritarian sense of the word, created a situation where the rule of law was applied according to "crude notions of equity."<sup>40</sup> States confiscated private property and prevented creditors from collecting debts, passed *ex post facto* laws, and violated basic principles of justice. Wood has found that "an excess of power in the people was leading not simply to licentiousness but to a new kind of tyranny, not by the traditional rulers, but by the people themselves."<sup>41</sup>

If the states through their legislatures were exercising arbitrary power, the citizens were trying to collect power directly in their own hands. Lacking any real redress in the face of laws that seemed onerous or unfair, the people often used extralegal activity such as committees, conventions, and even mob violence to accomplish desired ends. Wood calls this phenomenon "the people out-of-doors" and explains that it was a common feature of the prerevolutionary colonies. Immediately prior to independence, mob violence had decreased as revolutionary associations came to control and regulate almost all aspects of daily life. But by the late 1770s, when Congress and the state legislatures started passing laws that negated some of the economic rules adopted by the revolutionary associations, *ad hoc* local and state committees tried to assert the "real will" of the people against the legislatures. These committees instigated serious and recurrent riots in all of the major cities.<sup>42</sup>

Wood reports that by 1784, even the radical Samuel Adams "had come to believe that 'popular Committees and County Conventions are not only useless but dangerous.' When they were used in place of royal

legislatures, they had served 'an excellent Purpose,' but 'as we now have constitutional and regular Governments and all our Men in Authority depend upon the annual and free Elections of the People, we are safe without them. . . . Bodies of Men, under any Denomination whatever, who convene themselves for the Purpose of deliberating upon and adopting Measures which are cognizable by Legislatures only will, if continued, bring Legislatures to Contempt and Dissolution.'"<sup>43</sup> Nowhere were the people out-of-doors creating more chaos than in western Massachusetts, where Shays's Rebellion had dragged the people back to the state of nature. Mob rule was the only source of law.

Shays's Rebellion brings into sharp relief the changes that guided America's leading men to rethink their theories about government and ultimately to produce the new constitution with its expanded role for the central government. If it is true that revolutionary ideology played an honorable role in helping the Americans win freedom from the British, then it is equally true that the same ideology contributed to the chaos of lawlessness and mob rule that characterized the 1780s. And because Americans were well armed, when this ideology turned inward, it had ugly and dangerous consequences. Modern-day "revolutionaries" who believe that individuals should be prepared to topple tyrannical government acknowledge only half of our historical experience. America was born by revolution, but our founders, having witnessed the horrors of the mob, opposed creation of a permanent condition of revolution. Citizens with guns who challenged the laws of legitimate government were considered criminals, not revolutionaries, even before the Constitution was finalized. The fatuous idea that the Constitution and its amendments legitimized armed insurrection ignores altogether the purpose of the Constitutional Convention. The men gathered at Philadelphia clearly wanted to create a stronger central government. They knew a government that could not cope with insurrection would put the liberties for which they had just fought so hard at risk.

In 1786, farmers in western Massachusetts, led by, among others, Daniel Shays, asserted their natural right to take up arms against a tyrannical state government to protest the heavy taxation and tight fiscal policy that were causing financial hardship and foreclosures. The rebels took on the trappings of a militia, even though they were operat-



ing in opposition to state authority, and invoked the symbols of the revolutionary militia in an effort to distinguish themselves from an ordinary mob. Using their muskets and other weapons, they closed the courts in Northampton and other western Massachusetts cities to prevent further foreclosures. In doing so, the Shaysites relied on their perceived natural right to bear arms, which they claimed did not depend on the state constitution. When Governor James Bowdoin called out the militias, many of the towns' militias declined to act against the protesters. The governor, with the help of the Continental Congress, eventually raised an army to quell the rebellion. In response, the Shaysites moved toward Springfield in an attempt to seize the federal arsenal there. The government troops, under the direction of Secretary of War Henry Knox, used artillery to drive off the rebels and protect the arsenal. He then gave chase and forced Shays's forces to scatter. Through state and federal force, the rebel movement collapsed.<sup>44</sup>

Shays's Rebellion clearly illustrates the distinction between insurrection and revolution. The Shaysites believed that they were the true "body of the people" rising together to resist a tyrannical government. Shays did not see his uprising as one of individuals but rather as a local "communitarian" reaction to a distant and unresponsive government. Shays's opponents, who called themselves the Friends of Order, believed that the Shaysites were nothing more than an armed mob. According to Cornell, "In their view, American Independence had banished the right of armed resistance against constitutional government. . . . In a situation in which representative institutions and courts of law were functioning, the rule of law, not arms, was the primary guarantee of life, liberty and property."<sup>45</sup> Not only did the Friends of Order carry the day militarily, but the fear of mobs engaging in insurrectionary activity was a major impetus for the Constitutional Convention in 1787.

Washington, already deeply concerned by the weakness of Congress, found himself compelled by the rebellion in western Massachusetts to return to public life, and he made the difficult decision to attend the Constitutional Convention in Philadelphia. This was not an uncommon move among the men who gathered to write the new constitution.<sup>46</sup> "Bitter experience of fighting from weakness had all but obliterate

ated the naïve optimism of 1775, and had sensitized Americans to their own political peril. Fearful prophecies, based on dismal fact, functioned to defeat those prophecies by channeling political energies into the struggle against anarchy. . . . Nothing was feared more by leaders in the postwar era than disunion, and most people felt the same way."<sup>47</sup>

Americans in 1776 may have thought that their virtue and goodness would exempt them from the need for strong government, but by 1787 their experience with war and domestic unrest convinced leading citizens to go about building a state in earnest. Wood chronicles the opinions of some of these citizens as they faced the task of writing a new constitution: "'We were, at the commencement of the late war, but novices in politics,' wrote Thomas Tudor Tucker of South Carolina in 1784, 'and it is to be wished that we may not now be too indolent to correct our mistakes.' After lopping off 'the monarchical part' of the English constitution, 'we vainly imagined that we had arrived at perfection, and that freedom was established on the broadest and most solid basis that could possibly consist with any social institution. That we have in some points been mistaken, is too evident to be denied.'" Wood quotes Benjamin Franklin: "We have been guarding against an evil that old States are most liable to, excess of power in the rulers, but our present danger seems to be defect of obedience in the subjects."<sup>48</sup>

This thinking represented a dramatic change from the idea of 1776 that liberty required only the removal of a powerful government. By the mid-1780s, it seemed apparent that a strong government was needed to preserve the precious liberties for which men had died in the revolution. According to Wood, "The early state constitutions had rendered government too feeble. 'The principal fault,' constitutional reformers agreed, 'seems to be, a want of energy in the administration of government.' In nearly all of the states there were growing demands that the libertarian bias of 1776 be corrected, that the apparent licentiousness of the people be offset by an increase of magisterial power in order to provide for the 'execution of the laws that is necessary for the preservation of justice, peace, and internal tranquility.'"<sup>49</sup> Max Edling quotes America's third Supreme Court justice, a drafter of the Constitution, to make a similar point: "'We combine in society, with an expectation, to have

our persons and our properties defended against unreasonable exactions either at home or abroad,' Oliver Ellsworth said. If the government cannot do so, 'we do not enjoy our natural rights.'"<sup>50</sup>

## The Constitution

At the dawn of the new constitutional government in America, then, the issue was not how to perpetuate conditions where armed revolution would remain available as a permanent check on overreaching by the central government but rather how to create a society stable enough to protect liberties. Of course, some prominent citizens remained fearful of centralized power, and the debate between the two sides was played out in the course of drafting the Constitution. To a large degree, however, the group favoring a stronger government, known as the Federalists, succeeded in their goal. A constitutional guarantee for an individual right to armed insurrection would have been wholly inconsistent with the purpose of the constitutional gathering. Any attempt to read these events differently must come to terms with the fact that a major reason the Constitution was organized was to give the government the power to put down armed insurrection. The Insurrectionist contention that the framers intended to protect the accumulation of artillery and cannon and the stockpiling of small arms in private hands to protect against potential government tyranny is counterfactual.

Of course, the Insurrectionist worldview is not informed entirely by historical argument, accurate or otherwise. The Insurrectionists say that no matter what the historical context may have been, the Second Amendment enshrines our right to have guns free from government regulation. This argument does not stand up to scrutiny. The Constitution formed a new basis for governing in America. No longer would Congress have to rely on requests to the states because it would have the authority to act on its own. The Federalists sought to create a polity that had enough power to ensure stable government.<sup>51</sup> The Federalists were determined to vest the new country with the fiscal and military authority to defend commercial interests and territorial integrity, including the power directly to levy taxes and to raise a standing army. In addition, the Constitution gave Congress direct if not exclusive power over

the militia. Historian Garry Wills makes a persuasive case that the Constitution has a series of clauses that were “framed and passed precisely to put down domestic insurrections,” including, among others, Article III, Section 3, Clause 1, which makes treason a constitutional offense; Article I, Section 8, Clause 15, which specifically provides for the calling forth of the militia to “suppress insurrections,” not to acquiesce in them; and Article I, Section 8, Clause 16, which requires that Congress train and discipline the militia.<sup>52</sup>

At the Constitutional Convention, the debate about the military clauses was relatively brief, but it framed the objections that would arise at the state ratifying conventions. Edling observes that “anti federalist critique against the Constitution’s army clauses centered on the transfer of military power from the states to Congress. To them, the centralization of power brought about by the Constitution threatened the continued existence of two institutions which they believed to be vital to the preservation of liberty: the militia and the state assemblies. These provided the people with the means to withstand the possible abuse of power by the central government. Should the militia and the state government be swallowed up by Congress, this would tip the balance of power decisively in favor of the national government, which would then be able to pursue whatever actions it chose regardless of popular opposition.”<sup>53</sup> Ellsworth, who went on to become a great defender of the national government, insisted that “the authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power.”<sup>54</sup>

Obviously harkening back to the disrepair of the militia in the Revolutionary War, James Madison responded to this concern by stating that “the primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose; in like manner as the militia of a State would have been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a National concern, and ought to be provided for in

the National Constitution."<sup>55</sup> Let's be clear. The debate about the militia played itself out within the broader debate about federalism. This was a battle not about individual rights but about whether the state or federal government would control the militia.

The state ratification debates forced the Federalists to defend their consolidation of military power. In truth, the leading Federalists had no use for the militia. Ill-trained and unprepared, with few exceptions, the militia would not be an adequate force to help build the new nation. The Antifederalists were concerned that Congress would either use its power to remove the militias from state control or neglect the militias. The Antifederalists worried not that individuals would lose their right to own guns but that Congress would interfere with state prerogatives regarding the militia. For example, according to Cornell, "Virginians were especially worried that federal control of the militia would threaten their state's ability to put down insurrections, a particularly frightening prospect for a state with a large slave population."<sup>56</sup>

These federalism concerns were captured in a debate between Patrick Henry and James Madison at the Virginia ratifying convention. Henry complained that since the draft Constitution prohibited states from using their own militias to go to war unless they had been invaded, he believed that states would not be able to suppress insurrections.

If you give this clause a fair construction, what is the true meaning of it? What does this relate to? Not domestic insurrections, but war. If the country be invaded, a state may go to war, but cannot suppress insurrections. If there should happen an insurrection of slaves, the country cannot be said to be invaded. They cannot suppress it without the interposition of Congress. . . . The State legislatures ought to have power to call forth the efforts of the militia, when necessary.<sup>57</sup>

Madison responded by showing that dual sovereignty over the militia was the ultimate protector of the people's liberty:

Let me ask . . . what we are to understand from [Henry's] reasoning. The power must be vested in Congress, or in the state governments; or there must be a division or concurrence. He is against division. It is a political

monster. He will not give it to Congress for fear of oppression. Is it to be vested in the state governments? If so, where is the provision for general defence? If ever America should be attacked, the states would fall successively. It will prevent them from giving aid to their sister states; for, as each state will expect to be attacked, and wish to guard against it, each will retain its own militia for its own defense. Where is this power to be deposited, then, unless in the general government, if it be dangerous to the public safety to give it exclusively to the states? If it must be divided, let him show a better manner of doing it than that which is in the Constitution.<sup>58</sup>

Of course, the Constitution was ratified by the states, but some, like Virginia, offered amendments to be considered in the first Congress. Despite the evidence that the Constitution was crafted specifically to prevent insurrection, the Insurrectionists claim that what eventually was ratified as the Second Amendment changed the equation, preserving not only the right of insurrection but making it personal and individual. We cannot look here at every argument surrounding the Second Amendment, but we believe that there is one "right" it does not protect: a decision by individuals to take up guns against the state or federal governments. The Second Amendment reads, "A well regulated militia being necessary to the security of the free state, the right of the people to keep and bear arms shall not be infringed." The first clause clearly talks about the necessity of a militia and even links this need with the protection of freedom. The second enumerates a right of the "people" but does so in a way that clearly links it to a military purpose, "keep[ing] and bear[ing] arms." Even a cursory reading indicates that this was not intended simply to be a guarantee of personal protection.<sup>59</sup>

Dissenting delegates in Pennsylvania issued a document that is most often associated with an individual right to bear arms outside of a militia, and Insurrectionist "scholars" frequently cite it. The Pennsylvania dissent stands as one of the very few instances in which that right was described in terms that arguably contemplate an individual right. But as Cornell points out, the "dissent" was issued by a minority of delegates that had failed to garner enough support in the Federalist-dominated Pennsylvania convention to stop the Constitution from being

affirmed or even to get the convention to add a list of suggested amendments.<sup>60</sup>

The complaints emanating from the state conventions and the Antifederalist commentators, like those that arose during the Constitutional Convention, were directed not at the absence of a guarantee of an individual right to own or use firearms (for whatever purpose) but at Congress's power to raise a permanent military force under the control of the central government. Antifederalists opposed the idea of a standing army in times of peace and the threat that centralized control over the nation's military posed to the role of the various state militias.<sup>61</sup>

These concerns about the relationship between a national standing army and the state militias were raised and were a subject of serious debate, but there is no basis for concluding that the Second Amendment represented a decision to give the Antifederalists what they wanted. During the debates over the Second Amendment in the first Congress, the overwhelming Federalist majorities ensured that the powers delegated to the national government in the body of the Constitution were left intact. The records of the debate make it clear that the goal was to ensure that the state militias would not be displaced, and there was no discussion at all about the merits of protecting an individual right to own or use a gun, much less about the purposes that might be served by recognizing such a right in the Constitution. "The amendment, as revised, would still assuage Anti-Federalist concerns by stating a principled commitment to the value of a militia. But it would not hinder Congress in using its best judgment to determine how to organize, arm, and discipline an effective militia."<sup>62</sup> Constitutional historian Paul Finkelman adds,

Madison and the great Federalist majority in the First Congress rejected any amendments that undermined the power of the national government. Is it conceivable that they failed to follow this philosophy with the Second Amendment? That they meant to implement the demands of the Pennsylvania anti-Federalists and, in effect, eviscerate the power of the national government? Such an argument goes against the entire history of the period.

Hence, the Second Amendment prevents Congress from abolishing

the organized or “well regulated” state militias. . . . Madison and his colleagues provided for an amendment dealing with the militia because most of the states that proposed amendments wanted some guarantee that Congress would not destroy their militias.<sup>63</sup>

Of course, there was no shortage of Antifederalist criticism of the Constitution. Patrick Henry, for example, wanted the Constitution revised to give more power to the states on the grounds that they were most likely to protect the people’s liberties. Henry did not see the Bill of Rights as achieving any new distribution of power. Henry had used the lack of a bill of rights to campaign against the Constitution,

but when offered the Bill of Rights in 1789 he balked. Henry fully understood that a bill of rights would destroy the possibility of achieving his real goal, which was to destroy or completely undermine and remake the new Constitution. Henry and his cohorts correctly realized that if the lack of a bill of rights was no longer an issue, many of the softer anti-Federalists would be satisfied with the Constitution and accept the new government.<sup>64</sup>

This is exactly what came to pass. Madison and most Federalists were unwilling to go along with any more significant limitations on the powers delegated to the new national government. Madison was willing to consider a bill of rights because he did not think it altered the constitutional relationship between the states and the federal government. Finkelman writes, “The Bill of Rights did not shift any political power from the national government to either the states or ‘the people.’ In Madison’s mind it merely clarified the constitutional powers, rights, and responsibilities of the national government.”<sup>65</sup>

The structural amendments favored by many of the leading Antifederalists were defeated in the first Congress, including the amendments that would have limited the federal government’s military power. “The Antifederalists had lost. They wanted the militias as an alternative to a standing army. When they got militias and a standing army, they were not satisfied.”<sup>66</sup> Instead of a major body blow to the federal structure, a bill of rights was added as the first ten amendments, among them the



Second Amendment, which the Antifederalists did not support. The Insurrectionists are fond of quoting from Henry, Jefferson, and other Antifederalists to buttress the contention that the framers of the Constitution were intent on limiting the power of the federal government but neglect to acknowledge that the Antifederalists were on the losing side of the argument about whether to entrust the central government with more authority, both in general and with regard to the control of military forces.

Moreover, Cornell shows that with few exceptions, even those on the losing side of the constitutional debates did not consider the "right to keep and bear arms" to imply an individual right to take up arms against the government. For example, Cornell analyzes the thinking of St. George Tucker, one of the leading Antifederalist jurists of the revolutionary period. Tucker was a law professor at the College of William and Mary in Williamsburg, Virginia, and was well acquainted with the happenings at the Constitutional Convention. His treatise on Blackstone, published in 1803, was an important commentary on the laws and constitution of the new republic.<sup>67</sup> In Tucker's notes to his law lectures, which were made contemporaneously with the adoption of the Constitution and the Bill of Rights, he "accepted the common view that most citizens would own their own muskets, or other militia weapons. In the case of Cavalry officers, one might own a horsemen's pistol, but the constitutional protection accorded these weapons was clearly connected to their function as standard militia weapons. Guns without any connection to the militia were subject to the full scope of the individual states' police powers."<sup>68</sup> Tucker believed that the Second Amendment embodied the ancient right to resist government tyranny, but that right could only be exercised within the context of state law.

This idea, of course, was anathema to the Federalists, who had remained adamant that "an appeal to arms" would destroy the Constitution.<sup>69</sup> The important point here, though, is that even those Antifederalists who claimed that the Second Amendment guaranteed a right to use violence against the government thought that this right was limited to the states. They understood that the state "enjoyed tremendous latitude to legislate on a broad range of issues that could restrict individual liberty. As long as government's actions were a product of the people's

own representatives, government was entitled to limit the actions of its citizens in a manner consistent with the public good." Leading Antifederalists such as Maryland lawyer Luther Martin believed that arbitrary power could be resisted by arms but "did not advocate a permanent right of revolution or an individual right of resistance." Instead, they believed that "state control of the militia was the proper check on . . . arbitrary authority."<sup>70</sup>

"Brutus," a widely reprinted Antifederalist commentator, clarified the point that the constitutional debate with the Federalists was a discussion over federalism itself and whether power should reside in the state or federal governments. Responding to Hamilton's contention in Federalist 23 that the national government should retain unlimited military power, "Brutus" wrote,

The *protection and defence* of the community is not intended to be entrusted *solely* into the hands of the general government, and by his own confession it ought not to be. It is true this system commits to the general government the protection and defence of the community against foreign force and invasion, against piracies and felonies on the high seas, and against insurrections among ourselves. They are also authorised to provide for the administration of justice in certain matters of a general concern, and in some that I think are not so. But it ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other—Protection and defence against the murderer, the robber, the thief, the cheat, and the unjust person, is to be derived from the respective state governments.<sup>71</sup>

Of course, variations existed among the Antifederalists, and Cornell's groundbreaking work, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828*, details the distinctions among the elite, middling, and plebeian views of the Constitution. The majority of the Antifederalists agreed, however, that the states were the guardians of liberty. Although the middlebrow Antifederalist essayist "Federal Farmer" wrote "that the militia, when properly formed, are in fact the people themselves," Cornell points out that "Federal Farmer"

believed that "state control of the militia 'places the sword in the hands of the solid interest of the community, and not in the hands of men destitute of property, or principle, or of attachment to the society and government.'" <sup>72</sup> This writer's view of protection against government tyranny was not to spread guns around indiscriminately and hope for the best. He believed that the militias should remain tightly under state control.

Of course, some Antifederalists saw armed resistance to government as an individual right. In December 1878, as the Pennsylvania convention ratified the Constitution, Federalists attempted to mark the victory with a celebration in Carlisle. Antifederalists were determined to stop the festivities and rioted for several days, burning and executing effigies of leading Federalists. When several of the rioters were arrested, local militia units marched through the streets and secured their release. <sup>73</sup> For Antifederalist "plebians" (Cornell's word) who organized in militia units, "the right to bear arms included the right of citizens to organize spontaneously as militia units to defend their liberties." <sup>74</sup>

Most Antifederalists, however, were repulsed by this sort of behavior and recognized it as repugnant to the democratic order. "The specter of mobocracy frightened many Anti-Federalists. . . . To members of the Anti-Federalist elite, the right to bear arms and the militia were legal only within the structures provided by the states." <sup>75</sup> It is not surprising, then, that the first Congress soundly rejected any amendments to the Constitution that could change this understanding, such as those proposed in the Pennsylvania minority dissent. The Constitutional Convention was called in direct response to Shays's Rebellion and other mob violence. The Constitution was drafted with those events in mind, and it gave plenty of power to Congress to suppress these kinds of uprisings. The suggestion that the Carlisle riots persuaded the Federalist majority in Congress of a need to curb the power of the central government or to recognize a right of private citizens to use force against it simply makes no sense.

Insurrectionist theorists often argue that the Second Amendment's reference to a right of the people, rather than a right of the states, is an express recognition of a role for armed citizens acting outside of government control in the defense of liberty. Cornell, however, offers a

compelling explanation for the Second Amendment's reference to individual rights in the context of militias under the control of the states—it was intended to guarantee an individual right to bear arms in a state's well-regulated militia, free from federal interference. Cornell contends that the Second Amendment leaves under the control of the states decisions about how the militia is called up, when it drills, and what arms soldiers can carry and where.

So why is the Second Amendment directed at the right “of the people” to bear arms and not to the rights of the states to maintain militias? Cornell argues that the Second Amendment guarantees the right of individuals to participate in a well-regulated state militia in much the same way that individuals have a right to vote or to be included in the pool of citizens selected for service on juries: “Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as a civic right. Such a right was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner. Freedom of religion, freedom of the press, trial by jury were genuinely rights belonging to individuals, and were treated differently than were civic rights such as militia service, or the right to sit on juries.”<sup>76</sup> The right to serve on a jury is an individual right that is exercised collectively. In other words, no individual is entitled to be selected to serve on any particular jury, but no category of citizen may be excluded from service on a jury based on an arbitrary classification or invidious discrimination—for example, race or status as a property owner. The Second Amendment is an individual right, but not in the way that the Insurrectionists think.

In any event, the Second Amendment was not a codification of a natural right of self-defense against our government. David Konig notes that even Jefferson did not see the Second Amendment as a license for individuals to amass arms to vindicate their own interests, describing Jefferson as “consistent in his beliefs about states’ rights and civic republicanism, and supportive of the civic right—and thus obligation—of the individual to keep and bear arms collectively in a manner consistent with the Second Amendment as a guarantor of a republican revolution.”<sup>77</sup> Jefferson thought the state militias needed to be protected from

meddling by the federal government, but not because he believed individual citizens or the states had reserved the right to make war on the federal government. Jefferson understood that the new constitutional government ended any "recourse to arms,"<sup>78</sup> but he also thought that the state militias were an important local training ground for republican virtue, about which he cared deeply. For this reason, Jefferson did not want to see state militias subsumed by the military forces of the national government. Konig concludes that "for Thomas Jefferson the creation of a well regulated militia did not require a virtuous citizenry; rather, the creation of a virtuous citizenry required a well regulated militia."<sup>79</sup>

The states were not clamoring to protect their militias to preserve their ability to depose the federal government. The militias were needed to protect the frontier and to enforce the rights of property owners to control their slaves. The question for the states was not whether to maintain the power to challenge the authority of federal government through force of arms but how to address the need for localized use of police powers.

Many of the academics who have lent some measure of intellectual legitimacy to the Insurrectionist theory of the Second Amendment ultimately agree that there is no individual right to take up arms against government tyranny or are unwilling to face the logical consequences of their position. For example, in a widely cited 1995 article in the *Georgia Law Review*, Nelson Lund claims that the government lacks the authority to regulate weapons in any manner, that individuals can own "grenades and bazookas," and that the purpose of the Second Amendment is to prevent "attempts at political oppression by the government." In a footnote, however, Lund adds that "it obviously does not follow from this proposition that the Second Amendment creates an individual right of insurrection against the government."<sup>80</sup>

Of course, it is not at all obvious that interpreting the Second Amendment as allowing for no restrictions whatsoever on the private ownership of weapons of war does not legitimize an individual right of insurrection. Lund and his intellectual comrades can't have it both ways. They cannot claim an individual right robust enough to allow personal ownership of grenades and bazookas grounded in the need to

check government power and at the same time deny that they have legitimized an individual right of insurrection. The colonial militias so heavily regulated their members because the distinction Lund attempts to draw cannot be maintained in the real world. If citizens are to keep militia weapons in their homes, then they must be regulated. Otherwise, how could the state possibly determine whom to call out to quell an insurrection, what type of weapons will be needed, what kind of ammunition the citizens should bring, who will be officers, who says "March" and who says "Retreat," how enemy infiltrators will be detected and weeded out, and so on. The colonial militias mustered regularly and kept track of who had weapons and gunpowder so that they could perform as a unified fighting force. Even if the Second Amendment is a safeguard against governmental tyranny, it does not follow that individual ownership and use of firearms cannot be regulated. How otherwise can it be subject, as even Lund grudgingly admits it must be, to the control of the states?

The evidence shows that Constitution bestows no individual right to take up arms against the government. The Constitution was created to prevent armed anarchy and insurrection, and the Second Amendment did not negate the hard work that Madison and the other framers put into creating a strong government. But does this mean that Americans must stand idly by if the government fails altogether? For example, what would happen if the government permanently suspended elections and closed the courts? As Wills observes, "One of the principal devices of the insurrectionists is to confuse the right of insurrection under (within) the Constitution with the right of revolution (which would overthrow the Constitution). . . . A people can overthrow a government it considers unjust. But it is absurd to think that it does so by virtue of that unjust government's own authority."<sup>81</sup> Cornell adds that "while the natural right of revolution could never be parted with, the notion that there could be a constitutional appeal to arms was antithetical to the idea of constitutionalism itself."<sup>82</sup>

The revolution was not forgotten, but the framers hoped that because of the Constitution, it could be a thing of the past. There could be no appeal to arms to block enforcement of an unpopular law, such as a tax provision. The Constitution was intended to channel dissent into

nonviolent, lawful avenues for political change. When pressed during the ratification debates, both Hamilton and Madison, writing as "Publius" in the *Federalist Papers*, made it clear that if the Constitution were to fail, the people's original right to self-defense would not be forgotten. According to both men, however, this right was extremely limited and its use should be avoided at all costs.

In *Federalist 46*, Madison attempted to sell the new Constitution to the country. In response to the fear that the federal government could use a standing army to usurp a state's powers, Madison wrote, in a line the Insurrectionists like to quote, "To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties." The Insurrectionists neglect, however, to include the rest of the sentence: ". . . and united and conducted by governments possessing their affections and confidence."<sup>83</sup> In context, Madison made it clear that before any resort to violence, states would "open correspondence" with one another, "plans of resistance would be concerted," and "one spirit would animate and conduct the whole."<sup>84</sup>

*Federalist 46* does not support the claim that individuals with guns are the guarantors of liberty. It affirms that even if the Constitution fails, the states are the political unit to which people must adhere, and the well-regulated militias under state control are the only vehicle available for armed response. For Hamilton, too, if the federal government were to fall under the control of a despot, the people would resist "through the medium of their State governments," though he admitted that "the apprehension may be considered as a disease, for which there can be found no cure in the resources of argument and reasoning."<sup>85</sup>

While Insurrectionists often use the abridged quotation from Madison to justify taking up arms against the federal government, Madison himself pushed for the Constitution's strong centralized powers. In fact, during the Constitutional Convention, Madison insisted that the new government should have even more muscular powers. He went so far as to propose a federal veto over all state laws—ultimately defeated, of course. When his position on this matter was revealed many years later, during the 1808 presidential campaign, his reputation as a true Federalist, concerned with balancing state and federal powers, suffered.

The bottom line is that both Madison and Hamilton were nervous about the states wielding military power. There is no evidence that they would have gone a step further and given individuals the right to take up arms independent of the states. They were willing to acknowledge that the militia is the vehicle through which the states can employ the use of force. As we have seen, this concept necessarily implies the regulation of individual gun ownership, which was well accepted and uncontroversial at the time. Moreover, both men supported giving broad powers to the new government as a way to prevent politics from turning into armed conflict.

Not surprisingly, the founders, having just fought a war of independence from Great Britain, were not ready completely to do away with the right of revolution. Conversely, their apprehension about the prospect of ongoing revolution in lieu of ordinary politics drove the Constitutional Convention. The framers were eager to put that insecurity behind them. In fact, in *Federalist* 46, Madison discussed the possibility of a conflict between states and the federal government as an unlikely hypothetical. Clinton Rossiter, a noted American historian and editor of one edition of the *Federalist Papers*, summarized Madison's conclusion: "No happiness without liberty, no liberty without self-government, no self-government without constitutionalism, no constitutionalism without morality—and none of these great goods without stability and order."<sup>86</sup>

In this context, it is difficult to view "Publius's" words as a justification for individual citizens to oppose their own government with force. As Wood concludes, "The Americans had demonstrated to the world how a people could fundamentally and yet peaceably alter their forms of government. 'This revolution principle—that, the sovereign power residing in the people, they may change their constitution and government whenever they please—is,' said James Wilson, 'not a principle of discord, rancour, or war: it is a principle of melioration, contentment, and peace.' Americans had in fact institutionalized and legitimized revolution. Thereafter, they believed, new knowledge about the nature of government could be converted into concrete form without resorting to violence. . . . The Americans of the Revolutionary generation believed that they had made a momentous contribution to the history



of politics. They had for the first time demonstrated to the world how a people could diagnose the ills of its society and work out a peaceable process of cure."<sup>87</sup>

The framers took great pride in the revolution but became disillusioned when political violence continued after the war, threatening to disrupt the consolidation of the new democratic system. The peaceful revolution that accompanied the ratification of the Constitution does not say much about gun ownership but speaks volumes about the use of force as part of the political process. The framers tried to create a system that allowed for radical change without violence. We dishonor that legacy when we prepare for the worst at the expense of the magnificent system that they created. Neither the Second Amendment nor an inchoate right to armed revolution allows for violent opposition to the policies of a democratically accountable government, even if some citizens view those policies as tyrannical. The idea that gun owners are entitled to vindicate an individual right to insurrection is dangerous folly. An individual who claims the prerogative of deciding when violent resistance to a democratic government is justified disenfranchises fellow citizens and substitutes individual judgment for democratic institutions such as the courts.

## The Founders and Insurrection

The founders did not believe that violent insurrection against the government is a legitimate avenue of dissent. In fact, many of the founders had a deep aversion to armed rebellion and did not hesitate to use state and federal government forces to crush insurrections. A number of events that transpired shortly after the ratification of the Constitution shed light on how the leading figures of the generation—the men whom Joseph Ellis has labeled the “Founding Brothers”—viewed the power of the federal government under the Constitution. Their actions after taking the reins of power uniformly show the political distance they had traveled from the days of the revolution. Revolutionary ideology served up by opponents of the new government quickly met with opposition from all segments of the political spectrum, and the use of force or the

threat of force against the new government evoked not honor but disdain. The Founding Brothers, including Jefferson, did not hesitate to use the full power of the Constitution to enforce the laws of the new government when they took their turn at the helm.

As in so many areas of the presidency, George Washington set the tone for dealing with would-be domestic rebels. When protesters tried to evade the federal excise tax on whiskey in the early 1790s, he labeled them insurrectionists and used force to subdue them. The Whiskey Rebellion forced a confrontation between the revolutionary ideal that citizens have the right to take up arms against unjust laws and the constitutional ideal that there could be no extralegal remedy to prevent enforcement of a democratically enacted law. By the end of the rebellion in 1794, almost all responsible leaders had concluded that a "revolution" against democratic lawmaking was in fact an "insurrection" against legitimate government and deserved to be treated as such.

The first test of this principle resulted from passage of a tax law. In 1791, with bipartisan approval, Congress passed an excise tax on whiskey. Distillers in western Pennsylvania took umbrage at the tax and were determined to stop its enforcement, much as the previous generation had seen opposition to the Stamp Act and other British revenue-raising tactics as a political statement. The ostensible objection to the tax was that it placed an unfair burden on western farmers, who could not ship raw grain over the mountains to markets in the East and had to distill the grain into whiskey, a more durable product. The strong local response may have been symptomatic of a number of other grievances that the westerners believed eastern interests in Washington were ignoring, including inattention to the Indian threat and the failure to open the Mississippi River for trade.<sup>88</sup>

In any case, substantial parts of western Pennsylvania stood in open revolt by the summer of 1794. Turmoil had been escalating since the excise law was passed, and opposition was expressed through protest meetings, large-scale tax avoidance, and violence against tax collectors and distillers who complied with the law. The immediate cause of the revolt was the federal effort to effect service of process on distillers who failed to comply. One of the major sources of discontent was the fact

that the trials were to be held hundreds of miles away in Philadelphia. (Although the law was amended that summer to allow local trials, it was not retroactive.) On July 16, 1794, local militia units from Allegheny County, with approximately five hundred men, descended on the home of General John Neville, the inspector of excise for the area, and attempted to force him to resign. Neville defended his home with the help of a few soldiers from a nearby military base. Two of the militiamen were killed and four wounded before Neville escaped. His house was then looted and burned. On August 1, insurgent leaders called a meeting of militia companies, and six thousand men opposed to the tax gathered outside Pittsburgh in a show of force. Some of the protesters recalled the revolution against Britain in justifying their actions. They saw themselves "re-enacting the scenes of the Revolution and resisting an alien sovereign." One rebel supporter, radical Antifederalist William Petrikin, said, "It was time there should be a Revolution—that Congress ought either to Repeal the Law or allow these people to set up a government for themselves—and be separated from us."<sup>89</sup>

After showing considerable patience, President Washington took a two-pronged course of action. On August 7, he made it known that he was calling out the militia to stop the lawlessness and enforce the excise tax. He sent commissioners to the affected counties to offer amnesty to anyone who would offer an oath of submission. After hearing from the commissioners that the rebels remained unwilling to comply with the law, Washington ordered a militia force numbering well over ten thousand men, comprised of units from eastern Pennsylvania and neighboring states, to march on western Pennsylvania. All of the leaders of the insurrection who had advocated violence had escaped the area, and Washington's army, which he personally led for part of the journey, found no one left to engage. The rebellion was over. A handful of men were detained, and all but two were eventually acquitted of any wrongdoing. The two convicted men received pardons.<sup>90</sup>

The Whiskey Rebellion tested the question of whether the Constitution established a right to rebel against the government. Hamilton and Washington, of course, argued vociferously against such an interpretation. Without respect for duly enacted laws, anarchy would reign. On August 28, 1794, Hamilton wrote of the Whiskey Rebellion,

Were it not that it might require too long a discussion, it would not be difficult to demonstrate that a large and well-organized republic can scarcely lose its liberty from any other cause than that of anarchy, to which a contempt of the laws is the high-road. But without entering into so wide a field, it is sufficient to present to your view a more simple and a more obvious truth, which is this: that a sacred respect for the constitutional law is the vital principle, the sustaining energy, of a free government. . . . Those, therefore, who preach doctrines, or set examples which undermine or subvert the authority of the laws, lead us from freedom to slavery. . . . Such a resistance is treason against society, against liberty, against every thing that ought to be dear to a free, enlightened, and prudent people.<sup>91</sup>

Washington added,

I say, under these circumstances, for a self created, permanent body, (for no one denies the right of the people to meet occasionally, to petition for, or to remonstrate against, any Act of the Legislature &c) to declare that this act is unconstitutional, and that act is pregnant of mischief; and that all who vote contrary to their dogmas are actuated by selfish motives, or under foreign influence; nay in plain terms are traitors to their Country, is such a stretch of arrogant presumption as is not to be reconciled with laudable motives.<sup>92</sup>

For the Federalists, then, no right existed forcibly to resist a lawfully enacted statute, even one that is disagreeable or onerous. Militia units that organized without being called out by the governor or the president were mobs, and taking up arms against the government was treason.

Perhaps surprisingly, the vast majority of the Antifederalists and their heirs, the Democratic-Republicans, agreed with Hamilton and Washington and vehemently opposed violence as a part of the political process after the Constitution had been approved. They may have found the laws distasteful and unfair, but they were appalled at the idea that some citizens would resort to violence to resist the application of those laws. Most Americans, even those who thought the Federalists were accumulating too much power, believed that taking up arms against the

state was incompatible with constitutional government. Democratic-Republican societies had been vocal in their opposition to Hamilton's excise program, yet when violence broke out, the rebels were quickly condemned.

Albert Gallatin, an important Democratic-Republican spokesman who later served as President Jefferson's secretary of the treasury, differentiated "between a publication of sentiments and acting." He went further, arguing, "We must distinguish between an opinion merely that this or that measure is wrong, . . . and an opinion to which is annexed a declaration that those who give that opinion mean to act in a certain manner or advise others to act."<sup>93</sup> He thus drew a line between speaking out against a law and inciting a riot against it.

William Findley, a Democratic-Republican member of Congress from western Pennsylvania and a prominent opponent of the excise tax, defended the right of citizens to protest the excise in the public sphere. He did not believe, however, that the right to oppose the tax extended to rebellion: "The great error among the people was an opinion, that an immoral law might be opposed and yet the government respected." Further, "All men of discretion and interest in the country, [realized] that, if they permitted government to be violently opposed, even in the execution of an obnoxious law, the same spirit would naturally lead to the destruction of all security and order; they saw by experience that in a state of anarchy the name of liberty would be profaned to sanction the most despotic tyranny."<sup>94</sup>

Individual Democratic societies outside of western Pennsylvania took great pains to distance themselves from the rebels. A public resolution from the Democratic Society of Newark affirmed as "an essential ingredient in . . . Republican government, that the voice of the majority govern; that a deviation from this rule unhinges every principle of freedom, by setting up the will of the few against that of the many. That the conduct of our fellow-citizen in several counties of a neighboring state, is a flagrant violation of this important principle—the law which they have refused obedience to, having been constitutionally enacted by a majority of the representatives of the people."<sup>95</sup> When the claim that the Constitution and the Second Amendment protect an individual right to use force to contest an unjust law was put to the test, it was re-

jected by the same people who had just ratified the Constitution. As Cornell puts it, after the Whiskey Rebellion, it became clear that the “right to keep and bear arms and participate in the militia was intended to provide the people with the means to put down rebellions, not foment them.”<sup>96</sup>

A great deal of popular and scholarly analysis has been devoted to the rivalry between Jefferson and Hamilton and the differences in their political philosophies. Contemporary Insurrectionists routinely invoke Jefferson’s poetic prose in support of their claim that taking up arms against the government follows the best tradition of the founders. Yet the Insurrectionists bind themselves to Jefferson not for what he did as president but for what he did when he was John Adams’s vice president. Presiding over the Senate that passed the hated Alien and Sedition Acts that would prove to be the downfall of Adams’s presidency and reputation, Jefferson was anonymously framing some of the basic ideas about states’ rights (later used by the Confederacy) in his drafting of what has become known as the Virginia and Kentucky Resolutions. The resolutions, passed by their respective legislatures, registered opposition to the Alien and Sedition Acts and asserted that the states had the ability to nullify federal laws.

As in most of Jefferson’s efforts, he collaborated with Madison on the resolutions. However, although Madison participated, he cautioned Jefferson against being too assertive. Jefferson nonetheless slipped the concept of state nullification of federal laws into both resolutions. The Virginia and Kentucky legislatures removed the word *nullify* when they passed the resolutions in 1798, but the idea entered public discourse when Jefferson’s draft resolutions were printed anonymously in the press. In private correspondence that later became public, Jefferson wrote to Madison that if nullification were not taken seriously, which it never was, “secession” should be an option. Of course, the Virginia and Kentucky Resolutions came back to haunt both Jefferson and Madison after the Democratic-Republicans came to power in 1800, but the resolutions became the backbone of a states’ rights ideology that eventually became unsustainable, leading to the Civil War. Madison, for a few moments in 1798, pushed by what he viewed as the gross excesses of the Federalists, took up the Antifederalist critique of the Constitu-

tion that he had condemned during ratification. He came to regret this lapse, as Wills makes clear: "Those who admire Madison as a champion of states' rights are not admiring (as they think) the Madison of *The Federalist* but the Madison of 1798—even though he would spend the rest of his life trying to back away from the Virginia Resolutions."<sup>97</sup>

After the 1800 elections, the administrations of both Jefferson and later Madison stood as ready to use the force of the state to suppress an actual or even a latent insurrection as were Hamilton and the other Federalists. After Jefferson's first vice president, Aaron Burr, killed Hamilton during an 1804 duel, Burr's political career was finished, as was his law practice. Hoping to restore his wealth, he ran away (he was under indictment for murder in both New Jersey and New York) to the Southwest, where he came up with a scheme to detach Mexico from Spain and may even have tried (although the historical record is not clear) to establish a new nation composed of several of the western states with himself as the ruler.

Rather than view Burr's actions as a legitimate expression of self-determination based on republican principles, Jefferson had Burr and his two alleged coconspirators arrested and charged with treason. Jefferson was so zealous in his push to prosecute the men that he even allowed the suspension of their right to habeas corpus. All three eventually were acquitted, and Jefferson was left bitter by the experience, blaming the acquittals on what he regarded as one more facet of Federalist chief justice John Marshall's plan to empower the judiciary at the expense of the executive.<sup>98</sup> Burr's mysterious activities in the Southwest may never be adequately explained, but Jefferson was unwilling to countenance any type of rebellion on his watch as president, and he was willing to use the full power of the state to end the threat. Of all the founders, Jefferson had the most sympathies for the Shaysites and the Whiskey Rebels (although he clearly understood that rebellion was not protected by the Constitution),<sup>99</sup> but when he was in charge of the government, he acted as his predecessors had done and permitted no rebellion against the Constitution.

Jefferson also proved willing to expand the standing army and use it for purposes not confined to the defense of the country's borders against foreign aggressors. While he may be the darling of the Insurrectionists,

a review of the historical record shows that he was the only president to use the military for day-to-day law enforcement. To implement the Embargo Act, which prevented trade with European powers, Jefferson pressed Congress to give him the authority to call out the army and the navy, which it did. He then deployed the regular army in New York and Vermont to prevent cross-border trade into Canada. Among the founders, Jefferson was probably the most inclined to support an individual right to bear arms, and he offered an amendment to that effect during the drafting of the Virginia Constitution. (The amendment was defeated.) As president, however, he quickly realized that governance required enough force to ensure compliance with the law.<sup>100</sup> Citizens who tried to avoid the embargo were confronted with the full resources of the United States.

Despite Jefferson's statement that "the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants,"<sup>101</sup> neither he nor the other founders hesitated to suppress armed citizen rebellions, including tax revolts, with violence. The founders were reluctant revolutionaries and acted against England not as individuals but as a nascent government with full and representative deliberations. They worked to establish a new republic on the basis of equal representation and a belief in the rule of law. With political representation achieved, no legitimacy could attach to armed rebellion, either by individual or by the state. Insurrectionists of our era who argue for a right to "vote from the rooftops" with sniper rifles and to reject the voting booth as a definitive means of conferring democratic legitimacy on government action have no legitimate ties to our founding spirit. They amount to nothing but the misbegotten rogue armies and benighted vigilantes whose mind-set the best leaders of our nation have always detested.