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Credible Commitments and the Right to Bear Arms: Viewing the Second Amendment from a Game-Theoretic Perspective

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For most of its existence, the Second Amendment was largely ignored by Constitutional scholars. Recently, a veritable cottage industry has developed in which two distinct camps have surfaced: so-called "Standard Modelers," who argue that individuals have a right to bear arms for self-defense, the defense of the state, and, in the most extreme examples, to overthrow the government should it become tyrannical, and those who view the Second Amendment as a collective right vested in the state militias for the purposes of law enforcement, to protect against foreign aggression, to quell domestic insurrection, and as a check against federal overreach. Despite the enormous gulf between them, both sides agree that the right to bear arms provides a counterbalance against the federal government. This paper uses insights from game theory to shed new light on the adoption of the Second Amendment. The states suffered a commitment problem. They wished to cooperate with each other by founding a new republic, but feared the consequences of doing so: losing their freedom to a powerful government. The Second Amendment militated against the need for a large federal army, acted to counterbalance federal forces, and created the offensive means with which to confront a tyrannical government.

A well regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms, shall not be infringed.

The Second Amendment

INTRODUCTION

For most of its existence, the Second Amendment was "virtually ignored" by Constitutional scholars and the US Supreme Court.[1] Recently, however, a veritable cottage industry has developed over the meaning and origin of the right to bear arms. Two distinct camps have surfaced, largely following the lines

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[1] L. H. LaRue, "Constitutional Law and Constitutional History," *Buffalo Law Review*, 36 (1987), 373–401, 373; G. H. Reynolds, "A Critical Guide to the Second Amendment," *Tennesee Law Review*, 62 (1994), 461–511, 461; R. E. Shalhope, "The Ideological Origins of the Second Amendment," *Journal of American History*, 69, 3 (1982), 599–614.

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drawn in the contemporary gun control debate. First are the so-called "Standard Modelers," who argue that individuals have a right to bear arms for self-defense, the defense of the state, and, in the most extreme examples, to overthrow the government should it become tyrannical.[2] Second are those who view the Second Amendment as a collective right vested in the state militias for the purposes of law enforcement,[3] to protect against foreign aggression, to quell domestic insurrection,[4] and as a check against the overreach of the power of the federal government.[5] This debate sheds

[2] Patrick Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* (Amherst, NY: Prometheus Books, 2018); Charles, *Historicism, Originalism and the Constitution: The Use and Abuse of the Past in American Jurisprudence* (Jefferson, NC: McFarland, 2014); Charles, *The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court* (Jefferson, NC: McFarland, 2009); R. A. Sprecher, "Lost Amendment, The" *ABAJ*, 51 (1965) 554–57; Stephen Halbrook, "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787–1791," *North Kentucky Law Review*, 10, 13 (1982), 13–39; Shalhope; D. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review*, 82, 2 (1983) 204–73, Stephen Halbrook, *That Every Man Be Armed* (Albuquerque: University of New Mexico Press, 1984); S. Levinson, "The Embarrassing Second Amendment," *Yale Law Journal*, 99, 3 (1989) 637–59; A. Amar, "The Bill of Rights as a Constitution," *Yale Law Journal*, 100 (1991), 1131–1210; D. Vandercoy, "The History of the Second Amendment," *Valparaiso University Law Review*, 28 (1993), 1007–39, 1007; Reynolds; W. Van Alstyne, "The Second Amendment and the Personal Right to Arms," *Duke Law Journal*, 43, 6 (1994), 1236–55; J. L. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Rights* (Cambridge, MA: Harvard University Press, 1996); A. R. Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998); Robert Cottrol, *Gun Control and the Constitution: Sources and Explorations on the Second Amendment* (New York: Garland Publishing, 1994); Charles Dunlap, "Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment," *Tennessee Law Review*, 62 (1994), 643–78.

[3] The colonies had used their militias for this purpose before confederation and they would continue to use them for these purposes after confederation, with the notable exceptions of counterfeiting, piracy, and insurrection.

[4] The new republican government faced considerable domestic opposition. Not all of those suspected loyal to the British Crown had fled and the new state faced economic hardship that led to widespread grievances. The states did not hesitate to turn their militias on their own populations in order to quash such challenges. Perhaps the best-known example is the suppression of Shay's Rebellion in 1787.

[5] Jack Rakove, "The Second Amendment: The Highest State of Originalism," *Chicago Kent Law Review*, 76 (2000), 103–66, 103; Michael Bellesiles, "The Second Amendment in Action," *Chicago–Kent Law Review*, 76 (2000), 61–102, 3; Paul Finkelman, "The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court," *Cardozo Law Review*, 37, 623 (2015), 623–62; Finkelman, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836* (New York: Oxford University Press, 2000); I. Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis: Bobbs-Merrill Company, 1965); R. Hofstadter, *America as a Gun Culture* (New York: American Heritage Publishing Company, 1970); L. Cress, "An Armed Community: The Origins and Meaning of the Right to Bear Arms," *Journal of American*

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more heat than light and has, therefore, appropriately been termed "the Great American Gun War."[6] Advocates of gun rights typically emphasize the individualist view of the Second Amendment while proponents of gun control tend to emphasize the collective-rights interpretation.[7]

Despite the enormous gulf between them, however, both sides agree that the right to bear arms was adopted in order to supplement domestic policing powers, provide a defense against foreign aggression, and offer a powerful counterbalance against the new federal government. This paper focusses on the latter point, which has been at risk of being lost in the ongoing debate. Freedom from arbitrary authority was a major motivation underlying the American Revolutionary War and it remained a prevalent concern as the former British colonies came together to create a new union. Under the proposed Constitution, the former colonies would lose much of the independent military power they previously enjoyed to a new federal government, which would have the power to create and maintain a professional army, call forth the state militias, and pay for them by raising taxes. The fear that this new government might, if not properly checked, assume the worst aspects of British colonial rule, which had just been shed, set the stage for the adoption of the

History, 71, 1 (1984), 22–42; R. G. Weatherup, "Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment," *Journal on Firearms & Public Policy*, 1 (1998), 961–1001; D. Henigan, "Arms, Anarchy and the Second Amendment," *Valparaiso University Law Review*, 26 (1991), 107–29; Reynolds; Garry Wills, "To Keep and Bear Arms," *New York Review of Books*, 42 (1995), 62–73, Saul Cornell, "Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory," *Constitutional Commentary*, 16 (1999), 221–45, Carl Bogus, "History and Politics of Second Amendment Scholarship: A Primer," *Chicago–Kent Law Review*, 76, 3 (2000), 3–25, Bogus, "The Hidden History of the Second Amendment," *University of California at Davis Law Review*, 31 (1997), 309–408.

[6] B. Bruce-Briggs, "The Great American Gun War," *Public Interest*, 45 (1976), 37–62. A so-called "new paradigm" has also emerged representing a middle-ground position. The new paradigm argues that guns are a civic right; a "right of persons exercised collectively." Robert Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment," *Law and History Review*, 25, 1 (2007), 139–76. On this view, individual gun ownership was meant to provide protection for the broader community. See also Saul Cornell, "Don't Know Much about History: The Current Crisis in Second Amendment Scholarship," *Northern Kentucky University Law Review*, 29 (2002), 657–81, Richard Uviller and William G. Merkel, *The Militia and the Right to Arms; or, How the Second Amendment Fell Silent* (Durham, NC: Duke University Press, 2002); David Thomas Konig, "The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'the Right of the People to Keep and Bear Arms'," *Law and History Review*, 22 (2004), 119–59.

[7] Shalhope; Kates; Weatherup; Reynolds; R. Cottrol and R. T. Diamond, *The Fifth Auxiliary Right* (book review), *Yale Law Journal*, 104 (1995), 995–1026; Saul Cornell and N. DeDino "A Well Regulated Right: The Early American Origins of Gun Control," *Fordham Law Review*, 73 (2004), 487–528.

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Second Amendment. Advocates of the Second Amendment argued that the right to bear arms would help ensure that the states would remain free from tyranny, whether the source was foreign or domestic.

This paper uses a game-theoretic analysis to shed light on the Second Amendment. Game theory is the study of strategic interactions. It is particularly useful for understanding the incentives for conflict and cooperation between rational actors, and modeling the strategies they employ to manipulate them. Game theory has been used extensively in the study of international relations to model the interaction between states under the prevailing conditions of international anarchy.[8] While most extant research on the post-colonial period approaches the United States as a "cohesive and fixed 'nation'," a growing body of literature has come to consider the former colonies as lacking an overarching authority capable of binding commitments, arbitrating disputes, or providing for their collective security.[9] Totten writes that they "often acted like those on the European continent: they clashed over commerce and territory, formed economic 'pacts' with one another against other parts of the union, gathered their own armies, chartered their own navies, and pursued separate foreign policies."[10] Indeed, much like states in the international system, the former colonies were largely independent actors operating in conditions of anarchy. The proposed Constitution, however, planned to change this by binding them together in a union with a strong central authority. Seen in this way, the founding of the United

[8] Cf. James Morrow, *Game Theory for Political Scientists* (Princeton, NJ: Princeton University Press, 1994); Michael Nicholson, *Formal Theories in International Relations* (Cambridge: Cambridge University Press, 1989).

[9] Cf. Robbie Totten, "Security, Two Diplomacies, and the Formation of the US Constitution: Review, Interpretation, and New Directions for the Study of the Early American Period," *Diplomatic History*, 36, 1 (2012), 77–117, 79, David Hendrickson, *Union, Nation, or Empire: The American Debate over International Relations, 1789–1941* (Lawrence: University Press of Kansas, 2009); David Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003); James E. Lewis Jr., *The American Union and the Problem of Neighborhood: The United States and the Collapse of the Spanish Empire, 1783–1829* (Chapel Hill: University of North Carolina Press, 2000); Joseph Parent, *Uniting States: Voluntary Union in World Politics* (Oxford: Oxford University Press, 2011); Daniel Deudney, *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton, NJ: Princeton University Press, 2007); Deudney, "The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-union, circa 1787–1861," *International Organization*, 49, 2 (1995), 191–228, Peter Onuf and Nicholas Greenwood Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776–1814* (Madison: Rowman & Littlefield, 1993); Peter Onuf, "Anarchy and the Crisis of the Union," in Herman Belz, Ronald Hoffman, and Peter J. Albert, eds., *To Form a More Perfect Union: The Critical Ideas of the Constitution* (Charlottesville: United States Capitol Historical Society, 1992), 272–303.

[10] Totten, 97.

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States can be viewed as a type of contracting problem to which game theory is well suited.

In game-theoretic terms, the former colonies suffered a "commitment problem." They wanted to create a government in order to arbitrate disputes amongst them and provide for their collective security (amongst other things), but feared that it might turn against them, tyrannizing them much as the British had done.[11] In other words, they wished to cooperate, but worried about the possibility of defection. If they could not overcome this problem, ratification of the proposed Constitution would prove a challenge, perhaps even leading the newfound union to unravel.[12] In enshrining a Constitutional right to bear arms, the former colonies adopted a balancing strategy (amongst other things) to overcome their fear of defection.[13] It did so in two distinct ways. First, it enabled the states to retain their militias for the purposes of defense (indeed it precluded the federal government from disbanding them), thereby militating against the need for a large standing federal army, which could be used for the purposes of domestic repression. Second, it created a balance of power between the former colonies and federal government, deterring overreach by the federal government.[14] Some authors argue that the right to bear arms vested the states with the offensive means with which to directly confront a tyrannical government by force. The resulting government was then a novel form of federalism, sharing authority between multiple levels. In this way, it departed from the Weberian ideal type of statehood, characterized by the "monopoly over the legitimate use of physical force within a given territory."[15] Indeed, the Second Amendment created an oligopoly over the use of force, diffusing coercive power through the population, the states, and the federal government in a deliberate attempt to weaken the power of the federal government.[16]

This article proceeds as follows: I begin by discussing the credible-commitment problem from a game-theoretic perspective and the various solutions in

[11] On arbitrating disputes see ibid.; Parent. On collective security see Hendrickson, *Peace Pact*; M. Edling, *A Revolution in Favor of Government: Origins of the US Constitution and the Making of the American State* (Oxford: Oxford University Press, 2003).

[12] Totten, 79, 92.

[13] Cf. Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* (Oxford: Oxford University Press, 2016); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage, 1997).

[14] Hendrickson, *Peace Pact*, similarly argues that the Second Amendment allowed the states to balance each other out. Coupled with the expanded power of the federal government to arbitrate disputes, this had the effect of mitigating the insecurity that prevailed between them.

[15] Max Weber, *Politics as a Vocation* (Philadelphia: Fortress Press, 1972); Deudney, "The Philadelphian System," 208.

[16] Levinson, "The Embarrassing Second Amendment."

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the prevailing literature that have been proposed to resolve it. I then proceed to examine the decision to adopt the Second Amendment. I rely extensively on historical justifications, which were widely circulated in the Federalist Papers penned by Alexander Hamilton ("Publius"), the countervailing anti-Federalist essays of Robert Yates ("Brutus"), and others. I also make reference to the early modern writings of Machiavelli and the works of various seventeenth- to nineteenth-century anti-absolutist English writers (so-called Whigs), whom numerous Constitutional scholars cite as a driving intellectual influence for the Second Amendment.[17] I offer a novel game-theoretic reading of the Second Amendment. Drawing insights from the study of international security, I argue that the right to bear arms can be understood as a rational strategy adopted by actors operating under conditions approximating anarchy to help overcome their commitment problems. Finally, I discuss the evolution of the coercive apparatus in the United States, which has come to more closely resemble other states over time. In response to external forces, the federal government gradually developed a more robust and centralized coercive capacity, and, while the states continue to maintain powerful checks against federal overreach, they let their militias decline as the fear of tyranny receded.

This paper proposes to shed new light on one of the more idiosyncratic chapters of the Constitution. While recent research has tended to emphasize the socioeconomic and ideological aspects of the founding of the United States, it would not likely have succeeded without addressing the underlying security concerns. Totten writes, "Without the survival of the parts of the union the founders most likely could not have realized other motivations that they may have had for forming a new government. By necessity, security was one of if not the primary reason for constitutional reform."[18] In creating a government capable of addressing the prevailing security concerns, however, the founders created a new problem. A government powerful enough to arbitrate disputes between the former colonies and provide security against external threats would also be strong enough to tyrannize them. In other words, they had turned an external security problem into a domestic commitment problem. Insights from game theory allow us to understand the Second Amendment as a partial solution. The right to bear arms reduced the likelihood of federal overreach by eliminating the need for a large standing army and deterred any incentive the federal government might have to defect by providing a counterbalance to federal forces, which could be used in the event that defection did occur. In sum, the Second Amendment mitigated the fear of defection and provided an insurance policy if those mitigation

[17] Whigs are sometimes referred to as Republicans or Libertarians.

[18] Totten, 79.

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efforts failed. In so doing, the Second Amendment helped alleviate the states' commitment problems in part, thereby facilitating the timely passage of the Constitution. However, the utility of using a game-theoretic approach promises to extend beyond the particularities of eighteenth-century America. Insights from this case can enhance our understanding of contemporary examples of supra-national contracting, such as the European Union.[19] States jealously guard their sovereignty. Voluntary unions are, therefore, quite rare. Indeed, few states have willingly contracted away their sovereignty as the former American colonies did.[20] The American case affords insights not only into the potential reasons for contracting, but also into the limits of contracting, which is of particularly vital importance now that so much international contracting appears to have stalled.[21] Though often considered less salient than other aspects of the Constitution, the Second Amendment is therefore worthy of thorough scrutiny.[22]

WEAPONS AND THE PROBLEM OF CREDIBLE COMMITMENTS

The main hypothesis of credible-commitment theory is that actors will tend to have difficulty contracting (i.e. making agreements) unless they are able to convince each other that they will to adhere to an agreement in the future.[23] In the absence of an authority that can bind commitments, cooperation tends to break down, even if actors wish to cooperate. In other words, actors experience a prisoner's-dilemma-like scenario: despite their desire to cooperate, the fear of future defection will prevent them from reaching mutually beneficial agreements.[24] This may be because they are cynical (i.e. they don't believe the other side) or because of "time-inconsistent preferences" (i.e. they fear that their interlocutor's interests may change in the future).[25] This problem is said to be particularly acute where defection might imperil survival, for example during armed conflict. Indeed, the credible-commitment problem often leads violence to persist even when actors wish to terminate it.[26]

[19] Ibid., 80; Deudney, *Bounding Power*. [20] Parent. [21] Cf. ibid.
[22] Cf. Klarman; Rakove.
[23] John Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1984); James Fearon, "Rationalist Explanations for War," *International Organization*, 49, 3 (1995), 379–414. [24] Elster.
[25] Randall Schweller, "Neorealism's Status Quo Bias: What Security Dilemma?", *Security Studies*, 5, 3 (1997), 90–121, 101.
[26] Barbara Walter, "The Critical Barrier to Civil War Settlement," *International Organization*, 51, 3 (1997), 335–64; Walter, "Explaining the Intractability of Territorial Conflict," *International Studies Review*, 5, 4 (2003), 137–53; Barbara Walter and J. Snyder, *Civil Wars, Insecurity, and Intervention* (New York: Columbia University Press, 1999).

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However, the credible-commitment problem is not indelible. Indeed, cooperation is possible even when trust is low and the future uncertain. Scholars describe several strategies that actors employ to alter the prevailing incentive structures in order to mitigate the credible-commitment problem, several of which I will outline. First, they can introduce domestic audience costs. In other words, actors can make public statements such that they would be open to criticism from their constituents or lose public support if they reversed themselves, thereby raising the price of reneging on an agreement.[27] Political and business leaders, for example, often make public promises that would be damaging to their reputation to go back on. Second, actors can send costly signals of their desire to cooperate.[28] Kydd defines costly signals as "unilateral cooperative gestures that … involve some vulnerability on the part of the side that makes them."[29] Costly signals generally consist of some form of self-binding. For example, states may unilaterally reduce weapons stocks or lower their military readiness in order to signal their benign intent or deescalate tensions. Costly signals work by "persuading the other side that one is trustworthy by virtue of the fact that they are so costly that one would hesitate to send them if one were untrustworthy."[30] Third, actors can delegate enforcement to an external party. Third parties can provide robust guarantees if they have the necessary interest and sufficient resources to punish defection.[31] For example, states routinely enlist international organizations to enforce the rules of various treaties. Finally, actors can balance against the source of the commitment problem. Where there is no overarching authority capable of enforcing agreements, actors are said to turn to self-help mechanisms to ensure their survival. They do so, according to realists, by balancing. Balancing is the attempt to equalize power, making it more difficult and, therefore, less likely that others will take advantage of an actor or otherwise defect from an agreement.[32] Balancing encompasses a range of activities, including diplomacy, alliance formation, and, most crucially, military

[27] Robert Putnam, "The Logic of Two-Level Games," *International Organization*, 42, 3 (1988), 427–60; James Fearon, "Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs," *Journal of Conflict Resolution*, 41, 1 (1997), 68–90, M. Tomz, "Domestic Audience Costs in International Relations: An Experimental Approach," *International Organization*, 61, 4 (2007), 821–40.

[28] Andrew Kydd, "Trust, Reassurance, and Cooperation," *International Organization*, 54, 2 (2000), 325–57.

[29] Ibid., 333.

[30] Ibid., 326.

[31] Walter, "The Critical Barrier to Civil War Settlement"; Walter, "Explaining the Intractability of Territorial Conflict."

[32] Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Boston: Knopf, 1948); Kenneth Waltz, *Theory of International Politics* (Long Grove: McGraw-Hill, 1979); Stephen Walt, *The Origins of Alliances* (Ithaca, NY: Cornell University Press, 1987).

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preparation.[33] An armed population is one such example, and is the focus of this paper.

Arms can be used to protect actors against grave threats to their physical security by providing the material tools for their defense. They can be used to repel attacks, hold territory, and extract resources necessary for survival. Arms can be used to counter an attack or preempt a potential threat. Even small numbers of weapons may suffice for these purposes, particularly when they are organized, for example in the form of a militia. Contrary to the claims of offensive realists, who argue that actors require a preponderance of power in order to ensure their survival, actors may tolerate power asymmetries without compromising their security.[34] Indeed, the weak often prevail against more powerful actors. Small numbers of weapons used by highly motivated groups with sufficient knowledge of their surroundings regularly manage to repel and, in some cases, overcome much stronger adversaries, particularly when employing the so-called tactics of asymmetric or guerilla warfare.[35]

In so doing, weapons help change the calculus of the credible-commitment problem. They mitigate the risk of defection by providing the means of defense and the ability to punish defections, thereby enabling groups to assume and manage risks and uncertainty about the future. An armed population, then, is not so much an alternative to domestic audience costs, costly signals, and third-party enforcement, as it is an insurance policy against their failure.

[33] On diplomacy see S. Brooks and William Wohlforth, "Hard Times for Soft Balancing," *International Security*, 30, 1 (2005), 72–108, Robert Pape, "Soft Balancing against the United States," *International Security*, 30, 1 (2005), 7–45. On alliance formation see Waltz; Stephen Walt, "Alliance Formation and the Balance of World Power," *International Security*, 9, 4 (1985), 3–43.

[34] John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W. W. Norton & Company, 2001).

[35] Andrew Mack, "Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict," *World Politics*, 27, 2 (1975), 175–200; Ivan Arreguin-Toft, "How the Weak Win Wars: A Theory of Asymmetric Conflict," *International Security*, 26, 1 (2001), 93–128; James Fearon and David Laitin, "Ethnicity, Insurgency, and Civil War," *American Political Science Review*, 97, 1 (2003), 75–90; P. Sullivan, "War Aims and War Outcomes: Why Powerful States Lose Limited Wars," *Journal of Conflict Resolution*, 51, 3 (2007), 496–524; P. Sullivan and M. Koch, "Military Intervention by Powerful States, 1945–2003," *Journal of Peace Research*, 46, 5 (2009), 707–18; J. Lyall and I. Wilson "Rage against the Machines: Explaining Outcomes in Counterinsurgency Wars," *International Organization*, 63, 1 (2009), 67–106; Wayne LaPierre, *Guns, Crime, and Freedom* (New York: HarperCollins, 1995). American Revolutionaries made extensive use of use of these asymmetric tactics during the Revolutionary War. Indeed, the colonists prevailed over the British – securing their independence – not only through direct military engagements, but also through persistent harassment by an armed population (the militias), using what might today be termed insurgency tactics. Kates, "Handgun Prohibition"; Cress, "An Armed Community." For a countervailing view see Dunlap, "Revolt of the Masses."

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And, unlike external enforcement, which delegates the commitment problem to a third party, weapons provide the means for self-help. In other words, should actors retain the ability to deter defection and defend themselves, they need not turn to a third party to enforce an agreement. While none of these strategies fully remediate the credible-commitment problem, they do help shift the prevailing incentive structure from one in which there may be an incentive to break a deal to one in which there is less incentive to do so, thereby increasing the likelihood of compliance and cooperation. They help shift the calculation involved in defecting from the positive to the negative side of the ledger, thereby allowing actors to make more credible commitments to each other. If actors can convince each other that they won't defect, or convince themselves that they will survive defection, they will be more likely to enter into commitments with each other.

THE SECOND AMENDMENT

During the American War of Independence, several colonies, now calling themselves "states," organized a loose confederation for the purposes of "common defense" (amongst others). However, even before the conclusion of the war it had become increasingly evident that it was inadequate to that task.[36] The confederation struggled to fight effectively against the British;[37] it suffered persistent budgetary shortfalls, having been granted no central taxation mechanism;[38] and it was unable to arbitrate the increasing number of conflicts that arose between the states.[39] Even after winning independence from Britain, security threats loomed, particularly on the peripheries near the Spanish territories and the western frontier.[40] And, indeed, the states themselves posed potential security threats to each other.[41]

[36] Finkelman, *Prelude to Civil War*, 195.

[37] Even after their victory, complaints about the performance of the militias – persistently voiced by none other than General Washington – raised the need for a standing army to confront future threats. Hofstadter, *America as a Gun Culture*; F. Wiener, "The Militia Clause of the Constitution," *Harvard Law Review*, 54, 2 (1940), 181–220.

[38] Many states chose to free ride rather than fully contribute their share to the common government. Keith Dougherty, "An Empirical Test of Federalist and Anti-Federalist Theories of State Contributions, 1775–1783," *Social Science History*, 33, 1 (2009), 47–74, Keith Dougherty, *Collective Action under the Articles of Confederation* (Cambridge: Cambridge University Press, 2006).

[39] Hendrickson, *Peace Pact*; Totten, "Security, Two Diplomacies"; Parent, *Uniting States*. For example, Hamilton argued that if the confederation collapsed the states would ally themselves with competing European powers, setting the stage for conflict between them.

[40] Edling, *A Revolution in Favor of Government*; Lewis, *The American Union and the Problem of Neighborhood*.

[41] Totten; Hendrickson.,

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In 1787 a constitutional convention was convened in an effort to strengthen the confederation and shore up the fledgling central government. After several false starts, a new Constitution was drafted with a particular eye towards the provision of security.[42] The Constitution created a more robust central government with the power to raise armies, and to organize, arm, discipline, and call forth the state militias (Article I, Section 8); declare wars and suppress domestic insurrections (Article I, Section 7); and, perhaps most importantly, pay for these through an effective taxation mechanism.[43] No longer would each state separately enjoy "sovereignty, freedom, and independence" as they had previously. Indeed, under the proposed Constitution the states would lose most of their independent military capacity, receiving little more than the power to appoint officers and train the militias according to the rules set out by Congress.[44]

The new Constitution was not without criticism. Though it contained a then-novel tripartite system of checks and balances against the imposition of arbitrary authority (i.e. a separate executive, legislature, and judiciary), so-called Anti-Federalists grew concerned that a stronger federal government would come at the expense of, or even jeopardize, individual and state's rights.[45] They were concerned that a large standing army could be used as a vehicle for tyranny.[46] With its newfound ability to collect taxes and raise a large army and federalize the militias, some worried that the new federal government would be able to pursue unpopular or even unlawful polici.[47] Others were anxious that the federal government, with its expanded powers to equip the militias, would instead disarm or dismantle them, or otherwise let them fall into a state of disrepair, leaving the states altogether defenseless against arbitrary incursions into their authority (possibly even leading to their destruction at the hands of the federal government).[48] For example, Founding Father and

[42] Totten.,

[43] On fiscal military powers see Edling.

[44] While the articles allocated the right to conduct foreign policy, declare war, and raise an army and navy to the federal government alone, each state was not only allowed, but also in fact required, to "keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage" for the defense of the state (Article VI).

[45] On the imposition of arbitrary authority see Levinson, "The Embarrassing Second Amendment"; Reynolds, "A Critical Guide to the Second Amendment." On individual and states rights see Edling; Wiener, 184.

[46] Craig Whitney, *Living with Guns: A Liberal's Case for the Second Amendment* (New York: Public Affairs, 2012); Finkelman, *Prelude to Civil War*; Dunlap, "Revolt of the Masses," 646.

[47] Edling; Finkelman, *Prelude to Civil War*, 224–25.

[48] Finkelman, "The Living Constitution and the Second Amendment," 632; Finkelman, *Prelude to Civil War*, 224–25; Dunlap, 649–50; Edling; Whitney; Kates, "Handgun Prohibition," 212; Lawrence Tribe, *American Constitutional Law* (Auflage, 1988);

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Anti-Federalist George Mason argued that the new Constitution would give the federal government the power to destroy the state militias, "rendering them useless – by disarming them."[49] Luther Martin, also a Founding Father and Anti-Federalist, argued in front of the Maryland legislature that "if the general government should attempt to oppress and enslave them, [the states] could not have any possible means of self-defense."[50] The best-known Anti-Federalist tract, written by "Brutus" stated,

> The liberties of a people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power, which they may see proper to exercise, but there is a great hazard, that an army will subvert the forms of the government, under whose authority, they are raised, and establish one, according to the pleasure of the leader.[51]

Such feelings were no doubt colored by recent events (i.e. the use of a standing army by the British in an attempt to enforce unpopular legislation on the colonies and suppress the revolution that followed) as well as by the historic use of standing armies to suppress liberties in England (more on this below).[52]

Some Federalists similarly feared government meddling. For example, Pennsylvania delegate to the Continental Congress Tench Coxe feared that "civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens."[53] However, they generally had more faith that the checks and balances embedded in the Constitution would restrain the ambitions of the federal government.[54] Indeed, Hamilton dismissed Anti-

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Levinson; Henigan, "Arms, Anarchy and the Second Amendment"; Deudney, "The Philadelphian System"; Richard Kohn, "The Constitution and National Security: The Intent of the Framers," in Kohn, ed., *The United States Military under the Constitution of the United States, 1789–1989* (New York: New York University Press, 1991), 85.

[49] Quoted in Henigan, 117. See also Edling.

[50] Quoted in Henigan, 117.

[51] J. Storing, *The Complete Anti-Federalist* (Chicago: The University of Chicago Press, 2008).

[52] In the main, the colonists objected to their perceived disenfranchisement, including increased taxation and duties imposed on the colonies (e.g. the Stamp Act, the Sugar Act, the Tea Act, and others), as well as British mercantilist policies, which severely restricted the colonists' trade prospects abroad. The colonists also harbored grievances concerning British restrictions on westward expansion and settlement, the involuntary quartering of British soldiers, and the withholding of appointments to colonists under British arms. Because the American colonists did not enjoy representation within the British legislature, the increasingly onerous and burdensome legislation imposed on them without their advice or consent came to be viewed as contrary to their will and, thus, illegitimate. At first grievances were expressed through protest, petition, and the boycott of British goods. However, violence spread and the British flooded in troops (a standing army) to quell what it had declared an outright rebellion. Finkelman, *Prelude to Civil War*, 195.

[53] Quoted in Kates, 224.

[54] Vandercoy, "The History of the Second Amendment."

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Federalist concerns as "far fetched … and extravagant" and Madison called their fears "misguided exaggerations."[55]

Nevertheless, the work of the Anti-Federalists proved extremely effective: several states threatened to ratify the proposed Constitution only if changes were made. Madison proposed offsetting a standing army with the militias, while Anti-Federalists proposed limiting the size of a standing army or eliminating it altogether, instead relying on the militias for the purposes of defense.[56] In the end, a compromise was reached, enabling the timely passage of the Constitution. Rather than changing the text, which was itself a product of difficult compromise, the states agreed to draft a subsidiary document, "mollifying" the Anti-Federalists.[57] Twelve amendments were presented to Congress, ten of which were passed to become the core of the Bill of Rights. Where the Constitution increased the power of the federal government, these amendments acted to constrain it by enumerating separate individual and state rights, the right to bear arms being the second of these.[58] Kates argues that the Second Amendment was the most crucial component of the compromise necessary to ratify the Constitution. He writes,

> only four states suggested that the rights to assemble, to due process, and against cruel and unusual punishment be guaranteed; only three states suggested that freedom of speech be guaranteed or that the accused be entitled to know the crime of which he would be tried, to confront his accuser, to present and cross-examine witnesses, to be represented by counsel, and to not be forced to incriminate himself; only two states proposed that double jeopardy be barred …

yet five states called for an amendment guaranteeing the right to bear arms.[59] In either case, the Bill of Rights, which included the right to bear arms, helped satisfy the holdout states, thereby shoring up the Constitutional process and stabilizing the fledgling union.

[55] Quoted in D. Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," *William and Mary Quarterly*, 55, 1 (1998), 39–58.

[56] Alexander Hamilton, *The Federalist Papers* (Oxford: Oxford University Press, 2008), Federalist Paper 46; Dunlap, 648; Kohn, "The Constitution and National Security," 6.

[57] Finkelman, "The Living Constitution and the Second Amendment," 639; Edling; Whitney; Kates, 221; Higginbotham.

[58] For example, the First Amendment prohibits laws that infringe on the freedom of religion, of speech, of the press, of assembly, etc.; the Third Amendment prevents the quartering of soldiers on private property without consent; the Fourth Amendment prohibits unreasonable search and seizure; and the Fifth, Sixth, and Eighth Amendments protect the rights of the criminally accused – all of which are rights broadly afforded to individuals. The Tenth Amendment, on the other hand speaks to states' rights, reserving to the states all powers not explicitly granted to the federal government in the Constitution.

[59] Kates, 222. Vandercoy counts seven states.

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American Constitutional scholars cite two main intellectual sources for the Second Amendment: English Whigs[60] and Machiavelli, whom the Whigs made frequent references to.[61] According to Machiavelli, ancient Rome thrived when there wasn't a class of professional soldiers, but succumbed to tyrannical rule when a standing army persisted for an extended period.[62] For Machiavelli, military strength was essential for defensive purposes—ensuring the independence of one republic from another. However, when coercive power was centralized, Machiavelli argued, professional soldiers used their weapons to subordinate the general population, which was powerless to resist.[63] For Machiavelli, then, military strength is necessary to maintain the freedom of the state, but military strength concentrated in the hands of the few was anathema to freedom. An armed population, however, could defend against foreign aggression while preventing the emergence of a corrupt ruling class, which would likely result from the centralization of power in the hands of the few.[64] Though separated by hundreds of years, the Whigs draw similar conclusions to Machiavelli regarding standing armies and the virtue of an armed population.[65] Indeed, Whig writers made frequent reference to ancient Rome in arguing for an armed citizenry as a counterbalance to the federal government. It is for this reason that Pocock has called the founding of the new republic a "Machiavellian moment."[66]

[60] These include William Blackstone, James Burgh, James Harrington, John Trenchard, Algernon Sidney, and others.

[61] Whig literature was printed in America, well circulated, widely read, and liberally cited by Federalists and Anti-Federalists alike. Hofstadter, *America as a Gun Culture*; H. Ganter, "The Machiavellianism of George Mason," *William and Mary Quarterly*, 17, 2 (1937), 239–64, Shalhope, "The Ideological Origins of the Second Amendment"; Kates; Cress, "An Armed Community"; Weatherup, "Standing Armies and Armed Citizens"; Vandercoy; Malcolm, *To Keep and Bear Arms*; Bogus, "History and Politics of Second Amendment Scholarship"; J. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 2009).

[62] Niccolo Machiavelli, *The Art of War* (Chicago: The University of Chicago Press, 2009), Machiavelli, *Discourses on Livy* (Chicago: The University of Chicago Press, 2009). Kates.

[63] Moreover, should an armed class arise it would likely tend towards belligerent behavior because it would stand to benefit from armed conflict. Cress.

[64] Shalhope; Cress.

[65] Echoing Machiavelli, the Whigs argued that successive British kings attempted to disarm the population and raise standing armies in order to gain absolute control over their subjects. The Glorious Revolution put an end to despotic rule and marked the beginning of parliamentary democracy, in part by guaranteeing the English population the right to bear arms, thus ensuring that the Crown could no longer impose its writ by force. Malcolm; Kates; Cress; Weatherup; Vandercoy. Armed citizens, they reasoned, could protect the state from foreign aggression, obviating the need for a standing army, as well as preventing despotic kings from monopolizing power, as they had done under successive British kings. Malcolm.

[66] Pocock.

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DISCUSSION

In drafting the Constitution, the Federalists wished to strengthen the new republic in an effort to more effectively arbitrate the increasing number of disputes between them and better provide collective security.[67] At the same time, Anti-Federalists feared the consequences of doing so. In empowering the federal government, the states had created the means for their own dispossession. The Constitution created a standing army; placed the responsibility to equip the state militias in the hands of the federal government, which might neglect it; and created a federal right to take control of the militias. As a result, the states had created a credible-commitment problem. They could not trust the federal government not to use its newfound power to tyrannize them, as the British had done previously. There are, however, various strategies available to remediate commitment problems, many of which were adopted. The states sent costly signals of their desire to cooperate, introducing domestic audience costs through regularized elections, and they attempted to introduce third-party enforcement through the creation of the strong federal government to arbitrate disputes between them.[68] They were also particularly alive to the virtue of an armed population, an idea lent them from Machiavelli and the Whigs.

The argument that an armed population helps prevent a tyrannical government from arising comes in what might be considered a strong and weak variant, roughly corresponding to the debate between Standard Modelers and the advocates of collective rights. The weak variant, typically associated with collective-rights advocates, holds that the right to bear arms acts to limit the need for a strong centralized army.[69] "If standing armies are dangerous to liberty," Alexander Hamilton writes,

> an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm [it would] render a [federal] army unnecessary.[70]

The federal government would have little need to raise a large standing army so long as the states retained their militias for the purposes of collective defense.

[67] On disputes see Totten, "Security, Two Diplomacies"; Edling, *A Revolution in Favor of Government*. On collective security see Hendrickson, *Peace Pact*.

[68] Totten; Edling; Hendrickson.

[69] The militias were also said to provide defense without the financial expense or opportunity costs (i.e. manpower lost to the army) associated with a standing army; costs the young state could scarcely afford. Kates; Whitney, *Living with Guns*; Cress; Weatherup; Henigan, "Arms, Anarchy and the Second Amendment."

[70] Federalist Paper 29.

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As a result, the federal government would be limited in its ability to interfere in the affairs of the states. Moreover, the federal government was thought to be less likely to exceed its power because it would be reliant on the states for defense. "At the time of the framing," Reynolds writes, "the primary means of executing the law or quelling insurrection was by calling out the militia, a simple refusal on the part of the militia to perform its duties would be enough to frustrate tyranny pretty thoroughly."[71]

The strong variant of the right to bear arms is often called the "insurrectionist" interpretation because it contends that the Second Amendment contains the right to rebel against arbitrary authority, much as the colonists rebelled against the British.[72] This view is most closely associated with the Standard Model. On this reading, the Second Amendment provides the citizenry with both the means ("arms") and the justification ("the security of a free State") to resist and even overthrow their government should it become tyrannical.[73] In other words, the right to bear arms is guaranteed by the government in order that they can be turned against the government. Standard Modelers cite numerous sources for this interpretation, including Thomas Jefferson,[74] Alexander Hamilton,[75] and James Madison. It is worth quoting Madison, who authored the Second Amendment, at length:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, any army of more than twenty-five or thirty thousand men. 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 and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a

[71] Reynolds, "A Critical Guide to the Second Amendment," 510.

[72] Charles, *Armed in America*, refers to this as a "parliamentary right of resistance."

[73] Michael Waldman, *The Second Amendment: A Biography* (New York: Simon and Schuster, 2015); Finkelman, "The Living Constitution and the Second Amendment," 636, Reynolds, 512; W. Kaminer, "Second Thoughts on the Second Amendment," *Atlantic Monthly*, March 1996, 42; Halbrook, *That Every Man Be Armed*; Kates, 212, Malcolm; Amar, "The Bill of Rights as a Constitution," 1165; Levinson, "The Embarrassing Second Amendment," 650–51; Van Alstyne, "The Second Amendment."

[74] Jefferson wrote in the Declaration of Independence, "Governments are instituted among men, deriving their just powers from the consent of the governed … whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it."

[75] Federalist Paper 28 refers to the right of militias to resist or even overthrow a tyrannical government as the "original right to self-defense."

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militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it.[76]

Unlike the other aspects of the Constitution and the Bill of Rights, which prohibit or proscribe government behavior, on this view the Second Amendment threatens implicit consequences should the government exceed its authority.

Perhaps not surprisingly, the view that the Constitution contains the seeds of its own destruction has inspired legions of detractors, particularly in light of Article I, Section 8, which provides the federal government with the power to call forth (i.e. federalize) the state militias for, amongst other things, the suppression of domestic insurrection.[77] However, even if one thinks the insurrectionist view overstated, or rejects it outright, the fact that citizens would remain armed even in the event of the federalization of the militias should act as a powerful constraint against government overreach. As Deudney notes, "the Constitution did not legalize rebellion, but it did legalize the instruments necessary to do so."[78] Under Article 1, Section 8, the federal government had the responsibility to organize, arm, and discipline the militias. However, the states would be free to keep up an armed population if the federal government chose to neglect the militias.[79] Dunlap writes, "the Second Amendment reflects the Framers' desire to ensure that the federal government could never deprive the state of sufficient armed manpower … the people would not be obliged to seek weapons from a federally-controlled armory, instead they would equip themselves."[80] Indeed, the Uniform Militia Act, adopted less than a year later, required militia-eligible men to acquire weapons for this purpose. The states would retain a counterbalancing force even if the federal government sought to deprive them of one.

Where the Constitution increased the power of the federal government, the Bill of Rights acted to constrain it by enumerating separate individual and state rights.[81] The Second Amendment, however, is singular in that it appears, on its face, both as an individual right ("the right of the *people* to bear Arms, shall not

[76] Quoted in Henigan, 120–21.

[77] Charles, *Armed in America*; Finkelman, "The Living Constitution and the Second Amendment"; Finkelman, *Prelude to Civil War*, 236; Bogus, "History and Politics of Second Amendment Scholarship," 16; Henigan; R. Shalhope, "To Keep and Bear Arms in the Early Republic," *Constitutional Commentary*, 16 (1999), 269–80. Wills, "To Keep and Bear Arms," Dunlap, "Revolt of the Masses," 654.

[78] Deudney, "The Philadelphian System," 204.

[79] Finkelman, "The Living Constitution and the Second Amendment," 659; Finkelman, *Prelude to Civil War*, 235. Dunlap, 649–50, Kohn, "The Constitution and National Security," 85.

[80] Dunlap, 652.

[81] See note 58 above.

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be infringed.")[82] and as a state right ("A well regulated *Militia*"), fueling the ongoing debate between Standard Modelers and collective-rights advocates.[83] However, both sides agree that the Second Amendment was intended to ensure that the newfound republic would not succumb to arbitrary rule (amongst other things). In other words, the Second Amendment is a check on federal power, in particular its coercive power, that helps ensure that the republic remains free ("the security of a *free* state"). In game-theoretic terms, the Second Amendment helped mitigate the prevailing commitment problem in several ways. First, it diminished the need for a large standing federal army, which could be used for the purposes of domestic repression. Second, it created a counterbalance to the federal army in the form of the state militias and an armed population.[84] The right to bear arms diffused the power of the federal government by putting the entirety of the coercive apparatus beyond its control. Finally, in the most extreme interpretation, the Second Amendment provided the right to confront a tyrannical government by force. In so doing, the Second Amendment helped alter the prevailing incentive structures, reducing the incentive to defect by devolving the coercive power of the federal government, in both absolute and relative terms, to the states.[85] A weaker federal government would be less capable of tyrannizing the states, particularly if counterbalancing forces largely independent of the federal government were maintained.

From a game-theoretic perspective, then, an armed population should have a deterrent effect on the abuse of power.[86] In guaranteeing a right to bear arms,

[82] This reading gained currency in 2008 with the Supreme Court ruling, *District of Columbia* v. *Heller*. Cf. R. Spitzer, *Guns across America: Reconciling Gun Rules and Rights* (Oxford: Oxford University Press, 2015); Saul Cornell and Nathan Kozuskanich, *The Second Amendment on Trial: Critical Essays on District of Columbia v. Heller* (Boston: University of Massachusetts Press, 2013), Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford: Oxford University Press, 2008); Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* (New York: W. W. Norton & Company, 2011). Kevin Sweeney, "Firearms, Militias, and the Second Amendment," in Cornell and Kozuskanich, *The Second Amendment on Trial*, 310–82; Waldman. Despite Heller, however, numerous scholars emphatically reject the accuracy of reading on historical grounds. Cf. Finkelman, "The Living Constitution and the Second Amendment."

[83] It is also the only amendment to contain its own preamble: "A well regulated Militia, being necessary to the security of a free State." See Finkelman, "The Living Constitution and the Second Amendment," 631.

[84] Hendrickson, *Peace Pact*; Deudney, "The Philadelphian System," 201–2, 204.

[85] Nelson Lund, "The Second Amendment, Political Liberty, and the Right to Self-Preservation," *Alabama Law Review*, 39 (1987), 103–30, 115, 122, Levinson, "The Embarrassing Second Amendment," 657; Kates, "Handgun Prohibition," 270–71.

[86] Following a similar logic, Silverstone argues that divided powers acted as a check on American military action abroad. Scott Silverstone, *Divided Union: The Politics of War*

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the states enlisted a strategy of self-enforcement to overcome their fear of defection. Unlike the other checks and balances, the Second Amendment allowed the states themselves to enforce the bargain struck in confederation. By maintaining their own counterbalancing coercive apparatus in the form of an armed citizenry, the states needed not rely exclusively on a third party, such as the Supreme Court, to keep the federal government in check.

In this sense, the Second Amendment is not simply a continuation of colonial arrangements, in which a militia – drawn from and comprising the population – ensured the internal security of the colonies.[87] Nor did it rest on the assumption that citizen–soldiers were expected to fight better than professional soldiers against external threats. The Second Amendment was a radical innovation designed to prevent the new government from squelching the liberty of the republic. Weapons, then, were not so much an alternative to the other Constitutional checks and balances, as they were an insurance policy against their failure, allowing the states to take the risks necessary to construct a more robust republic.[88] Coupled with the other limits in the Constitution,[89] and the cumbersome process required to federalize the militias, the result was a central authority with little capacity to assert its writ without the consent of the governed.

Indeed, the states as well as individual citizens have, on several occasions, used their independent coercive power to defy the federal government.[90] In

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in the Early American Republic (Ithaca, NY: Cornell University Press, 2004), Silverstone, "Federal Democratic Peace: Domestic Institutions and International Conflict in the Early American Republic," *Security Studies*, 13, 3 (2004), 48–102. See also Kates, 270.

[87] An armed citizenry was essential for the provision of internal security in the early days of American statehood. In many areas the government simply lacked the necessary resources to provide law enforcement or equip the militias, so the burden was passed to individual citizens through the Second Amendment.

[88] Cf. Levinson; Reynolds, "A Critical Guide to the Second Amendment."

[89] For example, Article I, Section 8, limits the government's ability to raise funds for raising an army without legislative approval. Weatherup, "Standing Armies and Armed Citizens," 963. "The people," according to Vandercoy, "The History of the Second Amendment," 1007, "control the purse." Furthermore, the appointment of officers and the responsibility for training the militia is reserved to the states under Article I, Section 8. In other words, while the federal government would have the power to enlist the militia, the allegiances of the militia would remain with local authorities who trained and appointed them.

[90] For example, most states refused to send their militias to suppress Shay's Rebellion, which itself comprised numerous militiamen; many states tolerated draft resistance during the Whiskey Rebellion; and state militias failed to enforce the unpopular Embargo Act of 1807. See Higginbotham, "The Federalized Militia Debate." Those states that opposed the War of 1812, including Massachusetts and New York, refused to send their militias to support federal troops. Wiener, "The Militia Clause of the Constitution." The Civil War is probably the best example of states challenging the power of the federal government by force. When the southern states no longer found the bargain struck at confederation desirable, they had the ability to challenge it. While the states lost their capacity to refuse

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at least two examples – the disputed presidential election of 1800[91] and the Nullification Crisis of 1832[92] – the threat of a violent confrontation between state and federal governments helped motivate the leadership to reach a compromise, thus defusing the situation. Armed uprisings are messy affairs and are, therefore, best avoided. Whether or not such examples qualify as unwise, illegitimate, or even treasonous is beyond the scope of this paper. What is certain is that had there been no Second Amendment, such examples of the states counterbalancing the federal government by force would scarcely exist.

At the end of the Revolutionary War the federal government largely demobilized its military, "save 80 men to guard the stores."[93] While proposals to strengthen the federal army were repeatedly presented, most notably by George Washington, who argued that the militias underperformed during the Revolutionary War, the new federal military remained underfunded and anemic. Despite being granted the authority to raise an army under Article I, Section 8, of the Constitution, the federal government took little interest in doing so. The poor economic health of the new country, distrust of standing armies, and long-standing faith in the militias at first precluded the development of a strong national force. The government instead relied on the patchwork of state militias to confront security threats, both at home and abroad. However, these too had mostly fallen into a state of disrepair. Persistent

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to send their militias to assist the federal government in carrying out its constitutionally mandated duties after the passage of the 1903 Dick Act, various states continued to resist the impositions of federal government. Arizona and Oklahoma, for example, called out their National Guards to stop the construction of dams by the federal government, the governor of Iowa mobilized his National Guard to prevent a hearing of the National Labor Relations Board, and several southern states attempted to use their National Guards to block federally mandated civil rights initiatives. Wiener. While some of these examples might qualify as provocative or even illegal (Wiener describes several as outright "treason"), they would not have been possible without the passage of the Second Amendment. Without an armed populace and organized militias the South wouldn't have been able to raise an army to challenge the federal government and the federal government likely wouldn't have faced such a challenge if it had maintained a sizeable peacetime army. Deudney, "The Philadelphian System."

[91] See Joanne Freeman, "Corruption and Compromise in the Election of 1800: The Process of Politics on the National Stage," in Peter Onuf, Jan Lewis, and James Horn, eds, *The Revolution of 1800: Democracy, Race, and the New Republic* (Charlottesville: University of Virginia Press, 2002), 87–120. In 1801, several Republican state governors threatened to call out their militias if Congress failed to elect Thomas Jefferson President (it did). See Michael Bellesiles, "The Soil Will Be Soaked in Blood," in ibid., 60–86; Levinson.

[92] The Nullification Crisis began when South Carolina declared that protectionist tariffs imposed nationwide by the federal government would not be enforced within the state and prepared to resist the federal government. In response, Congress passed the Force Bill, which authorized military intervention in South Carolina. War was averted only when a lower tariff amenable to South Carolina was adopted.

[93] Wiener, 183.

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bickering between the federal government and the states over whose responsibility it was to pay for the militias led most states to neglect them.[94]

Over time, domestic and international threats would give rise to the need for a more robust centralized coercive apparatus. The Militia Act of 1792, passed in response to the Shays Rebellion, made it considerably easier for the President to call forth (i.e. federalize) the state militias to suppress domestic unrest.[95] And, by the end of the Second World War, the US had amassed amongst the most powerful standing national armies in the world. "As war became total in intensity and global in scope," Deudney explains, "constraints on the central state were weakened and compromised in the rush to mobilize and coordinate the economy and populace … the need for grand strategic and civil–military integration conflicted with the elaborate system of constraints upon executive war-making."[96] As a result, the United States has gradually come to more closely resemble other states with a centralized coercive apparatus (i.e. a monopoly over the use of force). Deudney concludes that this was "probably inevitable" given the threats posed by opponents of the United States. In this way, the United States offers an example of institutional isomorphism.[97]

CONCLUSION

The purpose of this paper has not been to overstate the role of the Second Amendment in the founding of the United States. Instead, it has been to shed light on one of its more unusual aspects. Unlike other in countries, the Second Amendment created an oligopoly over the use of force. Various

[94] Whitney, *Living with Guns*; Wiener, 200.

[95] By the time the new country faced its second major armed insurrection in 1794 – the so-called Whiskey Rebellion – Washington was able to order the Virginia, Maryland, Pennsylvania, and New Jersey militias to suppress the uprising. The powers provided for in the 1792 Militia Act were made permanent in 1795. Later, the 1903 Dick Act turned the state militias into a reserve service for the federal army. Now known as the National Guard, the militias were, for the first time in American history, properly trained and accoutered with the help of federal funds. See Whitney. Since then, safeguards against federal overreach have gradually diminished. While the Insurrection Act of 1807 required the permission of the states for the use of the militias by the federal government, the Supreme Court ruled in *Perpich* v. *Department of Defense* (1990) that the federal government can federalize the National Guard without the consent of the state. See Higginbotham. Nevertheless, the National Guard continues to swear allegiance to the state (as well as to the President) and can only be federalized on constitutional grounds (i.e. to suppress insurrection and repel invasion). See Hofstadter, *America as a Gun Culture*; Higginbotham.

[96] Deudney, "The Philadelphian System," 221.

[97] P. DiMaggio and W. Powell, "The Iron Cage Revisited: Collective Rationality and Institutional Isomorphism in Organizational Fields," *American Sociological Review*, 48, 2 (1983), 147–60.

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interpretations have been offered on how the Second Amendment would help mitigate the monopolization of power: the strong variant holds that an armed citizenry would have the means to overthrow the government should it exceed its authority, thus providing a powerful disincentive for federal overreach. The weak variant holds that the militias counterbalance the power of the federal government and limit the necessity of a strong centralized army with which the federal authorities might interfere in the workings of the states.

In exploring this peculiar feature of the Constitution from a game-theoretic perspective, the paper helps partially reconcile Standard Modelers with those who view the Second Amendment as a collective right. In game-theoretical terms, the Second Amendment can be viewed as a (partial) solution to the credible-commitment problem. It not only limits federal power by preventing the federal government from disarming state militias; it also constrains the federal government by providing a counterbalancing force, thereby disincentivizing defection. In both readings, the right to bear arms provides a self-enforcement tool against the potential defection of the federal government. Unlike other checks and balances, the Second Amendment allowed the states to enforce the Constitutional bargain themselves. As such, the Second Amendment helped create a measure of certainty in the uncertainty of the Revolutionary period. Though considerably less important than other checks and balances, the novelty of the Second Amendment makes it a worthy subject of study.

As the Revolutionary period passed, the states let their militias decline; over time, the coercive apparatus has coalesced in the hands of the federal government, growing in size and strength. Nevertheless, the right to bear arms remains as a lingering feature of the states' fear of arbitrary and coercive authority. Though individuals and the states have, on occasion, used the coercive power afforded them by the Second Amendment against the central government (sometimes illegally), what is remarkable is how rare these incidents are. The republic has held together not by some centripetal force, but instead through its unique system of power sharing and checks and balances, which include the Second Amendment.

AUTHOR BIOGRAPHY

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