

## Articles

# COMMONPLACE OR ANACHRONISM: THE STANDARD MODEL, THE SECOND AMENDMENT, AND THE PROBLEM OF HISTORY IN CONTEMPORARY CONSTITUTIONAL THEORY

*Saul Cornell\**

A new consensus on the meaning of the Second Amendment appears to be crystallizing among constitutional scholars.<sup>1</sup> This new model asserts that the Second Amendment protects both an individual and a collective right of the people to bear arms. Proponents of this interpretation also argue that Amendment is part of a checking function designed to enable the people to resist government tyranny, by arms if necessary.<sup>2</sup> Borrowing conceptual language from the physical sciences, supporters of this new interpretation contend that scholarship on the Second Amendment has produced a paradigm comparable to that employed by physicists to describe recent research: the new interpretation is dubbed the "Standard Model."<sup>3</sup> To support their interpretation, proponents of the new orthodoxy quote liberally from the writings of Federalists, Anti-Federalists, and early constitutional commentators such as St. George

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\* Associate Professor of History, Ohio State University. I would like to thank Steve Conrad, David Konig, Suzanna Sherry, and Eugene Volokh for reading earlier drafts of this essay.

1. See Randy E. Barnett and Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 Emory L.J. 1139 (1996).

2. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989).

3. On the use of the term "Standard Model" to describe the emerging body of scholarship on the Second Amendment, see Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461-71 (1995).

Tucker and Joseph Story, in order to support their claim that a broad consensus existed in post-Revolutionary America on the meaning of the right to bear arms.<sup>4</sup>

The growing chorus of support for the Standard Model among legal scholars contrasts with the cool reaction to the Standard Model among early American historians.<sup>5</sup> While legal scholars have confidently asserted the emergence of a new orthodoxy, there is little sign that historians are likely to come to a similar agreement. Indeed, the dominant trends in recent historiography point in the opposite direction. The notion that American political thought might be understood in terms of a single ideological paradigm has collapsed under the accumulating weight of evidence demonstrating the incredible vitality and diversity of American political culture in the Revolutionary era.<sup>6</sup> Ironically, at precisely the moment that many historians have abandoned the search for a "unified field theory" that can accommodate the heterogeneity of American political culture, legal scholars have turned to the language of physics and proclaimed the existence of a Standard Model.<sup>7</sup> Rather than begin

4. See, e.g., Levinson, 99 Yale L.J. (cited in note 2); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. Rev. 831 (1998).

5. For explicit historical critiques of the Standard Model, see Michael A. Bellestiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 L. & Hist. Rev. 567 (1998), and Gary Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books 62 (Sept. 21, 1995). For a response to Wills, see Letters by Sanford Levinson, David C. Williams, and Glenn Harlan Reynolds, N.Y. Rev. of Books 61 (Nov. 16, 1995). The efforts of Standard Modelers to overturn the traditional states' rights argument has blinded legal scholars to the centrality of federalism to the debate over the Bill of Rights. For a useful corrective to this view, see Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 Wm. & Mary Q. 39 (1998).

For dissent within the legal academy see Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. Rev. 57 (1995), and Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Valp. U. L. Rev. 107 (1991). For an example of historical scholarship supportive of the individual rights position central to the Standard Model, see Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. of Am. Hist. 599 (1982); for a counter-argument that the amendment reflected a collective right rooted in civic republican ideals, see Lawrence Delbert Cross, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. of Am. Hist. 22 (1984); see also *The Right to Bear Arms: An Exchange*, 71 J. of Am. Hist. 587 (exchange between Shalhope and Cross).

6. The most recent study of ratification supports the notion that neither Federalist nor Anti-Federalist ideas can be fit into a single explanatory model. Michael Gillespie and Michael Lienesch, eds., *Ratifying the Constitution* (U. Press of Kansas, 1989). For another useful effort to chart the range of discourses available to Americans during the struggle over the Constitution, see Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 Wm. & Mary Q. 3 (1988).

7. It is also ironic that the Standard Model in physics is itself being transformed, as competing versions of string theory have been propounded in an effort to move closer to

with the assumption of a broad consensus, historical scholarship has increasingly embraced a pluralist model of early American political and constitutional thought.<sup>8</sup>

The flaws in the Standard Model are emblematic of deeper problems in the way history has been used by constitutional scholars.<sup>9</sup> Partisans of the Standard Model have not only read constitutional texts in an anachronistic fashion, but have also ignored important historical sources vital to understanding what Federalists and Anti-Federalists might have meant by the right to bear arms. The structure of legal scholarship has served to spread these errors rather than to contain them. Once published, these errors enter the canons of legal scholarship and are continuously recycled in article after article.<sup>10</sup> Upon closer inspection, the new orthodoxy on the Second Amendment shares little with the Standard Model employed by physicists. Indeed, recent writing on the Second Amendment more closely resembles the intellectual equivalent of a check kiting scheme than it does solidly researched history.

The problem with the legal scholarship associated with the Standard Model is not simply a function of failing to remain up-to-date with the latest trends in early American historiography. Standard Modelers have more fundamentally failed to heed the useful guidelines suggested by H. Jefferson Powell in his important essay, "Rules for Originalists."<sup>11</sup> In that article, Powell correctly warned legal scholars about the dangers of anachronism in constitutional scholarship. The first error is to assume that the

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a more complete account of the universe. See George Johnson, *Almost in Awe, Physicists Ponder Ultimate Theory*, N.Y. Times D8 (Sept. 22, 1998).

8. The last effort to formulate such a unified field theory was Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 *Wm. & Mary Q.* 49 (1972). In his more recent work, Shalhope has embraced a more pluralist conception of early American political culture. See Robert E. Shalhope, *Roots of Democracy: American Thought and Culture, 1760-1800* (Twayne, 1990). For a post-mortem on republican synthesis, see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. of Am. Hist.* 11 (1992). Among historians, pluralism now seems to be the ascendent paradigm for understanding the ideologies of the Founding era.

9. See Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *Fordham L. Rev.* 87 (1997).

10. Thus, Akhil Amar cites Sanford Levinson, and David Williams cites Akhil Amar, and Glen Harlan Reynolds cites Levinson, Amar, and Williams. None of these articles has been subjected to the sorts of blind peer review that scholarship published in journals such as the *William and Mary Quarterly*, *Journal of American History* or the *Law and History Review* must pass before publication. Once historical errors enter this closed system, they are endlessly reproduced.

11. H. Jefferson Powell, *Rules for Originalists*, 73 *Va. L. Rev.* 659 (1987).

framers shared our world view: "The 1787 Constitution and the first twelve amendments," Powell noted, "were written and ratified by people whose intellectual universe was distant from ours in deeply significant ways."<sup>12</sup> The second error, also identified by Powell and committed by the Standard Modelers, is to forget that "[c]onsensus or even broad agreement among the founders is a historical assertion to be justified, not assumed."<sup>13</sup> When Standard Modelers claim that they have produced voluminous evidence to demonstrate such a consensus, they fall into an even more deeply rooted historical fallacy: rather than demonstrate the existence of a broad cultural agreement, supporters of the Standard Model have assumed that a common set of terms implied a deeper consensus on what those terms meant.

This anachronism at the heart of the growing body of literature on the Standard Model has been brought into sharper focus by Eugene Volokh's important essay, "The Commonplace Second Amendment."<sup>14</sup> Volokh produces copious evidence to suggest that similar language was found in nearly all of the constitutional documents produced in post-Revolutionary America, most notably the many state constitutions drafted during this period. Volokh suggests that the inclusion of provisions securing the right to bear arms in state constitutions demonstrates that "these provisions secure rights against the state governments."<sup>15</sup> If this is true, he argues, "they must recognize a right belonging to someone other than the state."<sup>16</sup> For Volokh this discovery provides further proof that the right to bear arms must have been viewed as an individual right by Americans of the Revolutionary generation.

Volokh is not alone. Other supporters of the Standard Model have also marshalled compelling evidence that Americans in this period shared a common constitutional language. But documenting the recurring use of a particular set of terms is not the same as understanding how Americans used the language of constitutionalism. Part of the problem with the Standard Model stems from a failure to grapple with a basic problem of historical interpretation, identified by the Cambridge historian Quentin Skinner in one of the most influential historical es-

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12. *Id.* at 673.

13. *Id.* at 684

14. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998).

15. *Id.* at 810.

16. *Id.*

says written in the last fifty years, "Meaning and Understanding in the History of Ideas."<sup>17</sup> In that essay, Skinner makes a vital distinction between "the *occurrence* of the words (phrases or *sentences*) which denote the given idea, and the *use* of the relevant sentence by a particular agent on a particular occasion with a particular intention (*his* intention) to make a particular *statement*."<sup>18</sup> The approach of Standard Modelers does not tell us much about the intent of the authors who wrote these texts. What did Federalists and Anti-Federalists each mean by the right to bear arms? The Standard Model suffers from the problem that mars so much law office history: a failure to adequately contextualize constitutional texts. To understand what a particular historical actor meant when he wrote about the right to bear arms requires scholars to immerse themselves in the surviving evidence from this period and to analyze published and unpublished sources, private comments as well as public statements. Indeed, in addition to the plethora of traditional textual sources, one must explore the political and social texts from this period. The behavior of the historical actors who wrote these texts must be read alongside their published statements.<sup>19</sup>

This failure of the Standard Model to place language in context is encapsulated in the notion of the "commonplace" that Volokh invokes in his recent essay. Standard Modelers have treated the recurring use of particular constitutional terms as examples of commonplaces.<sup>20</sup> What this approach ignores is the profound difference between our modern notion of the commonplace and the way in which the eighteenth century under-

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17. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in James Tully, ed., *Meaning and Context: Quentin Skinner and His Critics* 29-67 (Princeton U. Press, 1988). For a thoughtful discussion of the implications of Skinner's essay for constitutional theory, see Paul Brest, *The Misconceived Quest for the Original Understanding*, in Jack N. Rakove, ed., *Interpreting the Constitution: The Debate Over Original Intent* 227-62 (1990).

18. Skinner, *Meaning and Understanding* at 55 (cited in note 17).

19. On the absence historical contextualization in constitutional theory, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995). On the need to consult non-traditional texts, including social texts such as crowd behavior, to recover lost constitutional voices, see Saul Cornell, *Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography*, 12 L. and Hist. Rev. 1 (1994).

20. Volokh, 73 N.Y.U. L. Rev. at 810 (cited in note 14). Volokh's reading of the Second Amendment has been challenged by David Williams, who stresses the republican character of the Second Amendment. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991), and David C. Williams, *Response: The Unitary Second Amendment*, 73 N.Y.U. L. Rev. 822 (1988). The problem with this critique is that it also assumes a consensus in post-Revolutionary political and constitutional thought.

stood this term. The notion of the commonplace itself needs to be understood historically.

Educated Americans of the Revolutionary generation often kept commonplace books in which they copied passages from important texts. As literary historian Jay Fliegelman notes, the writers of commonplace books invariably edited and improved the texts they selected, in essence interpreting and re-reading the texts they copied. The ideas in commonplace books, upon closer inspection, were anything but commonplace. The practice of transcribing passages into commonplace books, like the drafting of constitutions, was not a passive exercise of simply repeating tired political clichés but rather a dynamic process in which individuals often transformed the meaning of the texts they read in profound ways.<sup>21</sup>

The contentiousness of American political and constitutional thought was evident to John Adams, who lamented the confusion in post-Revolutionary political discourse. Americans, Adams observed, could not even agree on the meaning of so basic a term as republicanism. He cautioned one correspondent that “[f]raud lurks in generals.”<sup>22</sup> Exasperated by a tendency for political language to become debased, Adams complained that “[t]here is not a more unintelligible word in the English language than republicanism.”<sup>23</sup> Most historians now accept the accuracy of Adams’s observation and have recognized that republican, liberal, and religious idioms were mixed together in a bewildering range of combinations during the late eighteenth century.<sup>24</sup>

21. On the culture of commonplace books, see Jay Fliegelman, *Declaring Independence: Jefferson, Natural Language, and the Culture of Performance* (Stanford U. Press, 1993). See also Douglas L. Wilson, *Thomas Jefferson's Early Notebooks*, 42 *Wm. & Mary Q.* 433 (1985); David Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonians Critique of Common Law Adjudication*, in Bruce H. Mann and Christopher L. Tomlins, eds., *The Many Legalities of Early America* (1999). On the notion of readers as active producers of meaning, see Kathy Davidson, *Revolution and the Word: The Rise of the Novel in America* (Oxford U. Press, 1986).

22. Linda Kerber, *The Republican Ideology of the Revolutionary Generation*, 37 *Am. Q.* 474, 474 (1985) (quoting John Adams to Mercy Otis Warren, August, 8, 1807). Kerber’s essay stresses both the variety of different discourses available to Americans during the Revolutionary generation and the ability of republicanism to be re-shaped by different groups to suit their particular political aspirations. Additional evidence of Adams’s frustration with the absence of consensus in America on the meaning of basic concepts such as republicanism may be found in his monumental study, *A Defense of the Constitutions of Government of the United States of America* (C. Dilly, 1787).

23. Kerber, 37 *Am. Q.* at 474 (quoting Adams to Warren) (cited in note 22).

24. For an excellent model of how different idioms could be fused together in novel ways, see James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 *J. of Am. Hist.* 9 (1987).

A systematic survey of the full range of American ideas about rights in the Revolutionary era examining the broad range of relevant sources would be a monumental undertaking. Yet such an exhaustive inquiry is not necessary to raise profound questions about the accuracy of the Standard Model. Consider the case of Pennsylvania, one of the many constitutional examples cited by supporters of the Standard Model.<sup>25</sup> In one of the most even-handed discussions of the Second Amendment, David T. Hardy concludes that Pennsylvanians "sought an unquestionably individual right."<sup>26</sup> Pennsylvania is thus a crucial test case for the Standard Model. In addition to the fact that the Standard Modelers rely on it, there are other reasons why Pennsylvania provides an excellent venue to contextualize the debate over the meaning of the Second Amendment. Ratification in this key state produced one of the most lively public debates over the meaning of the Constitution, and the writings of Federalists and Anti-Federalists in Pennsylvania were among the most influential and widely distributed of any essays published during ratification.<sup>27</sup>

How did Pennsylvanians understand the right to bear arms? Rather than demonstrate consensus, the historical evidence suggests that there was considerable conflict over how to understand this right.<sup>28</sup> Indeed, one need not even look beyond the ranks of Pennsylvania Anti-Federalists to see the contested nature of this seemingly commonplace idea. When the views of Pennsylvania Anti-Federalists are examined in historical con-

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25. Reynolds, 62 Tenn. L. Rev. (cited in note 3). For other examples of scholarship that has relied on Pennsylvania Anti-Federalist thought, see Thomas B. McAfee and Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. Rev. 781 (1997); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1 (1996); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 Valp. U. L. Rev. 131 (1991).

26. David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & Politics 1, 39 (1987).

27. On the distribution of these items and other writings by Pennsylvania Federalists and Anti-Federalists, see Merrill Jensen, ed., 13 *The Documentary History of the Ratification of the Constitution*, 588-96 (State Historical Society of Wisconsin, 1976) ("DHRC").

28. For useful discussions of the different approaches of Federalists and Anti-Federalists to the problem of rights, see Paul Finkleman, *Between Scylla and Charybdis: Anarchy, Tyranny, and the Debate over a Bill of Rights*, in Ronald Hoffman and Peter J. Albert, eds., *The Bill of Rights: Government Proscribed* 103-74 (U. Press of Virginia, 1997); on the diversity with the ranks of Anti-Federalists, see Saul Cornell, *Mere Parchment Barriers? Anti-Federalists, the Bill of Rights, and the Question of Rights Consciousness*, in Hoffman and Albert, eds., *The Bill of Rights* at 175-208.

text, they raise serious doubts about the historical validity of the Standard Model.

### RETHINKING THE MEANING OF LIBERTY AND RIGHTS: THE PENNSYLVANIA CONSTITUTION OF 1776

The language of the Pennsylvania state constitution of 1776 is often cited in support of the Standard Model's claim that the right to bear arms was an individual right that protected citizens from their state governments. The relevant provision in the 1776 Pennsylvania provision asserts:

The people have a right to bear arms for the defense of themselves and the State; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up. And the military should be kept under strict subordination to, and governed by the civil power.<sup>29</sup>

Shortly after adopting this language into their constitution, Pennsylvanians enacted a stringent loyalty oath. The Test Acts, as they were known to contemporaries, barred citizens who refused to take the oath from voting, holding public office, serving on juries, and transferring real estate. Individuals who refused the oath could also be disarmed, as "persons disaffected to the liberty and independence of this state."<sup>30</sup> The Acts thus stripped many essential rights from a large segment of the population, perhaps as much as forty percent of the citizenry. Both the timing and language of the Acts suggests that they were not simply an emergency measure enacted during time of war, but a reflection of a particular republican ethos that was antithetical to modern liberal ideas about rights. As historian Douglas Arnold notes, "the avowed policy of the architects of the test acts was, thus, not simply to provide for internal security but to reduce the political community to the 'faithful.'"<sup>31</sup> Efforts to challenge the

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29. Pennsylvania Convention, Declaration of Rights, August 21, 1776, in Jack N. Rakove, ed., *Declaring Rights: A Brief History With Documents* 86-87 (Bedford Books, 1998).

30. The Test Act was passed 1777. See James T. Mitchell and Henry Flanders, eds., *9 The Statutes at Large of Pennsylvania* 110-14 (Wm. Stanley Ray, 1903). The act was amended and the provisions for disarming "persons disaffected to the liberty and independence of this state" strengthened in 1778. *Id.* at 346-48.

31. Douglas Arnold, *A Republican Revolution: Ideology and Politics in Pennsylvania, 1776-1790* at 109 (Garland Publishing, 1989). Another useful account of the controversy over the Acts may be found in Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* at 282 (Pennsylvania Historical and Museum Commission, 1942).



constitutionality of the acts were unsuccessful and they remained in effect until abolished by the legislature in 1789. Throughout this period Pennsylvania's Constitutionalists, the group who would become the leading Anti-Federalists in the state, defended the Acts.

The evidence of the Test Acts shows that, contrary to the claims of legal scholars such as Sanford Levinson and David Williams, there is nothing embarrassing or terrifying about the way Pennsylvanians understood the right to bear arms. Gun ownership in Pennsylvania was based on the idea that one agreed to support the state and to defend it against those who might use arms against it. Only citizens who were willing to swear an oath to the state could claim the right to bear arms. Gun ownership in Pennsylvania was thus predicated on a rejection of the very right of armed resistance posited by the Standard Model.<sup>32</sup> The failure to consider the Test Acts, arguably the most important pieces of legislation enacted by Pennsylvania after adoption of their Constitution, is a serious historical omission on the part of supporters of the Standard Model.<sup>33</sup>

A number of supporters of the Standard Model have also drawn an analogy between the structural roles played by the press and by an armed population in checking government tyranny. While this comparison is instructive, it rests on an historically questionable reading of the way the press functioned in post-revolutionary America.<sup>34</sup> While leading Pennsylvania Con-

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32. For an argument that a similar policy informed gun laws in other states, see Bellesiles, 16 L. & Hist. Rev. (cited in note 5).

33. See, e.g., Levinson, 99 Yale L.J. (cited in note 2); Williams, 101 Yale L.J. (cited in note 20). Even in his extremely balanced account, David Hardy does not consider the Test Acts, an omission that calls into question his individualist reading of Pennsylvanian views of the right to bear arms. Hardy, 4 J.L. and Pol. 39 (cited in note 26). Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 Vt. L. Rev. 255 (1985) provides a cursory treatment of the Acts that both misconstrues the intent and scope of the Acts. Neither Halbrook nor Hardy consults Brunhouse or Arnold's work. The latter's 1976 Princeton University doctoral dissertation, originally titled *Political Ideology and the Internal Revolution in Pennsylvania, 1776-1790*, provides a detailed discussion of the controversy over the Test Acts.

34. On the connections between the First and Second Amendment and the notion of a checking function, see L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997). Powe's ideas have been endorsed by J.M. Balkin and Sanford Levinson in *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963-1013 n.157 (1998). Both of these discussions of free speech rest on outdated historiography tied to the controversy around the work of Leonard Levy. On this debate, see Leonard Levy, *Emergence of a Free Press* (Oxford U. Press, 1985). For a critique of Levy's thesis, see David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 Stan. L. Rev. 795 (1985). The terms of

stitutionalists certainly believed in freedom of the press, these same individuals also accepted the notion of seditious libel. Support for these two seemingly contradictory propositions did not mean that Constitutionalists were hypocrites. The appropriate means to both guard liberty and restrain licentiousness was to have the jury empowered to determine both the facts and the law on questions of libel. The conception of liberty that Constitutionalists embraced looked to the jury to protect liberty *and* to enforce communal norms. Because of this conception of liberty, Pennsylvania's constitution granted enormous latitude to the legislature to enact laws to promote the public good. Thus, for example, the authors of the Pennsylvania constitution showed no reservations about passing legislation banning the theater in Philadelphia as a threat to public virtue. Such a measure was perfectly compatible with constitutional ideas behind the Test Acts. Closing the theater or excluding large numbers of the population from claiming a right to gun ownership sprang from the same republican conception of liberty.<sup>35</sup> Once again, the notion that the Pennsylvania state constitution protected a modern liberal rights based vision of constitutionalism is simply anachronistic.

Proponents of the Standard Model concede that the republican emphasis on virtue justified the exclusion of a small category of citizens from gun ownership. Thus Glenn Harlan Reynolds echoes the claim of gun rights advocate Don Kates that "this emphasis on the virtuous citizen does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue."<sup>36</sup> This generalization clearly needs to be re-examined. Pennsylvania Constitutionalists, the supporters of the state con-

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this debate have shifted considerably since the publication of Levy's work. A more historically persuasive effort to root ideas about seditious libel in the context of post-revolutionary constitutionalism may be found in Norman Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (U. of North Carolina Press, 1986). Rosenberg's work provides a useful corrective to the Levy thesis and its critics.

35. It is worth observing that on a variety of other constitutional questions, including issues of political economy and representation, Anti-Federalists did articulate a more liberal constitutional vision. For a good illustration of the liberal dimensions of Pennsylvania Anti-Federalism, see Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in Richard Beeman, et al., eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (U. of North Carolina Press, 1987). On the blending of liberal and republican elements in Anti-Federalist thought, see Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (U. of North Carolina Press, 1999).

36. Reynolds, 62 *Tenn. L. Rev.* at 480 (cited in note 3) (quoting Don B. Kates Jr., *The Second Amendment: A Dialogue*, 49 *L. & Contemp. Probs.* 143, 146 (1986)).

stitution of 1776, believed that a much wider group of citizens could be excluded from the right to bear arms.

### PENNSYLVANIA ANTI-FEDERALISTS AND THE RIGHT TO BEAR ARMS

The Pennsylvania constitution of 1776 was written by the men who would eventually become the most prominent Anti-Federalists in that state. The most detailed elaboration of Pennsylvania Anti-Federalist ideas about the nature of constitutions and rights was framed by the Anti-Federalist author who adopted the republican pen-name of "An Old Whig."<sup>37</sup> In contrast to supporters of the new Federal Constitution, this Anti-Federalist made it clear that he put his faith in traditional "old whig" principles rather than in the innovations proposed by Federalists. In An Old Whig's constitutional thought, the rights of the community to legislate on behalf of the public good were not antithetical to liberty:

If [the people] yield up all their natural rights they are absolute slaves to their governors. If they yield up less than is necessary, the government is so feeble, that it cannot protect them.—To yield up so much, as is necessary for the purposes of government; and to retain all beyond what is necessary, is the great point.<sup>38</sup>

Certain rights could never be ceded by individuals. Religious conscience was the most obvious example of a right which could not be renounced. Other rights could only be compromised when the good of society demanded such sacrifices. Individual liberty could never be sacrificed for the good of a particular interest, or faction. Limits on liberty were permissible as long as laws were enacted by representatives of the people. It was vital, however, for citizens to remain active, vigilant, and even suspicious of government, so that representatives would never lose sight of the public good. This attitude did not mean that Anti-Federalists were anti-statist.<sup>39</sup> Anti-Federalists placed tremen-

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37. In his collection of Anti-Federalist writings, Herbert J. Storing does not identify the authorship of An Old Whig, but evidence for this attribution may be found in a letter from William Shippen, Jr., to Thomas Lee Shippen, (Nov. 18 and 22, 1787), in 2 *DHRC* at 288 (cited in note 27). These essays were most likely a collective effort of a number of the most prominent members of Pennsylvania's Constitutionalist party. An Old Whig, *Essays of An Old Whig*, in Herbert J. Storing, ed., 3 *The Complete Anti-Federalist* 17 (U. of Chicago Press, 1981).

38. *Id.* at 33.

39. The notion that American political thought was strongly anti-statist is central to

dous faith in the ability of the state to legislate on behalf of the public good. It was precisely because the state government could be counted on to represent the will of the people that An Old Whig advised his readers that, “[i]f, indeed, government were really strengthened by such surrender” of rights, and “if the body of the people were made more secure, or more happy by the means, we ought to make the sacrifice.”<sup>40</sup> He reiterated this by declaring that “if the good of his country should require it; and every individual in the community ought to strip himself of some convenience for the sake of the public good.”<sup>41</sup> Republican notions of citizenship, of sacrificing some measure of one’s liberty to serve the public good, were deemed essential.<sup>42</sup> “[W]herever the subject is convinced that nothing more is required from him, than what is necessary for the good of the community, he yields a cheerful obedience, which is more useful than the constrained service of slaves.”<sup>43</sup> An Old Whig willingly sacrificed a considerable degree of liberty, including the rights of dissenting religious and political minorities who were effectively disenfranchised and disarmed by state loyalty oaths, when the good of the community demanded such concessions.

An Old Whig provided one of the most thoughtful statements of Pennsylvanian Anti-Federalist constitutional ideals. A more widely distributed and in many respects more influential articulation of those views was provided by “The Dissent of the Minority,” written shortly after Pennsylvania’s ratification of the federal Constitution.<sup>44</sup> Although assembled in some haste, the

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the argument of Levinson, 99 Yale L.J. (cited in note 2). A similar notion also informs the argument of McAfee and Quinlan, 75 N.C. L. Rev. (cited in note 25). Both of these arguments also rest on a selective reading of the evidence. Most Anti-Federalists clearly placed great faith in their state governments. A more balanced assessment of Anti-Federalist views about the relationship between liberty and the state may be found in Robert C. Palmer, *Liberties as Constitutional Provisions, 1776-1791*, in William E. Nelson and Robert Palmer, eds., *Liberty and Community: Constitution and Rights in the Early American Republic* (Oceana Publications, 1987).

40. An Old Whig, *Essays* at 49 (cited in note 37).

41. *Id.*

42. Perhaps the best effort to demonstrate how Whig constitutional thought reconciled liberty with republican ideals may be found in John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (U. of Wisconsin Press, 1986), and *The Concept of Liberty in the Age of the American Revolution* (U. of Chicago Press, 1988).

43. An Old Whig, *Essays* at 33 (cited in note 37).

44. John Smilie, an author of the Old Whig essays, was one of the signers of the Dissent. Although the Dissent was signed by the Anti-Federalist members of the state ratification convention, including Smilie, it was drafted by Samuel Bryan, one of the most important Anti-Federalist essayists. The Address and Reasons of Dissent of the Minority . . . , in 2 *DHRC* at 617-24 (cited in note 27). Gary Wills notes that this piece was com-

views expressed in the Dissent attained a semi-official status as the statement of the Anti-Federalist minority of Pennsylvania's ratification convention. The Dissent not only provided a concise statement of Anti-Federalist objections to the Constitution, but also offered one of the first proposals for amendments to the Constitution, including two provisions on the right to bear arms.

The two amendments suggested by the Dissent of the Minority that touched on the right to bear arms need to be read against the general principles defined by An Old Whig. The Dissent of the Minority recommended the following amendments to the Constitution:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers. . . .

The inhabitants of the several states shall have the liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.<sup>45</sup>

The key phrase in the first provision of the Dissent, which is generally overlooked, is the clause that allows individuals who pose a danger to the public to be disarmed. Anti-Federalists clearly read this clause in extremely broad terms. The second

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posed in a hurry and is not among the most intellectually powerful representations of Anti-Federalist thought. See Wills, N.Y. Rev. of Books at 65 (cited in note 5). While these characterizations may be apt, it is also important to recognize that despite these shortcomings, the Dissent became one of the most widely reprinted Anti-Federalist essays.

In treating Anti-Federalist thought it is important to draw a distinction between those essays that were influential in 1787-88 and those that have become central to the modern scholarly canon. In a number of cases the texts most esteemed by modern commentators were not necessarily the ones most important to Anti-Federalists during ratification. For more on this issue, see Cornell, *The Other Founders* at 25-26 (cited in note 35).

45. Dissent of the Minority at 623-24 (cited in note 44). The provisions about hunting and fowling were not emulated by any state ratification conventions when proposals for amendments were debated.

provision, it is worth noting, bars Congress *but not the states* from placing restrictions on hunting. Rather than revealing an expansive individual right to bear arms, the Dissent reflects the strong states' rights conception of liberty defended by Pennsylvania Anti-Federalists. While Anti-Federalists in this state may have feared a distant government, they placed enormous faith in their state government.

Only by understanding the nature of Pennsylvania Anti-Federalism can the claim of John Smilie in the Pennsylvania ratifying Convention be properly contextualized. Smilie argued that “[w]hen a select militia is formed; the people in general may be disarmed.”<sup>46</sup> What did Smilie mean? If lifted out of context, Smilie’s words would seem to provide strong proof of the claims of Standard Modelers. Yet, Smilie, one of the authors of *An Old Whig* and a strong supporter of his state’s Test Acts, clearly accepted that serious restraints could be placed on the right to bear arms without undermining the idea of a liberty. Although he feared that federal control of the militia might disarm citizens, he showed no similar concern about his own state government — which had done precisely that with its Test Act. Smilie shared with many Anti-Federalists considerable faith in the ability of state government to regulate gun ownership. The state would decide who among the people demonstrated sufficient virtue to be trusted with the important task of serving in the militia.

The question of who exactly were “the people” was not only central to the meaning of the Second Amendment, but was also at the heart of the debate between Federalists and Anti-Federalists during ratification. The key question for Americans after 1776 was how the voice of the people was to be discerned. Indeed, the argument between Federalists and Anti-Federalists turned on this vital issue. For Anti-Federalists, appeals to the people that bypassed the existing structures of government, particularly the states, were viewed as a rhetorical ploy. The American people did not exist as an abstraction. The will of the people could only be organized through corporate entities such as towns and states.<sup>47</sup> The effort to counterpose states’ rights and

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46. Speech from John Smilie to the Pennsylvania State Convention (Dec. 6, 1787), in 2 *DHRC* at 509 (cited in note 27). For a discussion of the controversy over the creation of a select militia, see Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 156 (Harvard U. Press, 1995). Malcolm quotes Smilie’s convention speech without placing his statement in the context of Smilie’s earlier involvement with the Test Act controversy.

47. On the idea of the people as a political fiction, see Edmund S. Morgan, *Invent-*

individual rights is one of the most serious anachronisms in recent discussions of Anti-Federalism by supporters of the Standard Model.

Deciding exactly who the people were was closely connected to the problem of social class. Indeed, the meaning of the right to bear arms, unlike virtually any other right described in either state constitutions or the federal Constitution, was colored by the inchoate notions of class and rank that shaped American politics in this period.<sup>48</sup> Standard Modelers have generally approached Anti-Federalists as though they were modern democrats.<sup>49</sup> This misreading of the evidence has colored the way concepts such as the ideal of a general militia have been interpreted. The claim that such a militia included the full body of citizens needs to be carefully scrutinized. One of the most contentious issues pertaining to the militia was efforts by the wealthy to avoid militia service by hiring substitutes.<sup>50</sup> In effect, one could buy an exemption from a basic constitutional obligation. At the other extreme there was also concern over the threat posed by the inclusion of unpropertied citizens within the ranks of the militia.<sup>51</sup> The tendency to homogenize the thought of Anti-

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*ing the People: The Rise of Popular Sovereignty in England and America* 263-87 (Norton, 1988). The connections between states' rights and individual rights in Anti-Federalist thought are discussed in Cornell, *Mere Parchment Barriers* (cited in note 28).

48. For rather different approaches to the problem of class and rank in this period, see Gordon S. Wood, *The Radicalism of the American Revolution* (A.A. Knopf, 1992), and Alfred F. Young, ed., *Beyond the American Revolution: Explorations in the History of American Radicalism* (Northern Illinois U. Press, 1993). The issue of race is even more complex than class. For an argument that race was not an obstacle to gun ownership, see Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Georgetown L.J.* 309 (1991). For an interpretation that stresses the exclusion of African-Americans, see Bellesiles, 16 *L. and Hist. Rev.* (cited in note 5).

49. The claim that Anti-Federalism was essentially democratic is central to both Amar, 100 *Yale L.J.* (cited in note 4), and Williams, 101 *Yale L.J.* (cited in note 20). The problem with this view is that it ignores the complexity and diversity of Anti-Federalism, which included a broad spectrum of political views, some quite democratic and others extremely elitist.

50. Mark Pitcavage, *An Equitable Burden: The Decline of State Militias, 1783-1858* (1995) (Ph.D. dissertation, Ohio State University).

51. A number of Anti-Federalists expressed concern over the danger posed by the propertyless, who lacked the virtue associated with a militia composed of yeoman farmers or planters. These Anti-Federalists feared that the rabble might become an instrument of despotism. One forceful expression of this fear occurred in the Virginia Convention. See George Mason, *Speech in the Virginia Ratification Convention Debates*, in 10 *DHRC* at 1312 (cited in note 27). Mason believed that state control of the militia provided a solution to this problem by ensuring that virtuous members of the gentry retained positions of authority in the militia. Mason's thought reflected the hierarchical assumptions of planter society. On this point see Morgan, *Inventing the People* at 173 (cited in note 47). Recent historical scholarship suggests that even in Virginia the politics of def-

Federalists, casting the opposition to the Constitution as an essentially populist democratic movement, ignores the thought of elite Anti-Federalism and confuses the profound differences separating moderate democrats from the most radical wing of the Anti-Federalist coalition.<sup>52</sup>

Consider the case of two authors often quoted by Standard Modelers, New York's Federal Farmer and Virginia's George Mason. Ironically, the more hierarchical nature of Virginia society facilitated a more inclusive view of who might serve in the militia. Virginians such as Mason might confidently count on a political culture shaped by the ideal of deference to contain the threat posed by class antagonisms. New York's Federal Farmer was far less sanguine about the inclusion of the propertyless within the ranks of the militia.<sup>53</sup> While Standard Modelers have often cited Federal Farmer, they have seldom correctly identified its author.<sup>54</sup> Federal Farmer expressed the views of New York's Clintonians and may well have been the merchant Melancton Smith. Federal Farmer's variant of democracy captured the emerging liberal economic ideals of the merchant community in New York. Rather than praise the populism of Daniel Shays, Federal Farmer denounced Shays's Rebellion as an example of

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erence was breaking down. For a discussion of how members of the Virginia gentry dealt with the threat posed by an armed population, see Michael A. McDonnell, *Popular Mobilization and Political Culture in Revolutionary Virginia: The Failure of the Minutemen and the Revolution from Below*, 85 J. of Am. History 946, 948 (1998).

52. Cornell, *The Other Founders* (cited in note 35).

53. New York's Federal Farmer also argued that state control of the militia was necessary to prevent the creation of a select militia composed of the propertyless. In contrast to Mason, Federal Farmer viewed the propertyless as a much greater threat to social stability. Federal Farmer, *Letters from the Federal Farmer*, in Storing, *2 Complete Anti-Federalist* at 341-42 (cited in note 37).

54. The identity of the Federal Farmer has been a subject of considerable controversy. Once thought to be the work of Virginian Richard Henry Lee, the case against Lee is forcefully argued by Gordon S. Wood, *The Authorship of the Letters from the Federal Farmer*, 31 Wm. & Mary Q. 299 (1974). Wood's suggestion that Federal Farmer was probably a New Yorker has been elaborated by Robert H. Webking who argues that Federal Farmer may have been the New York merchant Melancton Smith. Robert H. Webking, *Melancton Smith and the Letters from the Federal Farmer*, 44 Wm. & Mary Q. 510 (1987). For examples of legal scholars who have used an older mistaken attribution of Federal Farmer's identity, see David T. Hardy, 4 J.L. & Pol. (cited in note 26); Halbrook, 26 Valp. U. L. Rev. (cited in note 25); Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 Akron L. Rev. 57 (1995); David B. Kopel and Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 Md. L. Rev. 438 (1997); Williams, 101 Yale L.J. (cited in note 20); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring With the People*, 81 Cornell L. Rev. 879 (1996); David E. Vandercoy, *The History of the Second Amendment*, 28 Valp. U. L. Rev. 1007 (1994).



leveller democracy.<sup>55</sup> Moderate democrats of the middling sort, such as Federal Farmer, were more apt to fear the dangers of an armed mob than they were to trust that such a mob might serve as the ultimate check on government tyranny. Federal Farmer and Pennsylvania's Old Whig each placed their faith in the state militias, not mobs, as the appropriate check on despotism, and were thus willing to limit gun ownership.

The fact that so many Anti-Federalists believed that one could exclude large numbers of individuals from the right of gun ownership suggests that a significant portion of Americans in eighteenth-century America understood liberty in terms rather different than those of modern liberal rights-based constitutional theories. Indeed, it is important to recall that the right of gun ownership was connected with an obligation of militia service. Governments could not only compel attendance at militia musters, but the failure to comply could result in fines. In general, modern rights are not subject to these sorts of restrictions and seldom carry with them these types of obligations.<sup>56</sup>

#### NATURAL OR CONSTITUTIONAL RIGHT: THE RIGHT TO BEAR ARMS AS A CHECK ON TYRANNY

For Standard Modelers, the checking function of the Second Amendment was intended by the framers to incorporate a right of revolution into the fabric of constitutionalism.<sup>57</sup> In his provocative article, "The Embarrassing Second Amendment," Sanford Levinson argues that the entire body of the people in arms, "or at least all of those treated as full citizens of the community," provided the ultimate constitutional check on government tyranny.<sup>58</sup> To the extent that Americans of the Revolu-

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55. For Federal Farmer's attack on the levelling democracy, see Federal Farmer, *Letters* at 224, 227, 253 (cited in note 53).

56. On modern theories of rights, see Ronald Dworkin, *Taking Rights Seriously* (Duckworth & Co., 1977). For a discussion of the historical evolution of American views of rights, see Michael J. Lacey and Knud Haakonessen, eds., *A Culture of Rights: The Bill of Rights, in Philosophy, Politics and Law, 1791-1991* (Cambridge U. Press, 1991). For a critique of modern rights based constitutional and political thought, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Macmillan, 1991).

57. Reynolds, 62 Tenn. L. Rev. at 472 (cited in note 3).

58. Levinson, 99 Yale L.J. at 646 (cited in note 2). The issue of citizenship in the post-Revolutionary era was exceedingly complex. Given the problem posed by loyalism, the issue of who might claim the full rights of citizenship is not as simple as Levinson's caveat implies. As historian James Kettner notes, the idea-common in English law—that "citizenship could comprehend separate legal categories of membership" continued to shape constitutional thought in this period. James Kettner, *The Development of American Citizenship, 1608-1870* at 215-16 (U. of North Carolina Press, 1978). For a more

tionary era were Lockeans, such a claim is a truism. Most Americans did accept a right of revolution. Such a right, however, was not a constitutional check, but a natural right that one could not exercise under a functional constitutional government. The people had a right to abolish their government and resort to armed resistance in defense of their liberties *when* the constitutional structures of government ceased to function. Even if some Anti-Federalists accepted the notion that certain natural rights might be judicially enforceable, few mainstream Anti-Federalists would have accepted that revolution was such a right.<sup>59</sup>

In fact, we can test this hypothesis by examining what happened when the most radical voices within Anti-Federalism tried to claim a right to use the militia and arms to check despotism. The two instances in which radical Anti-Federalists asserted a right to check government tyranny by resorting to arms, the Carlisle Riot and the Whiskey Rebellion, are central to evaluating the historical accuracy of the Standard Model,<sup>60</sup> and the failure to analyze this body of evidence is among the most glaring historical omissions associated with the Standard Model.<sup>61</sup>

Unrest in Carlisle was sparked by the Carlisle Federalists' decision to publicly celebrate their ratification victory. Carlisle

elaborate treatment of the exclusionary nature of citizenship during this period, see Rogers M. Smith, *Civic Ideals: Conflicting Values of Citizenship in U.S. History* (Yale U. Press, 1997).

59. Modern scholars are divided over the role of natural rights in early American constitutional thought. For a defense of the idea of an unwritten constitution grounded in natural law, see Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987). For alternative views that challenge the notion that the Founders expected judges to enforce principles of natural law drawn from an unwritten constitution, see Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. Rev. 421 (1991), and Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215 (1990).

60. Actions such as the Carlisle Riot and the Whiskey Rebellion are also precisely the type of events that provide an opportunity to write a constitutional history from the bottom up. On the notion of writing constitutional history from the bottom up, see Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. of Am. Hist. 1013 (1987), and William E. Forbath, Hendrik Hartog, and Martha Minow, *Introduction: Legal Histories from Below*, 1985 Wis. L. Rev. 759.

61. Episodes such as the Carlisle Riot and the Whiskey Rebellion, are not part of the current canon of constitutional law. On the concept of a constitutional canon, see Balkin and Levinson, 111 Harv. L. Rev. (cited in note 34), and Saul Cornell, 12 L. & Hist. Rev. (cited in note 19). Williams, 101 Yale L.J. at 582 (cited in note 20), and 81 Cornell L. Rev. (cited in note 54), deals briefly with the Whiskey Rebellion. Williams cites no contemporary evidence to substantiate his claim that opposition to the Whiskey Rebels was framed in the language of civic republicanism. For an analysis of contemporary responses to the Whiskey Rebellion, see notes 73-88 and accompanying text.

Anti-Federalists embraced a radical ideology that set them apart from the more moderate democratic ideas expressed in documents such as the Dissent of the Minority or the essays of An Old Whig. For these plebeian populists, the most radical voice among Anti-Federalists, the rights of the Federalist minority in Carlisle were easily cast aside when they contradicted the will of the *local* community. Plebeian populists were simple majoritarians who embraced an extreme form of local democracy. When Anti-Federalists challenged Federalists revelers in the streets of Carlisle a riot ensued. The Anti-Federalist instigators of the riot were arrested and jailed. When the rioters refused the opportunity for bail, local Anti-Federalists organized themselves through the militia, marched on the jail, and freed the prisoners. For plebeian populists the release of the prisoners was an example of direct democracy in action. Events in Carlisle vindicated their radical conception of constitutionalism and strengthened their resolve to oppose the new government. In contrast to the more sober voices of Anti-Federalist authors such as An Old Whig or Federal Farmer, the Carlisle Rioters did not fear the mob. For these Anti-Federalists the actions of the crowd were an authentic expression of the will of the people.<sup>62</sup>

William Petrikin, a rioter who became a spokesman for plebeian populist ideas, attacked Federalists, accusing them of trying to disarm "farmers, mechanics, labourers."<sup>63</sup> Federalists, Petrikin claimed, thought "[i]t would be dangerous to trust such a rabble as this with arms in their hands."<sup>64</sup> Petrikin's assault on the Federalists' notion of the militia reveals an important aspect of plebeian thinking about this issue. For plebeian populists such as the Carlisle rioters, the militia was a local institution that included the full body of citizens. These Anti-Federalists rejected the notion that one had to be a property owner to vote, serve on juries, or participate in the militia. During the Carlisle

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62. On the Carlisle Riot and the ideology of plebeian populism, see Saul Cornell, *Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism*, 76 *J. of Am. Hist.* 1148 (1990). The Standard Modelers generalize populism to all Anti-Federalists. For example, in an influential essay, Amar, 100 *Yale L.J.* (cited in note 4), argues that Anti-Federalism was essentially populist and democratic in spirit. This account not only homogenizes Anti-Federalist thought but seriously distorts the character of Anti-Federalist populism. In particular, Amar does not address the rather different approaches of moderate democrats and plebeian populists to the problem of rights.

63. Aristocrotis, *The Government of Nature Delineated*, in Storing, 3 *Complete Anti-Federalist* at 203 (cited in note 37). Storing did not identify the author in his collection. The attribution is based on a letter from William Petrikin to John Nicholson Carlisle (Feb. 24, 1788), in 2 *DHRC* at 694 (cited in note 27).

64. Aristocrotis, *Nature Delineated* at 203 (cited in note 63).

Riot, plebeian populists chose to bypass both the state courts and the state militia. In contrast to the authors of the Dissent and An Old Whig, plebeian populists were not advocates of states' rights but supporters of a radical localist vision of democracy. Yet even when plebeians invoked a right to bear arms to check despotism, it was not a constitutional right they asserted, but rather a vaguely articulated natural right of revolution. Their resistance was not couched in terms reminiscent of the language of either the Pennsylvania state constitution or the "Dissent of the Minority."

The notion that the militia was literally the entire body of the people in arms, and the related idea that the people might spontaneously organize to resist tyranny, inspired back-country Anti-Federalists in Pennsylvania to constitute themselves as militia units outside of the control of the state. As one anonymous author noted, "the counties of Cumberland, Dauphine, and Franklin, appear to take the lead, and have been long since repairing and cleaning their arms, and every young fellow who is able to do it, is providing himself with a *rifle* or musket, and ammunition."<sup>65</sup> This author went on to echo a common plebeian Anti-Federalist criticism of the Constitution, charging that "the *lawyers, &c.* when they precipitated with such fraud and deception the new system of government upon us, it seems to me, did not recollect, that the militia had arms."<sup>66</sup> Anarchy was not something to be dreaded if the alternative was despotism. "A *civil war* is dreadful, but a little blood spilt now, will perhaps prevent much more hereafter."<sup>67</sup> The author then went on to note that local militias refused to follow the directions of the state to deliver up their arms.

For local Federalists, the events in Carlisle merely confirmed their suspicion that the opponents of the Constitution were bent on establishing mobocracy. This view was shared by members of the Anti-Federalist elite, who were also horrified by the events in back-country Pennsylvania. For elite Anti-Federalists the right to bear arms and the militia were not a mandate for direct democracy. Bypassing the existing structures provided by the states and resorting to extra-legal crowd actions rendered the actions of plebeian populists contemptible in the

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65. Letter from Franklin County, Philadelphia Independent Gazetteer (April 30, 1788), in 17 *DHRC* at 251-52 (cited in note 27).

66. *Id.* at 252.

67. *Id.*

eyes of elites. Extra-legal actions, such as those taken by Anti-Federalists in Carlisle, were little more than mobocracy. For the eminent Massachusetts Anti-Federalist Elbridge Gerry, the Carlisle riot was a bitter reminder of the levelling tendencies to be found among the populace. Although an outspoken opponent of the Constitution, Gerry shared the Federalist belief that the nation's political problems stemmed from an "excess of democracy."<sup>68</sup> When he learned that the "people threatened the Justice in Carlisle to pull down his House, and the houses of the federalists," Gerry expressed grave concern that "we shall be in a civil War," adding his hope that "[may] God . . . 'avert the evil!'"<sup>69</sup> Rather than solidifying opposition to the Constitution, the plebeian radicalism of the Carlisle rioters set them in opposition to mainstream Anti-Federalists.<sup>70</sup>

A similar aversion to plebeian radicalism shaped the response of Pennsylvania Anti-Federalist Charles Pettit, who sought to distance himself from events like the Carlisle riot, and to avert any actions that might possibly promote anarchy. To "reject the New Plan and attempt again to resort to the old," would, he argued "throw us into a State of Nature, filled with internal Discord."<sup>71</sup> Pettit confided to George Washington that "[e]ven after the vote of adoption by the State Convention, a large proportion of the people, especially in the western counties, shewed a disposition to resist the operation of it, in a manner which I thought indicated danger to the peace of the State."<sup>72</sup> For Pettit, the willingness of plebeian populists to take their grievances into the streets was an example of mobocracy and had to be prevented at all costs.

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68. Gerry's statements about the dangers of an excess of democracy and the levelling spirit may be found in James Madison, *Notes of Debates in the Federal Convention of 1787* at 39 (Ohio U. Press, 1984). Gerry's constitutional thought is discussed at length by George A. Billias, *Elbridge Gerry: Founding Father and Republican Statesman* (McGraw-Hill, 1976). Gerry provides an excellent counter example to Akhil Amar's claim that Anti-Federalists were populist democrats, Amar, 100 *Yale L.J.* (cited in note 4). Elite Anti-Federalists such as Gerry were a vital part of the coalition that opposed the Constitution. For more on elite Anti-Federalist thought, see Cornell, *The Other Founders* 51-80 (cited in note 35).

69. Cornell, 76 *J. of Am. Hist.* at 1169 (cited in note 62) (quoting Elridge Gerry in Madison, *Notes of the Debates of the Federal Convention* at 39 (cited in note 68)).

70. For a description of the mood in Carlisle, see "Extract of a letter from Carlisle" dated January 4, 1788, in *Independent Gazetteer* (Jan. 12, 1788) *DHRC Mfm:Pa.* 328.

71. Charles Pettit to Robert Whitehill (June 5, 1788), in 18 *DHRC* at 154 (cited in note 27).

72. Charles Pettit to George Washington (March 19, 1791), in *DHRC Mfm:Pa.* 706.

The Whiskey Rebellion provides another occasion to test the Standard Model's claims about the meaning of the Second Amendment. Supporters of the Standard Model have not devoted much attention to the Rebellion. This omission is unfortunate for a number of reasons. The Whiskey Rebellion provides additional evidence that leading Anti-Federalists did not believe that individuals could spontaneously constitute themselves as militia units outside the control of the state or assert an individual right to bear arms to check government tyranny. Once again, the radical Anti-Federalists who did assert such a right did not ground it in any constitutional text, but instead framed their actions in terms of a natural, not a constitutional, right of revolution. The Rebellion is particularly fascinating because it prompted responses from a number of individuals who had taken a leading role in the debate over the Constitution, including several Anti-Federalists who had signed the Dissent of the Minority. The Rebellion also drew support from plebeian populists, including individuals who had participated in the Carlisle riot.<sup>73</sup>

The Whiskey Rebellion was a series of disturbances in western Pennsylvania and Kentucky prompted by a Federalist tax on whiskey, which included violent acts of resistance. Support for the rebels was strong in the town of Carlisle. William Petrikin, a leader of the Carlisle riot and a champion of plebeian populist ideals, sought support for the rebels from such prominent former Pennsylvania Anti-Federalists as William Findley and Robert Whitehill, both of whom had signed the Dissent of the Minority.<sup>74</sup>

While Findley sympathized with the grievances of the Rebels, he resolutely denounced their resort to arms and the underlying constitutional misconceptions they used to justify their actions. Findley actually tried to dissuade Petrikin from supporting the rebels. The fallacy of the Whiskey Rebels, Findley explained, was that they did not understand that resistance to unjust laws could not bypass the existing structures of constitutional government. Findley blamed the rebellion on a popular misconception about the nature of constitutional government. "The great error among the people was an opinion, that an im-

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73. The best account of the Rebellion is Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (Oxford U. Press, 1986).

74. For a discussion of the connection between the Carlisle riot and the Whiskey Rebellion, see Cornell, *The Other Founders* 200-13 (cited in note 35).

moral law might be opposed and yet the government respected.”<sup>75</sup> Findley himself repudiated plebeian populist constitutionalism. For plebeian populists, the will of the people could be reconstituted spontaneously in local organizations such as the militia, the jury, or even the crowd. Findley and other mainstream Anti-Federalists rejected this notion. “All men of discretion” 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>76</sup>

Findley’s opposition to the excise tax thus did not include support for “riots or any thing that might tend to promote any unconstitutional exertions.”<sup>77</sup> Findley strenuously argued that only legal action was appropriate to protest the excise law, and he denied that the situation faced by citizens in western Pennsylvania resembled that of the colonists who had opposed British tyranny a generation earlier. Americans enjoyed representation under the new government and were therefore bound to obey the law. Findley took great pains to distinguish between the orderly use of extra-legal action during the Revolution—when the people had no legal recourse to challenge the unjust acts of Parliament—and recent actions in western Pennsylvania.<sup>78</sup>

For the plebeian populists, the situation under the federal Constitution appeared to be quite similar to that faced by the colonists. For radical localists a distant government could never represent their interests. The use of extra-legal action during the Rebellion was therefore perfectly consistent with a plebeian constitutionalism. Erecting liberty poles, tarring and feathering excise men, and the use of threatening pseudonymous notes were all actions drawn from the rich stock of ritual behavior central to plebeian political culture in the Anglo-American world. Petrikin had employed many of these same techniques during the struggle against the Constitution. From Petrikin’s point of view, the excise was merely the most recent example of how the well-born had created an oppressive government to do their bidding.

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75. William Findley, *History of the Insurrection in the Four Western Counties of Pennsylvania* 300 (Samuel Harrison Smith, 1796).

76. *Id.* at 177.

77. *Id.* at 285.

78. *Id.*

Petrikin and Findley clearly interpreted the legacy of the Revolution in different ways.<sup>79</sup>

For Petrikin, erecting liberty poles was not the end of protest, but merely the beginning. He sought to dissuade the local militia from joining federal forces marching against the Rebels. Petrikin's vision of the militia as an agent of a radical democracy grew out of the same localist agenda that had inspired him to oppose the Constitution. He hoped that the militia might serve the same function it had during the Carlisle Riot, acting as an agent of local popular democratic agitation and organization. This time, however, Petrikin was disappointed. The militia did not oppose Washington's troops.<sup>80</sup>

At a meeting in Carlisle in which Petrikin and the former Anti-Federalist leader, Robert Whitehill, participated, Petrikin urged local residents to side with the rebels against the government. As one participant noted, Petrikin "sd a great deal agst the excise law & against the Constitution."<sup>81</sup> Petrikin was opposed by Whitehill, who had been one of the most prominent Anti-Federalists in the state. Whitehill "endeavored to show the impropriety of opposing" the law, arguing that "it would be better to submit," since continued opposition could "bring on a revolution."<sup>82</sup> In opposition to Whitehill, Petrikin argued that "the show of Liberty to the West ought not to be falted." Rather it should be "applauded and supported."<sup>83</sup> In response to Whitehill's suggestion that continued resistance would start a revolution, Petrikin observed "all Revns began by force and that it was as well it should begin."<sup>84</sup> The actions of the government had convinced him that "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—& be separated from us."<sup>85</sup> Robert Whitehill recalled in his testimony that Petrikin claimed that the "People in the West had better Separate themselves from the Government of the U. St. than undergo such hardships as they were subjected to, & they had better form

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79. On plebeian political culture and the rituals of protest, see Alfred F. Young, *English Plebeian Culture and Eighteenth-Century American Radicalism*, in Margaret C. Jacob and James R. Jacob, eds., *The Origins of Anglo-American Radicalism* 185 (Humanities Press International, 1984).

80. Cornell, *The Other Founders* 200-12 (cited in note 35).

81. Id. at 208-09.

82. Id.

83. Id.

84. Id.

85. Id.



of Government for themselves—that they should have a government who had no President no King.”<sup>86</sup> Petrikin’s radicalism embraced not only the rituals of plebeian culture, but an extreme form of democratic localism. He continued to affirm the legitimacy of plebeian rituals of protest and extra-legal action. The right of revolution, Petrikin argued, had not been cast aside with the establishment of the Constitution. In contrast to Findley and Whitehill, Petrikin believed that westerners were in exactly the same relationship to the new government as Americans had been with Britain.

For plebeian radicals the federal government under the Federalist party was just as illegitimate as the government of George III. Indeed, in the view of one contemporary, the Whiskey Rebels “flattered themselves that they were only carrying out Whig principles and following Whig examples in resisting the excise law.”<sup>87</sup> Petrikin’s politics typified the views of an important radical fringe within the ranks of the Anti-Federalist movement. Plebeian radicals articulated the most radical vision of democracy present in the debate over the Constitution; this ideology was rejected by more mainstream Anti-Federalists. The Whiskey Rebellion demonstrates the irreconcilable tension between moderate democrats such as Findley and plebeian radicals such as Petrikin. This split reflected different constitutional philosophies and approaches to politics.

Rather than view the right to bear arms as an expression of a right of resistance, it would be far more accurate to see the language of both the Pennsylvania state constitution and the federal Constitution as part of an effort to provide the state with a means to crush such resistance. The examples of Shays’s Rebellion and the Whiskey Rebellion both demonstrate that the militia was far more likely to be used to support the state than to provide a means to challenge the authority of the state.<sup>88</sup>

#### HISTORY AND THE SECOND AMENDMENT: AN OPEN QUESTION

The presence of such profound differences within the ranks of Anti-Federalists (even within a single state) raises serious

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86. *Id.* at 119 (testimony of Robert Whitehill).

87. Thomas P. Slaughter, *The Friends of Liberty, the Friends of Order*, in Stephen Boyd, ed., *The Whiskey Rebellion: Past and Present Perspectives* 13 (Greenwood Press, 1985) (quoting Reverend James Carnahan).

88. On this point, see Bellesiles, 16 *L. & Hist. Rev.* (cited in note 5).

questions about the assumption of the Standard Model that there was a broad consensus in post-Revolutionary America on how the right to bear arms ought to be interpreted. Efforts to discern a monolithic original intent on this issue seem historically naive.<sup>89</sup> The case of Pennsylvania suggests that Americans may have been as deeply divided then as they are now over this question. The idea that radical localists such as the Anti-Federalist Carlisle rioters might have meant the same thing as the ultra-nationalist Joseph Story when they spoke about the right to bear arms seems high unlikely.<sup>90</sup> Even if the case of Pennsylvania Anti-Federalism proves to be exceptional, the claim that a single paradigm can explain all of American constitutional thought on an issue as complicated as the right to bear arms runs counter to dominant trends in recent historical scholarship on the character of early American constitutional and political thought.<sup>91</sup> It would be nothing short of astonishing if there were no significant regional or class variations on an issue as complex as the right to bear arms.<sup>92</sup> Without further historical research and analysis, the truth of the Standard Model appears to be anything but a commonplace.

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89. Historians are far more dubious about identifying a single intent from among the many different positions voiced by the framers and ratifiers of the Constitution. To claim that commentators writing more than a generation later meant the same thing seems even more doubtful. For a discussion of the difficulty of weighting the various perspectives articulated during ratification, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (A.A. Knopf, 1996).

90. Sanford Levinson links Federal Farmer, James Madison, and Joseph Story, together into a single common stance on the meaning of the Second Amendment. Levinson, 99 *Yale L.J.* at 649 (cited in note 2). The example of Pennsylvania suggests that there was no consensus on this issue. The example of Massachusetts provides additional evidence of profound disagreement over how to interpret the right to bear arms. See Hardy, 4 *J.L. and Pol.* at 40-42 (cited in note 26).

91. A good sense of the divisions among early American historians may be found in comments collected in *The Creation of the American Republic, 1776-1787: A Symposium of Views and Reviews*, 44 *Wm. & Mary Q.* 550 (1987).

92. For two rather different efforts to explore the relationship between regionalism and the emergence of different political cultures in early America, see Jack P. Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture* (U. of North Carolina Press, 1988), and David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (Oxford U. Press, 1989). On the relationship of class to the problem of rights consciousness, see Hartog, 74 *J. of Am. Hist.* (cited in note 60).