

THE RIGHT TO BEAR ARMS

Through the Constitution, the people were guaranteed arms for their own personal defense, for the defense of their states and nation and for the purpose of keeping those at the reigns of government sensitive to the rights of the people.¹ This right is found explicitly in the Second Amendment but is supported by the Title of Nobility Clauses and the clauses providing for a military as well.

Although the Constitution does provide for a military,² the applicable provisions must be understood in light of the Title of Nobility Clauses and the Second Amendment.³ The Nobility Clauses prohibit a standing army in peacetime. However, it is clear through the clauses providing for an army and navy that they were interested in their own defense. In this sense, the Second Amendment should also be understood in a military context.

These three Constitutional provisions are not contradictory. The clauses providing for a military must be understood to be consistent with the Title of Nobility clauses because they were implemented together. The Second Amendment also supports the intended prohibitions of the Title of Nobility clauses. Furthermore, since the Second Amendment was implemented later in time and was intended to modify the Constitution, any explicit or implicit inconsistencies between the two should be found in favor of the Second Amendment. Considered as a whole, these provisions limit

¹ Shalhope, The Ideological Origins of the Second Amendment, 69 **J. Am. Hist.** 614 (1982), in Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 **Mich. L. Rev.** 204, 226 (1983).

² **U.S. Const.** art. 1, s. 8, cls. 11-17.

³ Any inferred provision for a standing army in the U.S. Const. art. 1, s. 8, cl. 12 would have been eliminated after the passing of the Second Amendment and the underlying meaning it was intended to convey. Cf. Kates, supra note 1 at 229 (supporting a personal right to firearms).

the government to providing arms--to each individual and in community armories--and training and organization for the citizenry in their use.⁴

I. The Title of Nobility Clauses

Our ancestors equated an absence of government with freedom.⁵ As John Quincy Adams said, “Our Country began its existence by the universal emancipation of man from the thralldom of man.”⁶

Our ancestors escaped from the shackles and tyranny of a feudal society and government controlled by nobility. Nobility and the principles underlying the self-serving, deceptive and cruel myth of *noblesse oblige*⁷ were discarded--in form and substance.⁸ The implementation of the Title

⁴ See **Ralph Meade, Patrick Henry: Practical Revolutionary** 28-29, 35 (1969) (this was the way the colonists understood the military). See also Elaine Scarry, War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms, 139 **U. Pa. L. Rev.** nn.113-114 and corresponding text (1991) (supporting a decentralized approach to a military force).

⁵ Edward J. Imwinkelried, Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution, 71 **Minn. L. Rev.** 269, 287-88 (1986). Akhil Reed Amar, Of Sovereignty and Federalism, 96 **Yale L. J.** 1425, 1430 (1987).

⁶ Quoted in Cong. Globe, 38th Cong., 1st Sess. 1319 (1864) (speech by Sen. Henry Wilson). Cf. Amar, *supra* note 5 at 1494 (implying that government has a tendency to be used in a lawless manner).

⁷ **Webster's Third New International Dictionary** 1532 (Philip Babcock Gove ed. 1986). The dictionary states that noblesse oblige is “[t]he obligation of honorable, generous, and responsible behavior that is a concomitant of high rank or birth.” Id.

⁸ See **Thomas Norton, The Constitution of the United States** 89 (1922) (speaking on the nobility's illegitimate acquisition of wealth and prestige through misrule). **The Federalist** No. 43, at 274-75 (C. Rossiter ed. 1961) (remarks of James Madison) (speaking of colonist's aversion of aristocratic innovations).

of Nobility Clauses⁹ into the Constitution was a key element in that effort.¹⁰

A. Nobility

The concept of nobility and what it means to be titled are key elements of the Clauses. Understanding these concepts will illuminate the colonist's intended prohibition. The two key words in the Clauses are title and nobility.

A title is an appellation of rank, distinction, privilege or profession.¹¹ Nobility is a condition of possessing characteristics of a higher kind or order, either inherited or acquired.¹²

A historical understanding of nobility helps give definition to the Clauses. The colonists had a deep understanding of nobility. Britain ruled the colonies and nobility governed the British Empire--an empire based upon a feudal system.¹³ The feudal system was spawned by vassals who provided military services to their lords in exchange for protection and economic maintenance.¹⁴

⁹ Article I, sections 9 and 10 of the U.S. Constitution provide, respectively, that “[n]o Title of Nobility shall be granted by the United States” and “[n]o State shall . . . grant any Title of Nobility”

¹⁰ **The Federalist** No. 43, at 274-75. Madison knew that Constitutional mechanisms were needed to eliminate the “aristocratic or monarchical innovations” that would inevitably arise. *Id.* If these innovations were left unchecked, they would lead to an undoing of the republican form of government they were attempting to establish. *Id.*

¹¹ **Webster's New World Dictionary** 1404 (3d C. ed. 1988). **Webster's Third New International Dictionary**, *supra* note 7 at 2400. **Black's Law Dictionary** 1485 (6th ed. 1990). **The Jefferson Cyclopedia** 48-51 (John P. Foley ed. 1900).

¹² **Webster's New World Dictionary**, *supra* note 11 at 919. **Webster's Third New International Dictionary**, *supra* note 7 at 1532. **Black's Law Dictionary**, *supra* note 11 at 1485. **The Jefferson Cyclopedia**, *supra* note 11 at 48-51.

¹³ Jeffrey A. Heldt, Military: Titles of Nobility and the Preferential Treatment of Federally Employed Military Veterans, 19 **Wayne L. Rev.** 1169, 1171 (1973).

¹⁴ From de Tocqueville's reference, the army was one of the constituents of the core "aristocratic element" in the European *Ancien Regime*. Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 **Yale L. J.** 1239, 1272 (1991). *See*

The protection and support provided by the lord eventually became a vassal's right and the structure that developed created discernible class distinctions.¹⁵ This basic framework, over time, produced a myriad of social classes inextricably linked with government.¹⁶

Under the feudal system, society became a complex hierarchy of governmental powers and privileges.¹⁷ Multiple exchanges of obligations developed within the government hierarchy of kings, greater lords and lesser lords.¹⁸ But nobility did not necessarily mean eminence. Lower nobility occupied various levels of public office according to their importance, and governmental

Henry Mayer, A Son of Thunder: Patrick Henry and the American Republic 80-81, 244 (1986) (linking the military and aristocracy). Military rank is closely related titles of nobility. **Alexis de Tocqueville, Democracy in America** 594, 622 (J.P. Mayer and Max Lerner eds. 1966). Peacetime service in the military is aristocratic. *Id.* at 627.

¹⁵ *Id.*

¹⁶ *See id.* at 1170 (indicating that aristocracy was a system of government-induced or supported peerage).

¹⁷ *Id.* at 1171. To become “titled” meant to become “entitled.” *Id.* English monarchs even granted fiefdoms to favored individuals in America. **James Bassett, A Short History of the United States** 76 (2d ed. 1924). The aristocracy in Britain intended to establish a nobility for life in America rather than a hereditary one. **Bernard Bailyn, The Ideological Origins of the American Revolution** 278 (1967), *noted in* Richard Delgado, *Inequality “From the Top”*: *Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 *UCLA L. Rev.* 100, 111 n.72-75 (1984). Nobility, although untitled, exists just as much in America as it does in Britain. *Noted in* Delgado, *supra* at n.11. Debrett's, which publishes the directory of Britain's nobility, announced its intention to publish **Debrett's Texas Peerage**. *Id.* This was the last of ten volumes devoted to “the untitled aristocracy” in the United States. **Peters, Tilting at Windmills**, Wash. Monthly, Oct. 1983, at 4, 6-7. *Id.*

¹⁸ Heldt, *supra* note 13 at 1171. There are many noble or noble-like rankings--not all based on heredity. **Webster's Third New International Dictionary**, *supra* note 7 at 1244 (King), *id.* at 1862 (Queen), *id.* at 1802 (Prince), *id.* at 1802 (Princess), *id.* at 699 (Duke), *id.* at 698 (Duchess), *id.* at 1384 (Marquess), *id.* at 713 (Earl), *id.* at 178 (Baron), *id.* at 178 (Baroness), *id.* at 1249 (Knight), *id.* at 1337 (Lord), *id.* at 1263 (Lady), *id.* at 776 (Esquire) and *id.* at 2216 (Squire) are some of them.

power was centralized and consolidated, not representative.¹⁹

The nobility abused this centralized and consolidated power.²⁰ It produced the phrase coined by Lord Acton, “Power tends to corrupt and absolute power corrupts absolutely.”²¹ The abuse the colonists suffered from the nobility led to war and the founding of a new nation.²²

Consequently, the colonists were essentially unanimous in their efforts to prohibit government supported nobility in their new nation.²³ The very concept was repulsive to the colonists.²⁴ One writer has noted that “[t]he records of the Constitutional Convention are replete with expressions of fear of monarchy.”²⁵ Elbridge Gerry, Edmund Randolph and George Clymer, representatives to the Constitutional Convention, said aristocratic forms were to be avoided.²⁶

¹⁹ Heldt, supra note 13 at 1171. The colonists fought the Revolutionary War because government was not representative; they only had structural representation. **James K. Hosmer, Samuel Adams; American Statesmen** 62-89 (John T. Morese, Jr. ed. 1884). Mayer, supra note 14 at 130-140.

²⁰ **2 Records of the Federal Convention of 1787** 224 (Max Farrand ed. 1911) [hereinafter Farrand]. Centralized and consolidated power leads to abuse. Cong. Globe, 34th Cong., 3d Sess. app. at 140 (1857) (remarks of Ohio Rep. John Bingham). Cong. Globe, 38th Cong., 2d Sess. 143 (1865) (remarks of Indiana Rep. Godlove Orth). **The Jefferson Cyclopedia**, supra note 11 at 51. **The Federalist** No. 85, at 521-22 (A. Hamilton).

²¹ Quoted in Gerry Spence, With Justice for None 217 (1986).

²² **The Federalist** No 85, at 521-22 (A. Hamilton).

²³ Delgado, supra note 17 at 112.

²⁴ Raoul Berger, Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser, 1990 **B.Y.U. L. Rev.** 873, 876 nn.27, 28 (1990).

²⁵ Berger, supra note 24 at 876. **The Federalist** No. 43, at 274-75 (remarks of James Madison) (speaking of colonist's aversion of aristocratic innovations).

²⁶ 2 Farrand, supra note 20 at 286. (Gerry); id. at 513 (Randolph); id. at 524 (Clymer). There were similar utterances by Constitutional Convention representatives John Rutledge, Benjamin Franklin, George Mason, Elbridge Gerry and

Randolph went on to state that “the permanent temper of the people was adverse to the very semblance of Monarchy.”²⁷

The prohibition against government endowed nobility was first enacted by the Continental Congress.²⁸ It is found in every draft of the Articles of Confederation except the first.²⁹ The first draft of the Constitution provided that “The United States shall not grant any title of nobility” and it became law virtually without change.³⁰ The Nobility Clauses were implemented into the Constitution with little dissent.³¹

Gouverneur Morris. 1 Farrand, supra note 20 at 119 (Rutledge); 83 (Franklin); 101 (Mason); 152, 425 (Gerry). 2 id. at 35-36 (Morris).

²⁷ 1 Farrand, supra note 20 at 88. **The Federalist** No. 43, at 274-75.

²⁸ Delgado, supra note 17 at 112. The Articles of Confederation provide:

. . . nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

Articles of Confederation art. VI.

²⁹ **Drafting the Federal Constitution** 706 (Arthur T. Prescott comp. 1941) [hereinafter Prescott], in Delgado, supra note 17 at 112 n.89.

³⁰ Delgado, supra note 17 at 112.

³¹ Prescott, supra note 29 at 711; 2 Farrand, supra note 20 at 183, noted in Delgado, supra note 17 at 112 n.87. 1 **U.S.**

Continental Congress, Secret Journals of the Acts and Proceedings 294, 305, 352 (1821) (Articles of Confederation), in Delgado, supra note 17 at 112 n.88. Twenty-one state constitutions, and one autonomous political entity in voluntary association with the United States, have similar prohibitions. **Ala. Const.** art. 1, s. 29; **Ariz. Const.** art. 2, s. 29; **Ark. Const.** art. 2, s. 19; **Conn. Const.** art. 1, s. 18; **Del. Const.** art. 1 s. 19; **Ind. Const.** art. 1, s. 35; **Kan. Const. Bill of Rights** s. 19; **Ky. Const.** s. 23; **Me. Const.** art. 1, s. 23; **Md. Const. Declaration of Rights** art. 42; **Mass. Const.** Pt. 1, art. 6; **N.H. Const.** pt. 1, art. 9; **N.C. Const.** art. 1, s. 33; **Ohio Const.** art. I, s. 17; **Or.**

B. Aristocracy and the Military

The colonists were completely against the establishment of a standing army.³² The colonists knew that a peacetime standing military contingent is, in part, a direct reinstatement of feudalism.³³ During the American Constitutional Convention, Elbridge Gerry opposed the standing army and centralized control of the militia on the grounds that monarchy and a centralized military are inseparable.³⁴ One led to the other and a "system of Despotism" was the inevitable result, he argued.³⁵ The will of the few was ennobled over the many because it could be implemented by force.³⁶

Madison linked aristocracy, the military and its inevitable ennobling-ignobling effect: "Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people."³⁷ He said a characteristic of European despotism was that they were "afraid to trust the

Const. art. I, s. 29; **Pa. Const.** art. 1, s. 24; **S.C. Const.** art. 1, s. 4; **Tenn. Const.** art. 1, s. 30; **Va. Const.** art. s. 4; **Wash. Const.** art. 1, s. 28; **W. Va. Const.** art. 3, s. 19; **P.R. Const.** art. II, s. 14.

³² 1 Annals of Cong. 750 (1789). **Elbridge Gerry, Observations on the New Constitution and on the Federal and State Conventions** 10-11 (1788), reprinted in Roy G. Weatherup, Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment, **Hastings Const. L. Q.** 961, 987-88 (1975).

³³ Heldt, supra note 13 at 1171.

³⁴ 2 Farrand, supra note 20 at 385.

³⁵ Id. States that existed during the colonial era implemented the principle into their constitutions. See e.g., N.C. Const. Art. 1, s. 30. "Standing armies in the time of peace are dangerous to liberty. Id.

³⁶ Gerry, supra note 32 at 10-11, reprinted in Weatherup, supra note 32 at 987-88.

³⁷ 1 Farrand, supra note 20 at 465. Commenting on the danger of a standing Army, Madison said,

The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended.

people with arms."³⁸ An aristocracy cannot last without a standing army.³⁹ The reason it cannot last is because the people will eliminate an aristocratic government by force if they have the opportunity.⁴⁰

The concept of slavery, the ultimate status of ennobling and ignobling, was used several times to capture the effect of a standing army. George Mason reiterated the colonist's view that it is the goal of monarchs to "disarm the people; that . . . was the best and the most effectual way to

Id. The right to revolution against tyrants, supported by Sydney and Locke, is derived from a universally acknowledged personal right to defend oneself against robbery or enslavement. Kates, supra note 1 at 230 n.110. The equation between personal self-protection and resistance to tyranny occurs again and again, particularly in the debates over the Constitution. Id.

³⁸ **The Federalist** No. 46, at 299-300.

³⁹ **Ralph Ketcham, James Madison: A Biography** 64, 640 (1971). Kates, supra note 1 at 228. Madison included an enslaved press and a disarmed populace as additional elements of repression by the aristocracy,

[a] government resting on a minority is an aristocracy, not a Republic, and could not be safe with a numerical and physical force against it, without a standing army, an enslaved press, and a disarmed populace.

Id. **The Federalist** No. 46.

⁴⁰ 3 John Adams, A Defence of the Constitutions of Government of the United States of America 471-72 (London, 1787-88), reprinted in Stephen P. Halbrook, To Keep and bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791, 10 **N. Ky. L. Rev.** 13, 14 (1982). Webster, An Examination into the Leading Principles of the Federal Constitution in Pamphlets on the Constitution of the United States 51, 56 (Paul Ford ed. 1888), reprinted in Halbrook, supra at 40, 51-52 (1982). 1 **St. George Tucker, Blackstone's Commentaries with Notes of Reference to the Constitution and Law of the Federal Government** 143 n.40, 300, reprinted in Kates, supra note 1 at 241-42. Robert Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign?, 36 **Okla. L. Rev.** 84 (1983).

enslave them."⁴¹ Whether or not the ruler or the army means the people harm is irrelevant. The effect of a centralized army disarms and enslaves the people.⁴²

Even indirect support of the military establishment during peacetime is prohibited by the Clauses.⁴³ The colonists knew a title of nobility when they saw it--even if it was disguised.⁴⁴ The Continental Congress, which had the same prohibition against titles of nobility, tried to convey a lifetime pension to the officers of the Revolutionary War and then, because of the uproar, tried to limit it only to five years.⁴⁵

The protest over the Continental Congress' resolution to commute the officers' promised life pension to a simple five years was scarcely abated when, in May of 1783, the officers formed a

⁴¹ 3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Constitution* 380 (2d ed. Philadelphia, 1836) [hereinafter *State Conventions*], reprinted in Halbrook, supra note 40 at 25. See generally Shalhope, supra note 1 at 606-13, in Kates, supra note 1 at 226 (stating the Federalist and Antifederalist arguments based on the individual rights to arms). Both Federalists and Antifederalists supported individual right to arms. The only debate was on how to guarantee it. Kates, supra note 1 at 223.

⁴² Scarry, supra note 4 at 1257, 1284.

⁴³ Heldt, supra note 13 at 1179-87.

⁴⁴ Id.

⁴⁵ Id. The Resolutions of the Town Meeting of Torrington, Connecticut are considered representative of the public mood:

The five years pay every body knows is not a charge of the war. . . . Congress have the same power, and can, with as much justice, at the expiration of the present five years, grant another five years pay, and then, perhaps, half-pay during life. And is it likely, the evil will stop here! Is it not highly probable that Congress, at present, are feasting their imaginations on the prospects of future pensions? It is the unanimous opinion of this town, that no power was ever delegated to Congress, by confederation, to grant half pay, etc. and that those resolves are unconstitutional, unjust and oppressive.

Appearing in the *Connecticut Courant*, July 29, 1783. Quoted in id. at 43, noted in Heldt, supra note 13 at n.117.

permanent fraternal organization called the Society of the Cincinnati.⁴⁶ The organization aroused suspicions that the officers proposed to become an aristocracy as well as a group of pensioners.⁴⁷

In a letter published in the Connecticut Journal in October 1787, there was a discussion about whether the Title of Nobility Clauses prohibited forms of nobility--like that of the Cincinnati.⁴⁸ It was thought that the Clauses were the best way to prevent an aristocracy from reforming.⁴⁹

II. The Second Amendment

A. An Armed Populace

The colonists were completely against the establishment of a standing army.⁵⁰ The militia was the colonist's army⁵¹ and the colonists believed a militia to be adequate for national defense.⁵² The foundation of this ideal starts with the personal right to bear arms. The right of each individual

⁴⁶ Scarry, supra note 4 at 1316.

⁴⁷ Heldt, supra note 13 at n.116.

⁴⁸ 3 **The Documentary History of the Ratification of the Constitution** 373, 379, 390-91 (Merrill Jensen ed. 1978) [hereinafter Jensen].

⁴⁹ Id. Without the enforcement of the Title of Nobility Clauses, an aristocracy would inevitably be reformed. Id. at 390. Our government was to be one that prevented every kind of royal honor. Id. at 391.

⁵⁰ 1 Annals of Cong. 750 (1789). Gerry, supra note 32 at 10-11, reprinted in Weatherup, supra note 32 at 987-88.

⁵¹ **The Federalist** No. 29 at 185 (A. Hamilton) (stating that the militia was not only sufficient for defense but the best possible security against a standing army). 3 State Conventions, supra note 41 at 378.

⁵² **Pennsylvania Herald**, Oct. 17, 1787, in Jensen, supra note 48 at 196-97, reprinted in Halbrook, supra note 40 at 19 (remarks of a "Democratic Federalist"). **The Debates on the Adoption of the Constitution** 659 (Jonathan Elliot ed. 1836) [hereinafter Elliot] (remarks of George Mason).

to bear arms is unmistakably clear from other documents of that era. One of the proposals for a bill of rights from Pennsylvania said,

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 them⁵³

Patrick Henry, who was appointed co-chairman of a committee to draft a Bill of Rights, said,

Are we at last brought to such a humiliating and debasing degradation, that we cannot be trusted with arms for our own defence? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress? If our defence be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?⁵⁴

Guard with jealous attention . . . liberty. Suspect every one who approaches that jewel.

Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.⁵⁵ The great object is that every man be armed

Everyone who is able may have a gun."⁵⁶

⁵³ Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971). Kates, *supra* note 1 at 222

(supporting the personal right to firearms).

⁵⁴ 3 Elliot, *supra* note 52 at 168-69, *reprinted in* Halbrook, *supra* note 40 at 25.

⁵⁵ 3 State Conventions, *supra* note 41 at 45, *reprinted in* Halbrook, *supra* note 40 at 25.

⁵⁶ 3 State Conventions, *supra* note 41 at 45, *reprinted in* Kates *supra* note 1 at 229.

Samuel Adams said that the "constitution be never construed . . . to prevent the people of the United States . . . from keeping their own arms."⁵⁷ Congressman Fisher Ames noted that "the rights of conscience, of bearing arms . . . are declared to be inherent in the people."⁵⁸ Thomas Jefferson said, "[n]o free man shall be debarred the use of arms in his own lands."⁵⁹ James Monroe included "the right to keep and bear arms" in a list of basic "human rights" that he would propose be added to the Constitution.⁶⁰

Madison intended to place the clause explicitly protecting the peoples right to keep and bear arms with other individual rights rather than with the Congress' powers to support an army. Even this intended construction supports the premise that the right to bear arms is personal in nature.⁶¹

Colonial era Constitutional scholar William Rawle, who was well-known and influential enough to have been offered the attorney generalship several times by Washington, flatly declared that the second amendment prohibited state, as well as federal, laws from disarming individuals.⁶²

⁵⁷ Schwartz, supra note 53 at 675.

⁵⁸ 1 **Works of Fisher Ames** 52-53 (1854) (letter of June 11, 1789 to Thomas Dwight). The next day U.S. Senator William Gray wrote Patrick Henry that Madison had introduced a "string of amendments" which "respected personal liberty." 3 **Patrick Henry** 391 (1951); see also Senator Gallatin's letter of Oct. 7, 1789 ("essential and sacred rights" which " each individual reserves to himself"), reprinted in Halbrook, supra at 40 n.90. Kates, supra note 1 at 223 n.79 (supporting the idea that the right to bear arms is an unalienable right).

⁵⁹ **The Jefferson Cyclopedia**, supra note 11 at 51.

⁶⁰ **James Monroe Papers**, N.Y. Public Library (miscellaneous papers in his own handwriting), in Kates, supra note 1 at 228.

⁶¹ Kates, supra note 1 at 223. Halbrook, supra note 40 at 28-29 (supporting the individual and personal right to bear arms).

⁶² **William Rawle, A View of the Constitution of the United States of America** 125-26 (2d. ed. 1829). Rawle shared this view with Hamilton, who saw the people's possession of arms as guaranteeing freedom from state as well as federal

"In the words of 'Philodemos':

'every free man has a right to the use of the press, so he has a right to the use of his arms.'

But if he commits libel, 'he abuses his privilege, as unquestionably as if he were to plunge his sword into the bosom of a fellow citizen' Punishment, not 'previous restraints,' was the misuse of either right."⁶³

Virginia Supreme Court justice St. George Tucker commented that the right to possess firearms was constitutionalized in the second amendment as among the most the "absolute rights of individuals." He said,

This may be considered as the true palladium of liberty The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.⁶⁴

tyranny. The armed populace, "by throwing themselves into either scale, will infallibly make it preponderate" against either a federal or a state invasion of popular rights. **The Federalist** No. 28, at 228 (C. Rossiter ed. 1961) (A. Hamilton). Kates, supra note 1 at 242 n.162 (supporting the people's right to rise up and use their arms to put down governmental tyrants).

⁶³ **Pennsylvania Gazette**, May 7, 1788, in Jensen, supra note 48 at 2579, reprinted in Halbrook, supra note 40 at 18.

The power to regulate is the power to destroy. The coercive power of government must not be used to destroy, or even limit, human rights--even in a small degree. These rights are unalienable. **Declaration of Independence.**

⁶⁴ 1 Tucker, supra note 40 at 143 n.40, 300, reprinted in Kates, supra note 1 at 241-42. Dowlut, supra note 40 at 84 (repudiating the notion of limiting the constitutional right to bear arms).

Can the condemnation of the modern notion of gun control and a standing army be any more explicit?⁶⁵

B. An Armed Populace to Defend Against Foreign Aggression

The standing army in peacetime was rejected as a means of defense against foreign aggression. A 1769 resolution of the Massachusetts House of Representatives epitomizes the intent of all the colonies and the people who eventually prevailed in the formation of the Constitution:

That the establishment of a standing army, in this colony . . . is an invasion of the natural rights of the people, as well as of those which they claim as free born Englishmen, confirmed by magna charta, the bill of rights, as settled at the revolution, and the charter of this province.⁶⁶

⁶⁵ Gun regulation is unconstitutional. 2 **Charles Montesquieu, Spirit of the Laws** 79-80 (Nugent trans., Colonial Press 1900). The disarming of the populace leads to a "monopoly of power [which] is the most dangerous of all monopolies." *Id.* The power to regulate is the power to destroy. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 426-427 (1819) (Marshall, C.J.). See generally **Bernard Schwartz, Constitutional Law: A Textbook** 169, 175 (1972) (recognizing the destructive power of regulation). Michael J. Van Zandt, Defense of Environmental Issues in the Administrative Forum, 31 **A.F. L. Rev.** 183, 190 n.57 (1989) (recognizing the destructive power of regulation). Beverly M.M. Charles, First They Came for the Teachers . . . : Competency Testing and the Decertification of Texas Teachers Issued Certificates Valid for Life, 12 **T. Marshall L. Rev.** 1, 2 n.21 (1986) (recognizing the destructive power of regulation). Gun control regulation destroys the people's right to bear arms. This is an illegitimate use of government because this right is unalienable.

⁶⁶ **Resolutions of the Massachusetts House of Representatives**, June 29, 1769, quoted in John Phillips Reid, In Defiance of the Law: The Standing-Army Controversy, The Two Constitutions, and the Coming of the American Revolution 166 (1981). Not even by consent, let alone by governmental fiat, may one be deprived of the right to arm oneself. See, e.g., 3 **William Blackstone Commentaries** 4. "Self-Defense, therefore, as it is justly called the primary law of nature, so its is not, neither can it be, in fact, taken away by the law of society." *Id.* Blackstone's classification of "arms for their defense" is among the absolute rights of individuals and is derived from "the natural

The word invasion embodied certain principles. With invasion comes the eventual depriving of ones arms and the establishment of a centralized military which is, and always has been, inimicable to the interests of the people. The people knew that this process, by degrees, would render them to a state of being little more than slaves.⁶⁷

"A Democratic Federalist" rejected the standing army as "that great support of tyrants."⁶⁸ He went on to say,

Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington and Bunkers Hill, and took the ill-fated [John] Burgoyne? Is not a well-regulated militia sufficient for every purposes of internal defense?

right of resistance and self-preservation when the sanctions of society and law are found insufficient to restrain the violence of oppression." 1 *id.* at 121, 143-44; **Thomas Hobbes, Leviathan** 87, 94 (1904) "[A] covenant not to defend myselfe from force by force is always voyd." *Id.*

He that suffers his life to be taken from him by one that hath no authority for that purpose, when he might preserve it by defense, incurs the Guilt of self murder since God hath enjoined him to seek the continuance of his life, and Nature itself teaches every creature to defend himself . . .

C. Ashbury, The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution 39-40 (1974) (unpublished doctoral thesis in history, U. of Michigan) (available at U. of Michigan Graduate Library), reprinted in Kates, supra note 1 at n.109.

⁶⁷ Luther Martin, III, Maryland J., no. 1021, Mar, 1788, reprinted in **Essays on the Constitution of the United States Published During its Discussion by the People** 1787-1788, at 11-19 (Paul Ford ed. 1892), in Scarry, supra note 4 at 1281.

⁶⁸ Pennsylvania Herald, Oct. 17, 1787, in Jensen, supra note 48 at 196-97, reprinted in Halbrook, supra note 40 at 19.

And which of you, my fellow citizens, is afraid of any invasion from foreign powers, that our brave militia would not be able to immediately to repel?⁶⁹

The passage of the second amendment eliminated any implicit notion that a standing army was intended through the enumerated provisions for an army.⁷⁰ The second amendment's right to keep and bear arms "came into being primarily as a way of dispersing military power across the entire population."⁷¹

⁶⁹ Pennsylvania Herald, Oct. 17, 1787, *in* Jensen, *supra* note 48 at 196-97, *reprinted in* Halbrook, *supra* note 40 at 19.

⁷⁰ The National Guard is unconstitutional as well. Halbrook, *supra* note 40 at 20-21, 31. David T. Hardy and John Stompoly, *Of Arms and the Law*, 51 *Chi.-Kent L. Rev.* 62, 69-70 (1974) (deriding the notion that the National Guard is the militia or that it is constitutional). James Biser Whisker, *The Citizen Soldier under Federal and State Law*, 94 *W. Va. L. Rev.* 947, 961-63 n.46-52 (1992) (deriding the notion that the National Guard is the militia or that it is constitutional). Jay R. Wagner, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent is there an Individual Right to Keep and Bear Arms?*, 37 *Vill. L. Rev.* 1407, 1437-1441 n.164-180 (1992) (deriding the notion that the National Guard is the militia or that it is constitutional). Kates, *supra* note 1 at 216 n.52 (deriding the notion that the National Guard is the militia or that it is constitutional). The people were ready to fight if the enumerated provision were to be construed to provide for a standing army. Their understanding of the second amendment ensured that any military was to be of the dispersed populace. Halbrook, *supra* note 40 at 23-24, 38 n.37.

⁷¹ Scarry, *supra* note 4 at 1268-69. The purpose of the Second Amendment is so that the people can enforce the Constitution. William Sumner, for example, speaks of shooting game as a way the population remains limber in the use of arms. *See An Inquiry Into the Importance of the Militia to a Free Commonwealth, in A Letter from William H. Sumner, Adjutant General of the Commonwealth of Massachusetts, to John Adams, Late President of the United States; with his Answer, in Anglo-American Antimilitary Tracts 1697-1830*, at 39-40 (R. Kohn ed. 1979). "Blackstone" wrote William Rawle saying "that the prevention of popular insurrections and resistance to government by disarming the people, is oftener meant than avowed by the makers of forest and game laws." Rawle, *supra* note 62 at 122-23 (citing 2 *William Blackstone Commentaries* 412). The colonists knew the people must be

Although the word army is used in the Constitution, the term simply refers to militias under federal leadership.⁷² The repeated call for the decentralization of military power at the ratification conventions was, in its overt phrasing, consciously poised against the centrist habits of the Constitutional Assembly. The right to bear arms works to amplify, rather than to contradict, the dispersal of military power that had already occurred at the center. During the deliberations of the ratification assemblies, the insistent call for a "right to bear arms" amendment envisioned military responsibility dispersed across the entire population.⁷³

armed. The lesson the colonists learned from Britain was later learned by the people of India. "Among the many misdeeds of the British rule in India, history will look upon the Act depriving a whole nation of arms as the blackest." The population would decide whether or not to use its weapons. 2 **Mahatma Gandhi, An Autobiography or the Story of My Experiments with Truth** 666 (Mahadev Desai trans. 1927). The French recognized this too. Noted in Scarry, supra note 4 at nn.34-35.

⁷² A militia generally supports itself. However, in an extended conflict, this becomes impractical. In this situation, a militia takes on the characteristics of an army which Congress may support--in ways beyond providing a national organizational structure, arms and training to which the militia may voluntarily avail itself and which Congress may provide on a continuing basis. A navy should be understood to be a militia at sea. Congress may provide arms for citizens involved in shipping to defend themselves. Since the people are sovereign and those at the reigns of government are the servants, the intended construction of the people is the one that controls. Amendments are the means for changing the Constitution, not governmental fiat--including the judiciary.

⁷³ Scarry, supra note 4 at 1278. See Mayer, supra note 14 at 249. The people had their own arms and had community armories. The president, as commander in chief, should be understood to be no more than an organizational head on a national level. The state government also provides organization and direction for armed resistance by the people, even against the national government, if necessary:

Independent of parties in the national legislature itself, . . . the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be

The Constitution guarantees popular control of any coercive force. Centralized control of an army was, from the infancy of the republic onward, consistently seen as the subversion rather than the fulfillment of the requirement for civilian authority.⁷⁴ The discussions of the militia and of the right to bear arms stressed civilian control. The concept of civilian expresses a distance from, not proximity to, centralized control. Adam Smith wrote:

In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force.⁷⁵

ready enough, if anything improper appears, to sound the alarm to the people, and not only be the VOICE, but, if necessary, the ARM of their discontent.

The Federalist No. 26, at 172 (A. Hamilton).

It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.

Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community.

Id. No. 28, at 181 (A. Hamilton); accord id. No. 84, at 516-517 (A. Hamilton); accord id. No. 46, at 298 (J. Madison).

"Plans of resistance would be concerted." Id.

⁷⁴ Scarry, supra note 4 at 1301. James Madison said, "A standing military force, with an overgrown Executive will not be safe companions to liberty." 1 Farrand, supra note 20 at 645.

⁷⁵ **Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations** 660 (E. Cannan ed. 1937) (5th ed. 1789), reprinted in Scarry, supra note 4 at 1301.

Elbridge Gerry said the militia supplanted the need for a standing army--"the bane of liberty."⁷⁶ This view is also supported by the pen of George Mason, from whom James Madison drafted the second amendment. Mason's proposal delineates that 1) the dispersed populace were to have arms; 2) they were to provide defense for themselves individually and corporately and; 3) a peacetime standing army was not intended in the Constitution:⁷⁷

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the people trained to arms, is the proper natural, and safe defence of a free state; that standing armies, in time of peace are dangerous to liberty, and therefore ought to be avoided.⁷⁸

⁷⁶ 1 Annals of Cong. 750 (1789). The committee on amendments made its report on July 28. *Id.* at 672, noted in Halbrook, supra note 40 at 31.

⁷⁷ Halbrook, supra note 40 at 27. **The Federalist** No. 46, at 299-300, 321 (J. Madison). The regular army with the dispersed populace and their ability to repel any danger. The interest of the people to ensure liberties that were common nationally would be adequate to provide a unified effort even though it would be organized locally. *Id.* **The Federalist**, No. 29, at 185 (A. Hamilton) (stating that the militia could not only preclude the need for a standing army but was "the best possible security against it, if it should exist"). In the War of 1812, President Madison called on the militia because there was "no other resource than in those large and permanent military establishments which are forbidden by the principles of our free government, and against the necessity of which the militia were meant to be a constitutional bulwark." 8 Gaillard Hunt, **The Writings of James Madison** 224-25 (fourth annual address) (emphasis added). Daniel Webster argued eloquently that a free government can never force its citizens to fight when their homeland is not threatened. **An Unpublished Speech by Daniel Webster in M. Anderson, The Military Draft** 633-45 (1982), noted in Alan Hirsch, The Militia Clauses of the Constitution and the National Guard, 56 **U. Cinn. L. Rev.** 919, nn.101, 115 (1987). A small number of personnel to formulate a national organizational structure and who will assist in its implementation is all that is needed. *Id.* at 943.

⁷⁸ Elliot, supra note 52 at 659. See also 3 **George Mason, Papers** 1068-71 (1970) (supporting the concept of defense by militia and rejecting a standing army).

According to Madison, the dispersed populace was the militia and the militia was the dispersed populace.⁷⁹ When the armed individuals are together in an organized group they are a militia. He said at the Virginia Convention,

If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. They best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.⁸⁰

C. Militias and Standing Armies

During the American Constitutional Convention, Elbridge Gerry opposed the standing army and centralized control of the militia on the grounds that monarchy and a centralized military are inseparable. One led to the other and a "system of Despotism" was the inevitable result:⁸¹ He said, freedom revolts at the idea [of even a small standing army] By the edicts of authority vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defence, and the security of national liberty is no longer under the control of

⁷⁹ See, e.g. Va. Const. art. I, s. 13 (1776). "[A] well-regulated militia, composed of the body of the people" Id. **Debates in the Convention of the Commonwealth of Virginia**, reprinted in 3 State Conventions, supra note 41 at 425. "Who are the Militia? They consist now of the whole people" Id. (statement of George Mason, June 14, 1788). **Letters from The Federal Farmer to the Republican** 123 (Walter Bennett ed. 1978). "A militia, when properly formed are in fact the people themselves" Id. (ascribed to Richard Henry Lee). **Letter from Tench Coxe to the Pennsylvania Gazette** (Feb. 20, 1778), reprinted in Jensen supra note 48 at 1779. "Who are these militia? are they not ourselves." Id. (emphasis in original). See also **Richard Trench, Dictionary of Obsolete English** 159 (1958), noted in Kates, supra note 1 at 216 n.51 (1983).

⁸⁰ 3 State Conventions, supra note 41 at 378 (emphasis added), reprinted in Weatherup, supra note 32 at 991.

⁸¹ 2 Farrand, supra note 20 at 385.

civil authority; but at the rescript of the Monarch, or the aristocracy, they may either be employed to extort the enormous sums that will be necessary to support the civil list--to maintain the regalia of power-- and the splendor of the most useless part of the community, or they may be sent into foreign countries for the fulfillment of treaties, stipulated by the President and two thirds of the Senate.⁸²

James Madison supported this view,

The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people.⁸³

Madison said a characteristic of European despotism was that they were "afraid to trust the people with arms."⁸⁴ He went on to say that

[a] government resting on a minority is an aristocracy, not a Republic, and could not be safe with a numerical and physical force against it, without a standing army, an enslaved press, and a disarmed populace.⁸⁵

⁸² Gerry, supra note 32 at 10-11, reprinted in Weatherup, supra note 32 at 987-88. This was foreseen over two hundred years ago. The military budget is about 25% of the federal budget (over 250 billion dollars!).

⁸³ 1 Farrand, supra note 20 at 465. The right to revolution against tyrants, supported by Sydney and Locke, is derived from a universally acknowledged personal right to defend oneself against robbery or enslavement. The equation between personal self-protection and resistance to tyranny occurs again and again, particularly in the debates over the Constitution. Kates, supra note 1 at 230 n.110.

⁸⁴ **The Federalist** No. 46, at 299-300.

George Mason reiterated the colonists view that it is the goal of monarchs to "disarm the people; that . . . was the best and the most effectual way to enslave them."⁸⁶ Whether or not the ruler or the army means the people harm is irrelevant. The effect of a centralized army disarms and enslaves the people.⁸⁷ No where is the violation of this principle more direct than the compelling of military service. The Antifederalist writer "Centinel" was prophetic in some of his concerns that the federal enumerated provisions for an army would be construed into a tool of oppression by tyrants to allow for centralized control of a military force:

This section will subject the citizens of these states to the most arbitrary military . . . you may be dragged from your families and homes to any part of the continent and for any length of time, at the discretion of the future Congress . . . however incompatible with their interests or consciences; in short, they may be made as mere machines as Prussian soldiers.⁸⁸

⁸⁵ Ketcham, supra note 39 at 64, 640. Kates, supra note 1 at 228 (supporting the concept that arms and democracy go hand-in-hand). See also **The Federalist** No. 46. "[T]he advantage of being armed, which the Americans possess over the people of almost every other nation . . ." Id.

⁸⁶ 3 State Conventions, supra note 41 at 380. See generally Shalhope, supra at note 1 at 606-13 (on The Federalist and Antifederalist arguments based on the individual rights to arms). Both Federalists and Antifederalists supported individual right to arms. The only debate was on how to guarantee it. Kates, supra note 1 at 223.

⁸⁷ Scarry, supra note 4 at 1284 and corresponding text.

⁸⁸ **Pennsylvania and the Federal Convention** 598 (McMaster and Stone eds.), reprinted in Hirsch, supra note 77 at n.103.

This prophecy came true in 1917. That is when the Court decided that one may be coerced to "serve" in the military.⁸⁹ The Court's rationale for allowing this kind of "service" rests on the notion that the enumerated provisions which provide for an army allow for it by implication.⁹⁰ The one word that could be construed to support such a construction is the word "discipline." However discipline did not mean to coerce one to conform to the dictates of another but simply the development of a skill.⁹¹ The people did not even want a standing army let alone be coerced to "serve" in it.

Military participation in this country has been voluntary.⁹² Voluntary participation recognizes that consent is the fundamental right of those who participate in the use of force of

⁸⁹ Selected Draft Law Cases, 245 U.S. 366 (1917). To act in the name of a non-entity such as "the people," "society" or "the state" is one of the most inane aristocratic and tyrannical concepts. See also Tocqueville, supra note 14 at 478 (noting that coercion and democracy are antithetical). The state has no interests outside of the rights of individuals. **The Federalist** No. 51, at 321-22 (J. Madison); accord 1 Farrand, supra note 20 at 421-22 (remarks of Madison).

⁹⁰ 245 U.S. at 368-69. The Court's rationale was based pragmatic concerns. They, being aristocrats, could not conceive that people would participate in the military out of duty, honor and conscience even though they have the liberty to abstain. Their decision was in error. See generally **John Graham, The Military Draft** (1971) (arguing against the military draft). Harrop A. Freeman, The Constitutionality of Direct Federal Military Conscription, 46 **Ind. L. J.** 333 (1971) (arguing against the military draft); Leon Friedman, Conscription and the Constitution, 67 **Mich. L. Rev.** 1493, (1969) (arguing against the military draft); Roland Adickes, The Constitutional Invalidity of the Draft, 46 **S. Cal. L. Rev.** 385 (1973) (arguing against the military draft); Akhil Reed Amar, The Bill of Rights as a Constitution, 100 **Yale L. J.** 1131, 1192 (1991). (arguing that forcing people into military service is unconstitutional).

⁹¹ This would include arms operation and safety training, marksmanship and military tactics.

⁹² **Marquis James, The Raven: A Biography of Sam Houston** 28 (1929). During the Revolutionary War, military participation was voluntary until the government of the people was suspended. Mayer, supra note 14 at 313, 317-318, 320-322. Even Congress' "requirement" that the people serve during the Revolutionary War was essentially only a request. Amar, supra note 5 at 1447. The people intended that the Constitution eliminate even aristocratic forms and

arms.⁹³ Kant wrote, "Every nation must be so organized internally that not the head of the nation--for whom, properly speaking, war has no cost (since he puts the expense off on others, namely the people)--but rather the people who pay for it have the decisive voice as to whether or not there should be war."⁹⁴ Kant asserted that war ought to be consensual and Hobbes asserted that war is consensual.⁹⁵ The people intended that their defense be based on the militia which is inherently voluntary. The people have never changed this principle.⁹⁶

Furthermore, to coerce a person into military "service" is outside the proper scope of government.⁹⁷ In addition, since the fourteenth amendment specifically prohibits involuntary

innovations. **The Federalist** No. 43, at 274-75 (J. Madison). The draft is a key component of aristocratic society and is antithetical to democracy. Tocqueville, supra note 14 at 478. The state has no interest outside of the rights of individuals. **The Federalist** No. 51, at 321-22 (J. Madison); accord 1 Farrand, supra note 20 at 421-22 (remarks of Madison). Only when one enlists does one assume legal duties in the military. The concepts of a draft, enlistment and soldiers are related to a standing army, not a militia.

⁹³ Cf. Scarry, supra note 4 at 1261-65. The etymology of the word "federal" is noteworthy: Based on the Latin foedus (meaning treaty or covenant), and its cognate fides (faith), a federal union is one relying on good faith and voluntary compliance of its members instead of direct governmental coercion of individuals. See Martin Diamond, The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both," 86 **Yale L. J.** 1273, 1279-80 (1977) (supporting voluntary compliance).

⁹⁴ **Immanuel Kant, On the Proverb That May be True in Theory, But is of No Practical Use, in Perpetual Peace and Other Essays on Politics, History and Morals** 61, 88 (T. Humphrey trans. 1983), reprinted in Scarry, supra note 4 at 1257.

⁹⁵ Scarry, supra note 4 at 1257.

⁹⁶ Id. at 1261-62. Hirsch, supra note 77 at 919, 924.

⁹⁷ The mechanism of government may only be used to require a perpetrator to remedy a distinct and palpable injury inflicted upon another person. To coerce one to kill, maim and destroy another and his property, or assist in it, when there hasn't been any distinct and palpable wrong inflicted upon him is completely contrary to legitimate government.

servitude and was implemented after the enumerated provisions, if nothing else, it overrules any previous "implicit" powers of the enumerated provisions inconsistent with it.⁹⁸

D. A Populace to Defend Against Domestic Tyranny

An armed citizenry would defend not only against foreign aggression but also against domestic tyranny. The colonists believed that force might be necessary to recover the reigns of government. The Declaration of Independence recognizes that the only just powers of government are derived from the consent of the people and that a long train of usurpations and abuses gives the people the right and the duty to "throw off such Government and provide new Guards for their future security."⁹⁹

John Adams relied on classical sources in the context of an analysis of quotations from Marchamont Nedham's *The Right Constitution of a Commonwealth* (1656) to vindicate a militia of all the people. He maintained that the "sword and sovereignty ever walk hand in hand together. This is perfectly just."¹⁰⁰ "The government is only just and perfectly free . . . where there is also a *dernier* resort, or real power left in the community to defend themselves against any attack on their liberties."¹⁰¹

This is just social engineering on an international scale and social engineering is not a legitimate function of government.

⁹⁸ It certainly overruled specific inconsistent enumerated provisions in the Constitution. There should be no question that inconsistent "implicit" notions, as the Supreme Court found in support of a draft, should be overruled.

⁹⁹ **Declaration of Independence.**

¹⁰⁰ 3 **John Adams, A Defence of the Constitutions of Government of the United States of America** 471-72 (London, 1787-88), reprinted in Halbrook, supra note 40 at 14.

¹⁰¹ **On Tyranny, Anarchy, and Free Governments**, New York Morning Post, Aug. 21, 1788, at 2, col. 2, noted in Halbrook, supra note 40 at 22.

Noah Webster said the people should annihilate the government on the first exercise of acts of oppression. The only thing stopping them would be a standing army. Even though he thought it likely that a standing army would be implemented by tyrants:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination* to resist the execution of a law which appears to them unjust and oppressive.¹⁰²

Before the amendments, William Lenoir worried that Congress could "disarm the militia."¹⁰³ But he knew that if the people "were armed, they would be a resource against great oppressions If the laws of the Union were oppressive, they could not carry them into effect, if the people were possessed of proper means of defense."¹⁰⁴

Before passage of the second amendment, Bostonian Antifederalist "John De Witt" wrote, It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a

¹⁰² Webster, An Examination into the Leading Principles of the Federal Constitution in Pamphlets on the Constitution of the United States 51, 56 (Paul Ford ed. 1888) (emphasis in the original), reprinted in Halbrook, supra note 40 at 48, 51-52.

¹⁰³ Elliot, supra note 52 at 203, reprinted in Halbrook, supra note 40 at 25.

¹⁰⁴ Elliot, supra note 52 at 203, reprinted in Halbrook, supra note 40 at 25.

free people. Tyrants have never placed any confidence on a militia composed of freemen.¹⁰⁵

Congress, at their pleasure, may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties¹⁰⁶

Before passage of the second amendment, Richard Henry Lee contended, It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended--and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they many in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength.¹⁰⁷

¹⁰⁵ **The Antifederalist Papers** 75 (Morton Borden ed. 1965) ("John De Witt" Letter, Am. Herald (Boston), Dec. 3, 1787).

¹⁰⁶ Id. Halbrook, supra note 40 at 18-19 (noting the colonist's concern that the clauses providing for a military might be misconstrued without the addition of what was to be the Second Amendment).

¹⁰⁷ **R. Lee, Letters of a Federal Farmer (1787-88)**, in Webster, An Examination into the Leading Principles of the Federal Constitution, in Pamphlets on the Constitution of the United States 305-06 (Paul Ford ed. 1888), reprinted in Halbrook, supra note 40 at 20.

Before passage of the second amendment, George Clinton, writing as "Cato," predicted a permanent force because of "the fear of a dismemberment of some of its parts, and the necessity to enforce the execution of revenue laws (a fruitful source of oppression)" ¹⁰⁸ "M. T. Cicero" wrote to "The Citizens of America":

Whenever, therefore, the profession of arms becomes a distinct order in the state . . . the end of the social compact is defeated No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and soldier in those destined for the defence of the state Such are a well regulated militia, composed of the free holders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen. ¹⁰⁹

Before passage of the second amendment, Madison, during the federal convention, identified "large standing armies" as "the greatest danger to liberty." ¹¹⁰

Tench Coxe, the writer of the probably most complete exposition of the amendments published during the ratification period, ¹¹¹ said,

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize . . . the people are confirmed by the next article in their right to keep and bear

¹⁰⁸ **The Antifederalist Papers**, supra note 105 at 38.

¹⁰⁹ Charleston State Gazette, Sept. 8, 1788, at ____, col. _____. See also id. Aug. 7, 1788, at 3, col. 1-2. Letter from New York, Oct. 31, 1787, in 3 Jensen, supra note 48 at 390. The colonists wanted to "prevent the establishment of standing armies in time of peace." Id. at 389. Reprinted in Habrook, supra at 22.

¹¹⁰ Prescott, supra note 29 at 524, reprinted in Scarry, supra note 4 at 1279.

¹¹¹ Halbrook, supra note 40 at 29-30. Madison supported Coxe's view of a personal right to arms. Id.

their private arms.¹¹² The militia, who are in fact the effective part of the people at large, will render many troops quite unnecessary.¹¹³ Who are the militia? Are they not ourselves . . . [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hand of the people.¹¹⁴ Should tyranny threaten, the friends to liberty . . . using those arms which Providence has put into their hands, will make a solemn appeal to 'the power above.'¹¹⁵

After the passage of the second amendment, Madison wrote in a February 6, 1792 article in *The National Gazette*,

In bestowing the eulogies due to the particular and internal checks of power, it ought not the less to be remembered, that they are neither the sole nor the chief palladium of

¹¹² Originally published under the pseudonym "A Pennsylvanian," these "Remarks on the First Part of the Amendments to the Federal Constitution" first appeared in the *Philadelphia Federal Gazette*, June 18, 1789, at 2, col. 1. They were reprinted by the *New York Packet*, June 23, 1789, at 2, cols. 1-2, and by the *Boston Centennial*, July 4, 1789, at 1, col.2, reprinted in Kates, supra note 1 at n.81.

Coxe sent a copy to Madison who replied commending its "explanatory strictures" of his proposal. 12 **Papers of James Madison** 257 (Charles Hobson and Robert Rutland eds. 1979) (letter of June 24, 1789, to Tench Coxe).

¹¹³ Coxe, *An American Citizen IV* in **The Documentary History of the Ratification of the Constitution** 435 (Joseph Kaminski and Gaspare Saladino eds. 1981); and in Coxe, *Examination of the Constitution*, in **Pamphlets on the Constitution of the United States**, supra at 151, reprinted in Halbrook, supra note 40 at n.14, 15.

¹¹⁴ *Pennsylvania Gazette*, Feb. 20, 1788, in Jensen supra note 48 at 1778-80, reprinted in Kates, supra note 1 at n.51.

¹¹⁵ Coxe, supra note 113 at 433. De Tocqueville, supra note 14 at xl-xli, 6.

constitutional liberty. The people who are the authors of this blessing, must also be its guardians.¹¹⁶

Madison said "the ultimate authority . . . resides in the people alone," and he promoted "[p]lans of resistance" and an "appeal to a trial of force" should the federal government encroach on the people's freedom.¹¹⁷

That the people did not consent to the government's creation of a standing army is reflected in an October 14, 1789 article in the United States Gazette:

The right of the people to keep and bear arms has been recognized by the General Government; but the best security of that right after all is, the military spirit, that taste for martial exercises, which has always distinguished the free citizens of these States; From

¹¹⁶ **James Madison, Government of the United States, reprinted in The Writings of James Madison Comprising His Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed** 93 (Gaillard Hunt ed. 1906), reprinted in Scarry, supra note 4 at n.53. The military must be dispersed (by having community armories and arms in the hands of the people) in order to implement the philosophy of a government of limited and enumerated powers. Government is small and dispersed not only that any damage that might be done with it will be small but more importantly so that it can be overcome by the concerted action of the people if it becomes illegitimate. The military, the quintessential characteristic of the coercive mechanism known as government, must also be dispersed or the people will not be able, as Madison said, to make appropriate changes and tyrants will be able to stay in power. Mayer, supra note 14 at 250, 260. The people of Virginia, of which many of the "Founding Fathers" were a part, on several occasions resorted to force of arms to deal with the government. This right is guaranteed to the people by the Second Amendment. To say that the Amendment refers to state rights is spurious. The Constitution specifically refers to the states when the rights of the states were at issue and to the people when there rights were at issue. Kates, supra note 1 at 218.

¹¹⁷ **The Federalist** No. 46, at 294, 298.

various parts of the Continent the most pleasing accounts are published of reviews and parades in large and small assemblies of the militia Such men for the best barrier to the Liberties of America.¹¹⁸

Theodorick Bland wrote Patrick Henry that "I have founded my hopes to the single object of securing (*in terrorem*) the great and essential rights of freemen from the encroachments of Power--so far as to authorize resistance when they should be either openly attacked or insidiously undermined."¹¹⁹

"A Framer" argued to "The Yeomanry of Pennsylvania":

Under every government the dernier resort of the people, is an appeal to the sword; whether to defend themselves against the open attacks of a foreign enemy, or to check the insidious encroachments of domestic foes. Whenever a people . . . entrust the defense of their country to a regular standing army . . . the power of that country will remain under the direction of the most wealthy citizens [Y]our liberties will be safe as long as you support a well regulated militia.¹²⁰

¹¹⁸ The Gazette of the United States, Oct. 14, 1789, at 211, col. 2, reprinted in Halbrook, supra note 40 at 37.

¹¹⁹ Letter from Theodorick Bland to Patrick Henry (March 19, 1790), in **Patrick Henry**, 417-418 (1951). Halbrook, supra note 40 at 38 (supporting the right of the people to rise up and use their arms to eliminate tyrants which rise to the reigns of government).

¹²⁰ Independent Gazette, Jan. 29, 1791, at 2, col. 3, reprinted in Halbrook, supra note 40 at 39. In our era, the corporate "person" would adequately fill the description "of the most wealthy citizens." See Steve Emery, Titles of Nobility: Indicators of Government Run Amok.

That the dispersed populace should have arms to enforce the Constitution as they intended it is supported by the writings of J.L. De Lolme, an eighteenth century author much read at the time of the American Revolution.¹²¹

. . . but all those privileges of the People, considered in themselves, are but feeble defences against the real strength of those who govern. All those provisions, all those reciprocal Rights, necessarily suppose that things remain in their legal and settled course: what would then be the recourse of the People, if ever the Prince . . . should no longer respect either the person, or the property of the subject . . . it would be resistance [R]esistance is looked upon by them as the ultimate and lawful resource against the violences of Power.¹²²

Alexander Hamilton said,

I trust the friends of the Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness.¹²³

¹²¹ Joyce Lee Malcolm, The Right of the People to Keep and Bear Arms: The Common Law Tradition, **10 Hastings Const. L. Q.** 285 (1982).

¹²² J. De Lolme, The Constitution of England 227 (New York 1793), reprinted in Malcolm, supra at n.4.

¹²³ Quoted in Cong. Globe, 38th Cong., 2d Sess. 484 (1865) (quoted by Rep. James Patterson). See 7 The Federal and State Constitutions, Colonial Charters and Other Organic Laws 3813 (Francis Thorpe ed. 1909) [hereinafter Thorpe]. The Constitution of Virginia--1776, from which we principally derive the Bill of Rights, recognized the right and duty of the people to reform, alter or abolish the government. 1 The Debates and Proceedings in the Congress of the United States 434 (Joseph Gales ed. 1834). See also **The Federalist** No. 22, at 152 (A. Hamilton). See also **The Federalist** No. 31, at 197 (stating that the people should weigh whether the Constitution is being upheld and take steps to rectify infringements). **John Marshall's Defense of McCulloch v. Maryland** 106, 142-43 (Gerald Gunther ed. 1969). That

If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self defense, which is paramount to all positive forms of government¹²⁴

Supreme Court Justice Joseph Story summed things up fairly well. He recognized that a centralized military or a police state was not necessary or needed and was a threat to liberty. He said an armed citizenry was sufficient and necessary to provide a defense

against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people.

The right of the citizen to keep and bear arms has been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.¹²⁵

the government is sovereign was heresy to early Americans. "None but the people . . . in exclusion of its government, are competent to make or reform a government of whatever nature. The governments are their deputies, for a limited and defined objects." Id.

¹²⁴ **The Federalist** No. 28 at 227. See also Halbrook, supra note 40 at 22-24 (similar statements from lesser known figures).

¹²⁵ 3 **Joseph Story, Commentaries on the Constitution of the United States** s. 1890, pages 746-47 (1833), reprinted in Robert A. Sprecher, The Lost Amendment, 51 **ABA J.** 665 (1965). Inevitably, the structure needed to support a

Supporting the current military structure need not be based on pragmatic concerns. A large military is dangerous¹²⁶ and is not needed. When the colonists won their independence, they did so against the most powerful military force on the face of the earth at that time. The colonists were successful because they were decentralized and had arms with which to defend themselves.¹²⁷ The people of Vietnam and Afghanistan have provided contemporary examples of this principle.

A citizen military provides many advantages. It is a bulwark against the tyranny and destruction of offensive actions. It provides the most effective means for preventing tyrants from rising to power.¹²⁸ It ensures a responsible government. It provides the best defense and does it in the most economical fashion.

The people's right to bear arms has slowly been eroded by a governmental aristocracy. The people have been tolerant but it is unlikely that they will restrain themselves forever while their liberties are being stripped away. The "Tree of Liberty" has gone a long time without a substantial watering. Tyrants will have to be eliminated and, unfortunately it will require the blood of patriots to do it. Thomas Jefferson said,

God forbid we should ever be twenty years without such a rebellion And what country can preserve its liberties, if its rulers are not warned from time to time, that this people

standing army leads to graft, greed, corruption and tramples on the rights of the people. Mayer, supra note 14 at 322, 331-33.

¹²⁶ 7 Thorpe, supra note 123 at 3184 (**Va. Const.**, Bill of Rights, s. 13 (1776)).

¹²⁷ Scarry, supra note 4 at 1257. In fact, this was the way it essentially was to remain. Id.

¹²⁸ Without a centralized military, despots like Hitler and Stalin could not have had such widespread influence.

preserve the spirit of resistance? Let them take arms The Tree of Liberty is watered by the blood of patriots and tyrants.¹²⁹

However, Jefferson may not have seen what a "Federal Republican" foresaw; that an army would be used "to suppress those struggles which may sometimes happen among a free people, and which tyranny will impiously brand with the name of sedition."¹³⁰

III. The People and the Constitution

A. The Legal Aristocracy

The Nobility Clauses indicate who should be interpreting the Constitution. The colonists did not intend to create a constitutional or even a legal priesthood in light of the underlying precepts of the Title of Nobility Clauses.

Alexis de Tocqueville said, "[b]y birth and interest a lawyer is one of the people, but he is an aristocrat in his habits and tastes" ¹³¹ Although his comments were phrased in such a way

¹²⁹ Letter from Thomas Jefferson to James Madison (Jan. 30, 1787); Letter from Thomas Jefferson to William Stephens Smith (Nov 13, 1787) in Saul K. Padover, Thomas Jefferson and the Foundations of American Freedom 98-99 (1965).

¹³⁰ The Antifederalist Papers 19. See The Federalist No. 71, at 433 (A. Hamilton).

The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter

Id.

¹³¹ De Tocqueville, supra note 14 at 245. See Peter J. Ferrara, Comment On: Making the Case for a Constitutional Right to Minimum Entitlements, 44 Mercer L. Rev. 567, 568 (1992).

not to denigrate the American legal aristocracy (because of his predisposition to aristocracy),¹³² De Tocqueville did say that it is at the bar or the bench that the American aristocracy is found.¹³³

1. Masters as Servants and Servants as Masters: The People and the Constitution

The colonists did not intend to create a constitutional or even a legal priesthood in light of the underlying precepts of the Title of Nobility Clauses.¹³⁴ However, judges have ordained themselves as the ultimate interpreters of the law and the constitution.¹³⁵ United States Supreme Court Chief Justice Charles Evans Hughes said, “we are under a Constitution, but the Constitution is what the judges say it is.”¹³⁶ Because the Supreme Court has ultimate control over the whole legal system, five people can exert their will over hundreds of millions of people.¹³⁷

¹³² De Tocqueville, supra note 14 at xxxvi-xxxvii. Hazard, supra note 14 at 1271. Not only does the legal profession have a monopoly (through statutes prohibiting the unauthorized practice of law) but lawyers are de facto unelected law makers. **Roger S. Haydock, et al., Fundamentals of Pretrial Litigation** 8 (3d ed. 1994). They are the unelected 4th arm of the government. James W. Hurst, Lawyers in American Society, 50 **Marq. L. Rev.** 594, 598 (1966).

¹³³ De Tocqueville, supra note 14 at 247. R. Kent Newmyer, Daniel Webster as Tocqueville’s Lawyer: The Dartmouth College Case Again, 11 **Am. J. of Legal Hist.** 127, 128 (1967).

¹³⁴ David M. Ebel, Why and to Whom Do Constitutional Meta-Theorists Write?--A Response to Professor Levinson, 63 **U. Colo. L. Rev.** 409, 411 (1992).

¹³⁵ **Fred Rodell, Woe Unto You Lawyers** 16, 18 (A Berkley Book 1980) (1939). *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-180 (1803). The declaration by the Supreme Court that the Supreme Court is the final arbiter of the Constitution is self-serving and fails to recognize that that the people never gave the Supreme Court this kind of authority and that the people should be able to exercise this power through the jury. Amar, supra note 90 at 1188-89. Contra Sparf v. U.S., 156 U.S. 51, 72 (1895) (holding that the jury may not be instructed that they the power of nullification).

¹³⁶ Quoted in Rodell, supra note 135 at 41.

¹³⁷ Ronald J. Bacigal, Putting People Back into the Fourth Amendment, 62 **Geo. Wash. L. Rev.** 359, 384 (1994).

This structure is a very ominous and foreboding one. It is quintessential embodiment of an entrenched aristocracy, as George Mason defined it, “the governt. of the few over the many”¹³⁸ in our society today. De Tocqueville warned America of the dangers of such tyranny several hundred years ago. He acknowledged that the President could abuse his power, but his power was limited.¹³⁹ De Tocqueville said Congress had great power but legislation could be changed after the election of representatives more sensitive to the wishes of the people.¹⁴⁰ But the United States Supreme Court could plunge a nation into anarchy or civil war.¹⁴¹ De Tocqueville's words were prophetic.¹⁴² They still are. Thadeus Stevens was similarly prophetic when he said in 1850, speaking of the slavery of the black man and its likely transmutation into a larger sphere, that “[t]he people will ultimately see that laws . . . will eventually enslave the white man.”¹⁴³

The fundamental tool of tyranny used by judicial aristocrats is the doctrine of stare decisis-- “to abide by, or adhere to, decided cases.”¹⁴⁴ Everyone must abide by the decisions of the few at

¹³⁸ 2 Farrand, supra note 20 at 224. See Cong. Globe, 34th Cong., 3d Sess. app at 140 (1857) (remarks by Rep. Bingham) (linking the government of a few over many with slavery).

¹³⁹ Phil C. Neal, De Tocqueville and the Role of the Lawyer in Society, 50 **Marq. L. Rev.** 607, 608 (1966).

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² See Dred Scott v. Sanford, 60 U.S. 393, 451 (1856). A civil war followed not long after the Supreme Court's declaration that people with black skin color are not actually people, and hence are not attributed the rights of people, so they may be reduced to property. Id. People have effectively been reduced to property through the government's establishment and development of the corporation. Great unrest among the populace was caused by the injustices perpetrated through the empowerment of the corporation. Live-stock Dealers' & Butchers' Ass'n v. Crescent City Live-stock Landing & Slaughter-House Co., 15 F. Cas. 649 (D. La. 1870) (Slaughter-House Cases).

¹⁴³ Quoted in Hans Trefousse, The Radical Republicans 56 (1969).

¹⁴⁴ **Black's Law Dictionary**, supra note 11 at 1406.

the top.¹⁴⁵ This doctrine sprang from the same tyrannical aristocratic atmosphere from which the colonists fought to free themselves.¹⁴⁶ Even though this is not just, the Court knows that it must appear to be so.¹⁴⁷ They substitute consistency for justice.

Although, technically, stare decisis is only a “principle of policy, not a mechanical formula,”¹⁴⁸ it has been treated like a rule of law.¹⁴⁹ Practically speaking, rarely can a “lower” court decide a case differently than a similarly decided case by a “higher” court.¹⁵⁰ The Court has articulated the arrogance and contempt for justice embodied in this policy: “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be

¹⁴⁵ Maurice Kelman, The Force of Precedent in the Lower Courts, 14 **Wayne L. Rev.** 3, 4 (1967).

¹⁴⁶ James C. Renquist, The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court, 66 **B.U. L. Rev.** 345, 348 (1986). One of the key elements of a government ruled by the people is a jury where they judge both law and fact. Amar, supra note 90 at 1187-95. This is one of the things the colonists fought for. Hosmer, supra note 19 at 191.

¹⁴⁷ Charles H. Nalls and Paul R. Bardos, Stare Decisis and the U.S. Court of International Trade: Two Case Studies of a Perennial Issue, 14 **Fordham Int. L. J.** 139, 142 (1990).

¹⁴⁸ *Patterson v. Mclean Credit Union*, 485 U.S. 617, 618-619 (1988). Supposedly, it is a doctrine of convenience. Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 **Cornell L. Rev.** 401, 402-403, 410 (1988). In reality, there is no stare decisis at all. Leading Cases, 105 **Harv. L. Rev.** 177, 187 (1991). Frank H. Easterbrook, Ways of Criticizing the Court, 95 **Harv. L. Rev.** 802, 818 n.39 (1982) (stating that stare decisis really is little more than a mirage invented by judges in an effort to have us, as well as other judges, believe they are constrained).

¹⁴⁹ Kelman, supra at note 259 at 4.

¹⁵⁰ See Id. (stating that there is an absolute duty to apply the law as last pronounced by superior judicial authority). The persuasive value of an opinion should be an adequate substitute for reliance on stare decisis. **Peter Wesley-Smith, Theories of Adjudication and the Status of Stare Decisis**, reprinted in **Precedent in Law** 73-87 (Laurence Goldstein ed. 1987). **Erik G. Light, Legal Theory and Philosophy** 1705, 1706 (1989).

settled than it be settled right.”¹⁵¹

Not only do judges enforce their views upon everyone else but they have also taken it upon themselves to drastically change the kind of government the colonists implemented. Any changes made to government were to be made by the people--a foundational premise upon which the government of this nation rests.¹⁵² If the Constitution needs changing, the people have provided the mechanism for its change--Constitutional amendments.¹⁵³ If there isn't sufficient impetus among the populace to change the Constitution, it shouldn't be changed.¹⁵⁴

2. Masters as Servants and Servants as Masters: Juries and the Law

¹⁵¹ *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1931) (Brandeis, J., dissenting).

¹⁵² Mayer, *supra* note 14 at 298. Even with “consent,” government cannot legitimately be used beyond its intended scope regardless of its “representativeness.” Cong. Globe, 34th Cong., 3d Sess. app. at 140 (1858) (remarks of Ohio Rep. John Bingham).

¹⁵³ U.S. Const. art. V.

¹⁵⁴ **John Marshall's Defense of *McCulloch v. Maryland*** 130-31 (Gerald Gunther ed. 1969). The people are supreme. The Constitution is subordinate to the people and those people at the reins of government subordinate to the Constitution. *Id.* Amar, *supra* note 5 at 1463 n.163. “[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.” **The Federalist** No. 45, at 289 (J. Madison). Governmental supremacy through discretionary power is a British theory and was anathema to the colonists. Amar, *supra* note 5 at 1480. In America “. . . the people, without exaggeration, may be said to be entirely the masters of their own fate.” **The Federalist** No. 28, at 180-81 (A. Hamilton). People at the reins of government are to be subordinate to the Constitution, not redefine it or make implicit assumptions about it. The colonists were aware of the folly of “representatives” thinking they were the people and their views were representative of the people. **The Antifederalist Papers** 19. Representatives commonly “betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter” *Id.* **The Federalist** No. 71, at 433 (A. Hamilton). Government officials are only “representatives,” “agents,” “delegates,” “deputies,” and “servants” and are not considered the people and have only ministerial, not discretionary, powers. Amar, *supra* note 5 at 1436.

The doctrine of stare decisis typifies the attitude of those people at the reins of government and is further reflected in the diminution of the role of the jury. Not only have those people in the legal profession ennobled themselves but they have ignobled their masters--the people. Early in this nation's history, the jury had the right to decide questions of law and fact in each case.¹⁵⁵ They were essentially a mini-governmental body with veto power.¹⁵⁶ The role of the jury ensured that the government did not rest on a small number of persons because juries changed in composition with each case and were drawn from the general population.¹⁵⁷ The judiciary has since made the jury little more than their rubber stamp.¹⁵⁸

When the Constitution was established, the people were adamant about having ultimate

¹⁵⁵ *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808) (allowing the jury to decide questions of law). *Sparf v. U.S.*, 156 U.S. 51, 156 (1895) (Gray & Shiras, JJ., dissenting) (arguing that the jury had the power of nullification). Amar, *supra* note 90 at 1187-95.

¹⁵⁶ Amar, *supra* note 90 at 1187-95. Bacigal, *supra* note 137 at 366-69, 407. John Adams said, "the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature" as they have with regard to other decisions of government. 2 **John Adams, The Works of John Adams** 253 (Charles C. Little & James Brown eds. 1850). Vox populi, vox dei. The voice of the people is the voice of God. An Interview with Tom Foley, **C-SPAN**, 6:30 p.m., 12-23-94.

¹⁵⁷ Amar, *supra* note 90 at 1183, 1187-95. Bacigal, *supra* note 137 at 368. The judge's role is merely to give an opinion and to provide some guidance to a jury which "clearly means by way of advice and instruction only, and not by way of order or command." *Sparf*, 156 U.S. at 135 (Gray and Shiras, JJ., dissenting).

¹⁵⁸ Spence, *supra* note 21 at 87-91. Today the jury can't be instructed that they have ultimate say on what the law is. *Sparf*, 156 U.S. 51; *United States v. Dougherty*, 473 F.2d 1113 (1972) (refusing an instruction of jury nullification). Mark D. Howe, Juries as Judges of Criminal Law, 52 **Harv. L. Rev.** 582 (1939) (tracing the decline of the jury's ability to determine law). See generally Note, The Changing of the Jury in the Nineteenth Century, 74 **Yale L. J.** 170 (1964) (documenting the decline of the power of the jury). Bacigal, *supra* note 137 at 378.

control of the law.¹⁵⁹ They established themselves as the final arbiter of the law by establishing a jury in which they had the power to determine both law and fact.¹⁶⁰

The infringement upon the role of the jury in the application of the law was one of the key issues which triggered the colonist's struggle for independence.¹⁶¹ Their rights under the Magna Charta of having “judgment of his peers on the law of the land” was being taken away from them.¹⁶² In the colonial era, the jury had the right and obligation to decide matters of both law and fact--even contrary to the instructions of the judge or the will of the legislature.¹⁶³ In fact, they were a mini-governmental body for each case.¹⁶⁴ Thomas Jefferson said, “[t]he jury, which was the most energetic means of making the people rule, is also the most effective means of teaching it to rule.”¹⁶⁵

The jury's protective role was praised as a “safeguard against the arbitrary exercise of power

¹⁵⁹ Hosmer, supra note 19 at 191. Bacigal, supra note 137 at 369-70. Ronald Bacigal noted, “Alexander Hamilton successfully asserted that jurors 'have the right beyond all dispute to determine both law and fact'.” Id. at 369. Amar, supra note 90 at 1133. Thomas Jefferson stated, “It is in the power, therefore to the juries, . . . to take on themselves to judge the law as well as the fact.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 3 **The Writings of Thomas Jefferson** 82 (H.A. Washington ed. 1853) Quoted in Bacigal, supra note 137 at 388.

¹⁶⁰ Hosmer, supra note 19 at 191. Bacigal, supra note 137 at 370-71. Sparf, 156 U.S. at 165 (Gray & Shiras, JJ., dissenting).

¹⁶¹ Hosmer, supra note 19 at 191. Bacigal, supra note 137 at 374-78.

¹⁶² Hosmer, supra note 19 at 191. Bacigal, supra note 137 at 374-75.

¹⁶³ Amar, supra note 90 at 1187-95.

¹⁶⁴ Id. 1 Tocqueville, supra note 14 at 293. De Tocqueville stated, “The jury is, above all, a political institution” Id. According to Alexander Hamilton, the jury had the power to determine the law “for reasons of a political and peculiar nature, for the security of life and liberty.” 7 **Hamilton's Works** 335-36 (1886).

¹⁶⁵ Quoted in Spence, supra note 21 at 87. De Tocqueville, supra note 14 at 254.

by the government. . . .”¹⁶⁶ The jury, by design for pragmatic and philosophical reasons, served as mechanism to keep power in the hands of the people and out of the hands of judges.¹⁶⁷ Thomas Jefferson said, “I know of no safer depository of the ultimate powers of the society but the people themselves.”¹⁶⁸

3. Masters as Servants and Servants as Masters: Honor

The people at the reins of government, irregardless of the branch of government or whether they are elected or appointed, have ennobled themselves by crowning themselves as masters and have ignobled the people to the level of servants. The ennobling, preeminence and majesty of the legal profession is typified by the requirement that people stand when a judge enters into or leaves

¹⁶⁶ Carmen A. Frattaroli, The Jury: Is it Viable, 6 **Suffolk U. L. Rev.** 897, 898 (1971). Paul Hoffman, Double Jeopardy Wars, The Case for a Civil Rights “Exception”, 41 **UCLA L. Rev.** 649, 668 (1993) (stating that jury nullification is a safeguard against governmental oppression). Sparf, 156 U.S. at 149 (Gray and Shiras, JJ., dissenting). See also Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (extolling the jury as an “inestimable safeguard against the compliant, biased or eccentric judge”).

¹⁶⁷ **Anne Strick, Injustice for All** 185 (1977). To the colonist, common sense was superior to “great legal science.” Paul D. Carrington, Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748-1816), 53 **Pitt. L. Rev.** 705 (1992). A judge's main function was to “see that the parties has a fair chance with the jury.” Howe, supra note 158 at 591. It is the height of arrogance and spurious for a “servant” to foist his views upon his “master” through notions of “police power” or “general welfare.” Cf. Halbrook, supra note 40 at n.94 (stating that the people retained the right to conduct themselves in a manner they wish and that government officials are not their overseers). Cf. Amar, supra note 5 at 1434, 1440 (stating that government officials only have the power that the people explicitly gave them).

¹⁶⁸ Strick, supra note 167 at 226. Ronald Bacigal stated, “The jury serves a limited term and can never grow into a dangerous system.” Bacigal, supra note 137 at 412 n.328.

the courtroom.¹⁶⁹ In addition, the requirement that the person fulfilling the role of judge or justice is entitled to be called by those words as a prefix to their name or by “your honor” indicates that judges are in an elevated position.

The issue of honor came up, indirectly, with respect to the presidency of George Washington.¹⁷⁰ Congress attempted to bestow titles such as “His Excellency” and “His Highness, the President of the United States and Protector of their Liberties.”¹⁷¹ The issue generated controversy in Congress and among the people.¹⁷² Some felt an exalted title was necessary to elicit respect from foreign leaders.¹⁷³ Others said an exalted title would violate the principles for which the people fought.¹⁷⁴ The latter carried the day.¹⁷⁵

The concept of honor presupposes a society in which individuals are accorded status, and

¹⁶⁹ *In re Chase* 468 F.2d 128 (7th Cir. 1972) (holding that persons must rise upon command when the judge enters and leaves the courtroom); *Ex Parte Krupps*, 712 S.W.2d 144 (Tex. Crim. App. 1986) (holding that persons must rise upon command when the judge enters and leaves the courtroom). Contra, *U.S. v. Snider*, 502 F.2d 645 (4th Cir. 1974) (stating that respect for the judiciary is earned, not commanded); *Commonwealth v. Cameron*, 462 A.2d 649 (Pa. 1983) (holding that contempt requires disruption of the proceedings, not merely failure to rise upon command).

¹⁷⁰ **Sol Bloom, History of the Formation of the Union under the Constitution** 373-82 (1935).

¹⁷¹ Id. at 375-76.

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ Id. at 377-78. Some colonial leaders even urged George Washington to be a king. Delgado, supra note 17 at n.86. Some people referred to Patrick Henry as “Son Allesse Royale” and “His Excellency” when he was governor of Virginia but the people thought this sort of deference was unbecoming, pompous cant. Mayer, supra note 14 at 318-19.

¹⁷⁵ Bloom, supra note 170 at 377-78.

therefore deference, within a hierarchically arranged social order.¹⁷⁶ The colonists sought to eliminate this kind of society.¹⁷⁷ It is inconsistent with the egalitarian principles of American democracy.¹⁷⁸ Special veneration is not due to those who are at the reins of government.¹⁷⁹

According to Montesquieu, honor is the primary “spring” of aristocracy.¹⁸⁰ “[I]t is the nature of honor to aspire to preferments and distinguishing titles,” and “[a] monarchical government supposeth . . . preeminences, ranks, and likewise a noble descent.”¹⁸¹

Just as a king uses the coercive force of government to elicit “honor” from his kingship, judges compel “honor” which is supposedly attributable to their status.¹⁸² To compel honor is to establish a system of stratification and to prescribe appropriate behavior for people at the various points in the hierarchy; it entails acceptance of superordination and subordination.¹⁸³ Berkeley Law Professor Robert Post said,

Honor presupposes that individuals are unequal. An individual's honor is but the personal

¹⁷⁶ De Tocqueville, supra note 14 at 593-94, 96, 601-02. Robert C. Post, The Social Foundations of Defamation Law: Reputation and the Constitution, 74 *Calif. L. Rev.* 691, 702 (1986).

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Post, supra note 176 at 722-23.

¹⁸⁰ Id.

¹⁸¹ Post, supra note 176 at 700. 1 Montesquieu, supra note 65 at 28. **The Federalist** Nos. 9, 43, 47, 78 (A. Hamilton) (J. Madison). In **The Federalist** No. 47, Montesquieu is described as “celebrated” and as an “oracle who is always consulted.” Id. at 301. The Continental Congress similarly praised him as “the immortal Montesquieu. **Gordon Wood, The Creation of the American Republic, 1776-1787**, 152 (1969).

¹⁸² Post, supra note 176 at 700. **Pitt-Rivers, Honour and Social Status**, in **Honour and Shame: The Values of the Mediterranean** 21-22, 35 (J.G. Peristiany ed. 1966). **J.K. Campbell, Honour and the Devil**, in id. at 149.

¹⁸³ **John Davis, People in the Mediterranean: An Essay in Comparative Social Anthropology** 98 (1977).

reflection of the status which society ascribes to his social position. Individuals are therefore inherently unequal because they occupy different social roles. It is a characteristic of honor that these social roles are hierarchically arranged.¹⁸⁴

Generally, there are two ways to look at the relationship between those at the reins of government and the people. Officials can be viewed as superior to the people in character, wisdom and mission and consequently the people must be subject to their guidance.¹⁸⁵ It then follows that even legitimate public censure of a ruler is wrong because the ruler is due utmost respect and this would diminish the official's authority.¹⁸⁶ Officials, however, can be viewed as agents or servants and therefore, in their position, inferior to the people.¹⁸⁷ From this perspective, the character, wisdom and mission of the people is considered superior to that of the official.¹⁸⁸ The official should be deferential to and subject to the criticism of his master because this is within the proper scope of their relationship.¹⁸⁹

Our nation rejects the notion that government officials are superior to the people and subscribes to the principle that the people are superior to government officials.¹⁹⁰ In New York

¹⁸⁴ Post, supra note 176 at 700.

¹⁸⁵ Id. note 290 at 722.

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ **J.F. Stephen, A History of the Criminal Law of England** 299-300 (1883). The Preamble of the Constitution declares; “[w]e the people of the United States . . . do ordain and establish this Constitution for the United States of America.” **U.S. Const. Preamble**. “We the people” deliberately identifies the people as the masters and the ones who are due deference rather than the “state,” or as in England, the King. Post, supra note 176 at 722.

¹⁹⁰ Post, supra note 176 at 706 n.95.

Times Co. v. Sullivan,¹⁹¹ the Court said that in America, government officials are “public servants,” and the people are their masters.¹⁹² Masters have status and rightly demand veneration; servants do not.¹⁹³ Hence the Court reaffirmed Madison's view that in “the American form of government,” where the people are in control of the Government, and not the Government in control over the people.”¹⁹⁴ In this country, government officials are not “the superior of the subject.”¹⁹⁵ The unarticulated implication of Sullivan is that compelling or vindicating official honor is not a constitutionally legitimate function.¹⁹⁶

IV. Conclusion

George Mason said when an aristocratic body rises to power, it is “like the screw in mechanics,” it works “its way by slow degrees” and holds “fast whatever it gains” and “should ever be suspected of an encroaching tendency.”¹⁹⁷ Slowly but surely, over several hundred years, a veritable American aristocracy has arisen to exercise expansive control over the lives of the people of this nation.

The Title of Nobility Clauses are an indicator of the extent of the liberty the people have lost. The ascendant aristocrats have reduced the people to servants and they have elevated

¹⁹¹ 376 U.S. 254 (1964).

¹⁹² New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964).

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ Id.

¹⁹⁶ Post, supra note 176 at 724.

¹⁹⁷ 2 Farrand, supra note 20 at 224. See Cong. Globe, 34th Cong., 3d Sess. app at 140 (1857) (remarks by Rep. Bingham) (linking the government of a few over many with slavery).

themselves to masters. The people have been enslaved by the establishment of a standing army, their right to self-government has been swept away by aristocratic innovations and the institution of the corporation and a welfare state have reduced the people to slavery.

Correctly understood and applied, the Title of Nobility Clauses can act like a pin to an over-inflated balloon. They burst the bubble of a myriad of supposedly legitimate governmental functions. We have been led to believe that these powers were derived from the Constitution but, in reality, they are supported by nothing but the whim and caprice of tyrants.

Will the people at the reins of government recognize and correct the errors of their predecessors? If not, a just solution through self-help seems unreachable in the face of the most powerful military and economic force ever on the face of the earth. Nevertheless, the people are not without a solution. The colonials expected that tyrants, over time, would entrench themselves in government.¹⁹⁸ They also recognized that the people have a liberator. Thomas Jefferson said, “Can the liberties of a nation be thought secure when we have removed their own firm basis, . . . that these liberties are a gift of God; . . . that they are not to be violated but with His wrath.”¹⁹⁹

However coincidentally, Billy Graham referenced a conversation between Habakkuk and God, respectively, applicable to our dire straight in his May 1994 newsletter:

The law is paralyzed, and justice never prevails. The wicked hem in the righteous, so that justice is perverted. Look at the nations and watch--and be utterly amazed. For I am going

¹⁹⁸ Mayer, supra note 14 at 379. R.H. Lee warned the friends of “civil liberty” that a “coalition of Monarchy men, Military Men, Aristocrats, and Drones whose noise, impudence & zeal exceeds all belief” and an “elective despotism” would arise--just as it has. Id.

¹⁹⁹ Quoted in Cong. Globe, 38th Cong., 1st Sess. 1202 (1864) (speech by Sen. Henry Wilson). This parallels the message given during the Revolution. “Be not afraid, nor yet dismayed, by reason of this great multitude; for the battle is not yours, but God's.” Mayer, supra note 14 at 295.

to do something in your days that you would not believe, even if you were told.²⁰⁰

²⁰⁰ Habakkuk 1: 4-5. David Wilkerson's expectations of God's intervention are similarly apocalyptic, "Behold, I will do a thing . . . at which both the ears of everyone that heareth it shall tingle." **Times Square Church Pulpit Series**, June 13, 1994 (quoting 1 Samuel 3:11).