

James Madison and “The Second Amendment”

History 380 – United States Constitution and Law

March 27, 2009

## James Madison and “The Second Amendment”

“Here are some more people with missing chromosomes who oughta be thrown screaming from helicopters: gun enthusiasts! And I’m not against guns. I’m not against bullets. I’m not even against people shootin’ each other—shootin’ somebody’s part of the American Dream.”

—George Carlin<sup>1</sup>

Responsible, law-abiding citizens<sup>2</sup> of the United States have a Right to assemble themselves as militia. These have a Right to keep and bear arms in order to preserve the lives of themselves and the lives of others. This is perhaps the most important Right in *The Bill of Rights*. From an old-fashioned, gun-toting perspective, the keeping and bearing of arms is simply a way of life. But more importantly, from a constitutional perspective, this right ensures that all other rights will be protected.

Throughout this essay, I will focus on the *legality* of this Right, rather than the morality or the emotionality of the issue. (Most approach constitutional issues with their hearts and feelings, rather than their heads and thoughts. Then, emotions and sentiments dictate *what* they think, *who* they support, and *how* they vote.) The keeping and bearing of arms will hereafter be considered as a *constitutional* issue.

I will examine and explore the following: (1) the original intent of “The Second Amendment,” (2) the legality of this Amendment (as it now applies to state rights), and most

---

<sup>1</sup> George Carlin, *Complaints and Grievances*, (Atlantic Recording Corporation, 2001).

<sup>2</sup> Even from a semi-conservative standpoint on “The Second Amendment,” I recognize the necessity to keep handguns from those under the age of 21 and the necessity to keep firearms from felons, parolees, psychotics, etc. The exceptions as to who can and who cannot keep and bear arms (according to rational, legal discrimination) are as crucial and as necessary as the Right itself. For example, I have a Right to keep and bear firearms within the limitations of the law...but do I have a right to keep and bear a machinegun, a bazooka, or drive a tank to school? In other words, this Right, like other Rights, requires limitations. This Right is not absolute.

importantly, (3) the opinion of James Madison concerning the Right of the minority to keep and bear arms (using Lance Banning's publication<sup>3</sup> and additional, supporting publications).

### The American Mainstay

In the 2006, Academy-Award-winning motion picture, *The Departed*, Jack Nicholson portrays fictional, Irish mob boss, Frank Costello. In the beginning of the film, Costello beguiles a local youngster: "I don't want to be a product of my environment. I want my environment to be a product of me."<sup>4</sup>

Costello continues, "When I was your age they would say we could become cops or criminals. Today, what I'm saying to you is this: when you're facing a loaded gun, what's the difference?"<sup>5</sup>

Costello asks a thought-provoking question: when facing a loaded gun, what is the difference between a cop and a criminal? A loaded gun in the hands of a cop *or* in the hands of a criminal is *still* a loaded gun. Both cop and criminal are poised to take life; both give power to an implement of death.

The cannon, the musket, the scattergun, and the revolver are all implements of death. Without dispute, the firearm, in its various forms, was invented in order to shoot lethal projectiles at high velocities—not for mere amusement or novelty, but for the destruction of its target.<sup>6</sup> Some firearms are shot in offense, others in defense. Regardless of the user's moral

---

<sup>3</sup> *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic.*

<sup>4</sup> William Monahan, *The Departed*, (Warner Brothers Pictures, 2006).

<sup>5</sup> *Ibid.*

<sup>6</sup> Keep in mind, however, that the firearm can be used for leisure, recreation, or sport. The firearm is neutral, like any other implement. The shovel, the pickaxe, the hammer, and the screwdriver are not weapons until the user decides to use them as such. Did Karl Friedrich Benz or the Duryea brothers envision the possibility of vehicular homicide?

intention or political position, and regardless of the intended or unintended target, the firearm is here to stay.

Historically, the firearm has been an integral mainstay in America. During the days of New England paternalism and Filmerian beliefs and practices, the colonists and settlers brandished their muskets and scatterguns for the primary purpose of providing sustenance for their families. And that which provided sustenance also provided a means for defense. In the face of British oppression, the revolutionaries took up arms as militiamen and soldiers, and by and by, the Continental Forces prevailed in the American Revolutionary War.

The cannon, the musket, the sword, and the bayonet allowed the colonists to administer death—but without these implements, the colonies would have remained vassals to a foreign king.

Concerning the firearm as a mainstay in America, attorney at law, Dr. Stephen P. Halbrook, concludes: “Regardless of how the nine justices of the Supreme Court may rule, it seems likely that millions of Americans will continue to exercise their constitutional right to keep and bear arms.”<sup>7</sup> Despite the rulings of the highest Court, the armed American will not surrender his arms.<sup>8</sup>

Halbrook and law professor, Lawrence M. Friedman, seem to agree. Friedman writes: “The Supreme Court has no army, no way to force its dictates on society. Whether its decisions ‘stick,’ or dissipate in empty air, depends on the reaction of society.”<sup>9</sup>

---

<sup>7</sup> Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right*, (The University of New Mexico Press: Albuquerque, New Mexico, 1984), 197.

<sup>8</sup> Consider the armed extremist who is willing to die before surrendering. Those refusing to surrender their arms will be counted among the criminals and outlaws.

<sup>9</sup> Lawrence M. Friedman, *Law in America: A Short History*, (Modern Library: New York, New York, 2004), 144.

The Supreme Court cannot police the citizenry. Legal precedent and stare decisis are only sounds in the air and ink on the pages without societal agreement and compliance. Likewise, “The Second Amendment” is only a political buzzword without American grit and tenacity (and ammunition). Because the firearm is here to stay, “The Second Amendment” will continue to be more than the ink which bled from the quill of James Madison, Father of *The Bill of Rights*.

#### James Madison and the Beginnings of “The Second Amendment”

Before the Revolution, each colony among the Thirteen had subscribed to written constitutions, setting forth the rules and limits of governmental power within their geographical borders. After the victory, political leaders from each colony-turned-state assembled in order to preserve the victorious Union.

Thus assembled, the Founders argued and disputed in order to resolve the limitations inherent in the Articles of Confederation, which had served as the Colonial Constitution during the War. The Founders ultimately agreed that a new, federal constitution was necessary. Soon after the ratification of the new Constitution, the Founders responded to a demand for a written declaration of unalienable Rights—this declaration, amended to the Constitution, was *The Bill of Rights*.

On June 8, 1789, Madison submitted an early draft of *The Bill of Rights* in the House of Representatives. In this draft, Madison had written: “The right of the people to keep and bear arms shall not be infringed; a well-armed and well-regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.”<sup>10</sup>

---

<sup>10</sup> Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right*, (The University of New Mexico Press: Albuquerque, New Mexico, 1984), 76.

This proposed draft was obviously a preview of what would become “The Second Amendment.”<sup>11</sup>

Madison’s proposal was neither distasteful nor objectionable; his proposal was not unexpected or surprising. The Right of the people “to keep and bear arms” was not a new idea or even a radical idea among the delegates or their constituents. (After all, a “well-regulated militia” had endured the War with Britain.) These had armed themselves, not only in a spirit of defiance and revolution, but in a spirit of independence, nationalism, and personal defense. And now, after their victory, in a time of relative peace, Madison sought to preserve and guarantee a pre-existing Right—an unalienable Right which predated the Constitutional Convention, the ratification of the Constitution, and *The Bill of Rights*.

The Right to keep and bear arms was older than the Union itself.

Madison was not without political or ideological support. Other, notable political leaders among Madison’s contemporaries likewise agreed that the people ought to remain armed. Even before Madison had begun his work on *The Bill of Rights*, his home state had adopted The Virginia Declaration of Rights in 1776. The Rights of the Virginians included the Right to keep and bear arms, which read thusly: “That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state....”<sup>12</sup>

Virginia was not unique; other states, including Pennsylvania, Massachusetts, and North Carolina had also included similar language in similar declarations of Rights.<sup>13</sup>

Madison’s phrasing, from his early draft to the finalized and ratified Amendment, parallels the words found in Virginia’s Declaration of Rights. The Virginian, by virtue of the

---

<sup>11</sup> Madison, of course, eventually revised the language, but the generalities are apparent in both versions.

<sup>12</sup> Mark V. Tushnet, *Out of Range: Why the Constitution Can’t End the Battle Over Guns*, (Oxford University Press: New York, New York, 2007), 23.

<sup>13</sup> *Ibid*, 22-24.

Declaration, kept and bore arms, and undoubtedly, Madison wished to secure the Rights of his statesmen for his countrymen. Ever familiar with state rights, Madison simply acknowledged that the Right to keep and bear arms was a national right—a Right reserved for New Yorkers, Pennsylvanians, New Jerseyans, Rhode Islanders, and all others. Madison understood the importance of the states’ right *and* the statesmen’s Right to remain armed.

Concerning Madison’s statehood and his ideals to represent his statesmen, Lance Banning writes: “Throughout the Constitutional Convention, Madison’s Virginia background and perspective strongly influenced his positions.”<sup>14</sup>

As already stated, the rights of the Virginians included the Right to keep and bear arms. Madison’s position on the keeping and bearing of arms echoed the rights of his statesmen. The inclusion of this Right was the result of his background and his point of view.<sup>15</sup>

Concerning the inclusion of the Right to keep and bear arms, Alan M. Gottlieb writes: “The Founding Fathers had an abiding fear of government. At the time the Constitution was drafted, they had just concluded a long and bloody war against one form of tyranny. However, they were equally concerned about the kind of government they had just established.”<sup>16</sup>

Many of the Founders, particularly the Anti-Federalists, feared that their newly formed government could devolve into a dictatorship.<sup>17</sup>

Banning writes: “The Constitution, [its Founders] observed, contained a clause declaring it the supreme law of the land. In case of conflict, it would clearly override state bills of rights.”<sup>18</sup>

The Founders ensured that their Constitution, including its Bill of Rights, would serve to

---

<sup>14</sup> Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*, (Cornell University Press: Ithaca, New York, 1998), 177.

<sup>15</sup> We are often the product of our backgrounds and points of view.

<sup>16</sup> Alan M. Gottlieb, *The Rights of Gun Owners*, (Merril Press: Bellevue, Washington, 1991), 1-2.

<sup>17</sup> Will an armed collective body allow a dictator to usurp power and seat himself as a head of government? Perhaps this question is best answered by those who neither keep nor bear arms.

<sup>18</sup> Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*, (Cornell University Press: Ithaca, New York, 1998), 283.

override or supersede laws not in harmony with “the supreme law of the land.” In other words, the federal Constitution is the criterion for both federal law *and* state law. In example, if a state passes a law which violates “The Second Amendment,” the supreme law of the land serves to correct the violation.

Throughout his publication, Banning observes that Madison desired to protect the rights of the minority from the tyranny of the majority. Acknowledging this observation, Madison’s inclusion of the Right to keep and bear arms embraces liberalism.<sup>19</sup> This inclusion was not whimsical or coincidental. Rather, this inclusion was purposeful—for the protection of the minority from the tyranny of the majority. Therefore, adopting Banning’s terminology, this Right is a liberal right. In summation, the Right to keep and bear arms was included in *The Bill of Rights* at the behest of its draftsmen, James Madison. *The Bill of Rights*, containing “The Second Amendment,” was ratified on December 15, 1791.

#### The United States Supreme Court and “The Second Amendment”

Despite the original intent of the language, those who oppose “The Second Amendment” argue that the words refer to state-regulated militias, not the right of the individual.<sup>20</sup> In some states, legislators and politicians, in direct opposition to “The Second Amendment,” have enacted bans and laws which restrict the individual’s Right to keep and bear arms.<sup>21</sup>

---

<sup>19</sup> Banning uses the term “liberalism” in describing the protection of the minority against the tyranny of the majority. Conversely, Banning uses the term “republicanism” in describing the rule of the majority.

<sup>20</sup> This argument seems to be the most common argument.

<sup>21</sup> Throughout his publication, Gottlieb chronicles the Supreme Court’s preservation of “The Second Amendment.” These cases include: *United States vs. Cruikshank* (1876), *Presser vs. Illinois* (1886), *Miller vs. Texas* (1894), *United States vs. Miller* (1939), and *Lewis vs. United States* (1980).



Most recently however, in 2008, the Supreme Court decided upon this question after reviewing the landmark legal case, *District of Columbia vs. Heller*.<sup>22</sup> While employing the incorporation doctrine, the Supreme Court upheld that “The Second Amendment” protects the Right of the individual to own and use a firearm for personal, private use.

The Court ruled thusly: “The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”<sup>23</sup> The precedent is now set: in accordance with original intent, “The Second Amendment” preserves the Right of the individual to keep and bear arms. The Court’s decision concerning the *District of Columbia vs. Heller* case was close, indicating that the decided constitutionality of “The Second Amendment” was not unanimous.<sup>24</sup>

### Conclusions

According to Banning, Madison “linked the failings of the Union with the problems of the states.”<sup>25</sup> And wishing to resolve these problems, Madison sought to preserve the Union by way of preserving the rights of the states—including their collective right and their individual Right to keep and bear arms. This Right was included in *The Bill of Rights* in order to preserve the Union.<sup>26</sup>

Further proof that Madison endeared the Right to keep and bear arms is apparent in his essay, *Federalist No. 46*, wherein he writes, “[This Right is a] protection for the states in the

---

<sup>22</sup> The *District of Columbia vs. Heller* Supreme Court case was the first case in history to address *and* answer the question concerning the right of the individual—not just a collective body—to keep and bear arms (specifically handguns).

<sup>23</sup> *District of Columbia vs. Heller*, No. 07-290, 5.

<sup>24</sup> This was a 5 to 4 decision.

<sup>25</sup> Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*, (Cornell University Press: Ithaca, New York, 1998), 78.

<sup>26</sup> Consider the preservation of the Union as it pertains to the events of the American Civil War and the subsequent Reconstruction.

maintenance of their militia organizations against possible encroachments by the federal power.”<sup>27</sup>

In *Federalist No. 46*, Madison informs his readers that the Right to keep and bear arms was included in *The Bill of Rights* in order to protect the commonwealth from “possible federal encroachments.”

In other words, this Right is a deterrent, preventing federal coercion, oppression, and tyranny.

Tyranny and dictatorship in modern-day America may seem outrageous or even impossible after two centuries of an established, semi-constitutional government. But *how* did America remain established? And more importantly, was America free from tyranny and dictatorship during these two centuries? According to Banning, Madison sought to preserve the Union and the states. Did Madison’s Bill of Rights preserve the Union? Did “The Second Amendment” preserve the Union? Or did the firearm preserve the Union? In the future, will the firearm preserve the Constitution? Depending on whom you ask, the aforementioned questions will generate a myriad of conflicting and thoughtless responses.

In his text, Banning refers to Madison as a “child of the republican revolution”<sup>28</sup> and a “revolutionary militant.”<sup>29</sup>

When one considers “The Second Amendment” and its draftsmen, the term “revolutionary militant” is wholly appropriate as it applies to James Madison. Finally, Banning

---

<sup>27</sup> Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right*, (The University of New Mexico Press: Albuquerque, New Mexico, 1984), 191.

<sup>28</sup> Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*, (Cornell University Press: Ithaca, New York, 1998), 76.

<sup>29</sup> *Ibid*, 79.

concludes that Madison recognized, “that any sovereign people [must] retain the natural right of revolution.”<sup>30</sup>

A sovereign people must therefore stand as an *armed* people, ready to revolt. If they are to “retain the natural right of revolution,” they must also retain the natural Right to keep and bear arms.<sup>31</sup> For proponents of “The Second Amendment,” the Right of revolution and the Right to keep and bear arms are interconnected.

As stated earlier, the Right to own and use a firearm is guaranteed in “The Second Amendment.” I consider this Right as the *most important Right* in *The Bill of Rights*. Like Jack Nicholson’s character in *The Departed*, I do not want to be a product of my environment—I want my environment to be a product of me.<sup>32</sup> As a minority myself, I do not want to be tyrannized by the majority.

Liberal thinker, Edward Abbey writes: “The rifle is the weapon of democracy. Not for nothing was the revolver called an ‘equalizer.’ Egalite implies liberte. Let us hope our weapons are never needed—but do not forget what the common people of this nation knew when they demanded the Bill of Rights: An armed citizenry is the first defense, the best defense, and the final defense against tyranny.”<sup>33</sup>

---

<sup>30</sup> Ibid, 393.

<sup>31</sup> Hopefully, the next revolution, if necessary, will begin *without* the firearm.

<sup>32</sup> William Monahan, *The Departed*, (Warner Brothers Pictures, 2006).

<sup>33</sup> Edward Abbey, *Abbey’s Road*, (Penguin Books: New York, New York, 1991), 132.

## Bibliography

- Abbey, Edward. *Abbey's Road*. Penguin Books: New York, New York, 1991.
- Banning, Lance. *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. Cornell University Press: Ithaca, New York, 1998.
- Carlin, George. *Complaints and Grievances*. Atlantic Recording Corporation: New York, New York, 2001.
- District of Columbia vs. Heller*, No. 07-290, 2008.
- Friedman, Lawrence M. *Law in America: A Short History*. Modern Library: New York, New York, 2004.
- Gottlieb, Alan M. *The Rights of Gun Owners*. Merril Press: Bellevue, Washington, 1991.
- Halbrook, Stephen P. *That Every Man Be Armed: The Evolution of a Constitutional Right*. The University of New Mexico Press: Albuquerque, New Mexico, 1984.
- Monahan, William. *The Departed*. Warner Brothers Pictures, 2006.
- Tushnet, Mark V. *Out of Range: Why the Constitution Can't End the Battle Over Guns*. Oxford University Press: New York, New York, 2007.