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Article

Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment

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Ever since its modern rediscovery as a source of ideas for constitutional analysis, civic republicanism has not rested entirely easily in the bosoms of its principal supporters, the academic left. This discomfort may be unavoidable, because republicanism is an old belief system and carries signs of its age, while the academic left aspires to be progressive. In particular, republicans have persistently celebrated the right of citizens to keep and bear arms. [\[1\]](#)

This endorsement and the discomfort it causes to neorepublicans is the central theme of Sanford Levinson's recent, insightful essay, *The Embarrassing Second Amendment*. [\[2\]](#) Focusing on their distrust of constituted authority, Levinson argues that the republican Framers of the Second Amendment insisted on the right of all private citizens to keep arms, so as to be able to revolt. [\[3\]](#) Under a republican interpretation, then, the Second Amendment provides for a personal right to own firearms. [\[4\]](#) This reading, Levinson suggests, would be "embarrassing" to the academic left, which would prefer to prohibit private ownership of guns. [\[5\]](#) In a response, Wendy Brown observes that the republican right of revolution presupposed a virtuous citizenry, and as we do not now have such a populace, we should not have such a right--even if we believe in republicanism. [\[6\]](#) Moreover, in Brown's view, we need not today slavishly accept all aspects of early republican doctrine; instead, we should purge the tradition of its offensive elements--particularly of the sexism and violence suggested by the Second Amendment. [\[7\]](#)

This dialogue between Levinson and Brown has had several important consequences. It has drawn attention to the Second Amendment as a subject for scholarly analysis, [\[8\]](#) and it has attracted the notice of no less a popular pundit than George Will at a time when the federal government is seriously discussing nationwide gun control. [\[9\]](#) In addition, this dialogue explicitly addresses the concern that reviving republicanism may bring with it an acceptance, even an encouragement, of violence. [\[10\]](#) Levinson and Brown confront these issues with boldness, clarity, and acuity. I suggest, however, that careful examination of the intellectual context of the right to arms leads to conclusions different from both Levinson's and Brown's.

This Article addresses the meaning that the Second Amendment would bear in a modern republican interpretation. My purpose is primarily heuristic rather than prescriptive: I offer an

analysis of the role of the right to bear arms in republican theory, not a judgment concerning the general attractiveness of republican theory as a whole. Such a concentration on the right to arms in the republican tradition is important for several reasons. First, the Second Amendment, perhaps more than any other provision of the Constitution, is grounded in the republican tradition. [\[11\]](#) We must therefore look principally to republicanism for illumination of the historical meaning of this particular Amendment--even if one gives a liberal reading to the rest of the document. Many commentators have instead offered historical exegeses of the Amendment that, in my view, miss the significance of its surrounding tradition and mistakenly find an individual right to arms for self-defense. Second, as the dialogue between Brown and Levinson illustrates, some neorepublicans find the Amendment embarrassing and feel the need to prune it from the republican thicket. In contrast, I argue that the Amendment is central to the republican tradition and perfectly consistent with its principal commitments. Finally, in a broader sense, an analysis of the Second Amendment in the republican tradition allows a clearer perspective on the overall advisability of a modern republican revival: to the extent one finds the modern implications of the provision troubling, utopian, or just not very useful, one might question the wisdom of the revival as well.

The republican tradition that lies behind the Second Amendment is not just embarrassing--it is terrifying. It acknowledges that humans are never wholly in control of their own destinies. At the heart of republicanism lies a paradox that mocks human efforts at self-government: republics can never successfully survive unless their citizens act in a virtuous manner, eschewing private interests for the sake of the public good, but citizens will not act virtuously except in a republic that fosters such virtuous conduct. Hence, a republic is in effect a logical contradiction, a paradox in its very nature. Creating or maintaining a republic against the constant risk of corruption by particularistic interests is therefore the most difficult of tasks. Republican theory, however, offers some structures to aid in this task, prominent among them the universal militia.

The republican framers of the Second Amendment were painfully aware that ultimate political power would lie with those who controlled the means of force. As a result, they sought to arm not a narrow slice of society that might seize the government for its own end, but rather all the citizens in a state, in the form of a universal militia, which would always act in the common good. In republican thinking, this militia had an ambiguous status. On the one hand, it was a creature of the state apparatus, inasmuch as the state [\[12\]](#) gathered it, ensured it was universal, trained it in the use of arms, and mobilized it against foreign invasion or domestic insurrection. On the other hand, it was composed of all of the citizens, deriving its legitimacy from them and being virtually synonymous with them.

The militia, in other words, constituted a forum in which state and society met and melded, [\[13\]](#) and this combination offered some advantages for curbing corruption. If the evil of partiality touched a segment of the population, then the militia--constituted as an instrument of the state--could restrain any movement toward demagogic rebellion. But if the state became corrupt, then the militia--now constituted as "the people"--could resist despotism. Indeed, the line between state and people ideally disappeared in the militia, in that the militia members were both rulers and ruled.

From this republican perspective, the error of those who today seek to guarantee a private right to arms is that they would thereby consign the means of force to those who happen to possess firearms--a partial slice of society--rather than to the whole people assembled in militia. Even in the eighteenth century, literal universality was never more than a rhetorical aspiration or a regulative ideal, but it was nevertheless the prevailing ideal, and any departure from it meant failure. At a minimum, therefore, any modern version of this militia must be so inclusive that its composition offers some meaningful promise that it will not become the tool of a slice of society, as it could in the case of those who decide for private reasons to buy a gun or to become members of the national guard. [14] The militia must be the people acting together, not isolated persons acting individually.

As we today have no such universal militia and no assurance that contemporary arms-bearers will be virtuous, the Second Amendment itself is--for now--outdated. But republican theory does not, in the absence of a virtuous citizenry, give up. Through the militia ideal, republicanism offers practical guidance on how positively to engender civic virtue, in the form of disinterested self-sacrifice, amongst a nonvirtuous, self-interested populace. Although this militia ideal may seem hopelessly utopian in its conception of the redemptive possibility of politics, it is central to the historical tradition as an icon of the main theme of republicanism--empowering citizens engaged in deliberative politics in pursuit of a common good. [15] It therefore seems worthwhile to consider the present implications of the militia ideal for courts interpreting the Second Amendment, and, more importantly, for citizens seeking to realize the promise of republican government.

For courts, the great change from the 1780's is that without a universal militia it is impossible to hazard a republican reading of the Second Amendment. The militia was a precondition for the right to arms. Without a militia the right is meaningless. The republican tradition thus suggests that the provision as written has become outdated. From a judicial perspective, this part of republicanism is not very useful, because the world really has changed, and republicanism cannot mean what it once did.

On the other hand, the Amendment can serve as a regulative ideal, emphasizing the importance of committing force to virtue. Despite the effective nullification of the provision by the disappearance of the militia, judges might seek other means to secure those ends. In particular, courts can give the Amendment new life by reinterpreting other constitutional provisions to serve the functions of the old militia.

The militia ideal has even greater significance for neorepublicans seeking to reconstruct society in nonjudicial fora. It suggests, in particular, that they should emphasize the populist strain of republican theory. Since the people can no longer directly participate through the militia, they need militia-surrogates, bodies that serve functions formerly served by the militia. One course would be to reactivate the universal militia itself, which would act on its own views of the commonweal to resist tyrants and demagogues. The problem with this course is the extreme danger in giving arms to citizens who are not now and may never become virtuous. That fear is rational and one that contemporary republicans should share: republican measures may be inappropriate for an unrepublican populace.

The better course is to pursue other measures that would grant the people opportunities to develop virtue, such as universal service, and to control their own lives--such as workplace democracy. At some later point, it may be appropriate to reconstitute a universal militia, and the Second Amendment would reacquire its original meaning. In the interim, the control of arms will lie with the government, not the people--a profoundly unrepublican condition--but even within a republican framework some risks are not worth taking. The suggestion of a revived militia, however, starkly poses the central difficulty faced by modern neorepublicans: How does a population characterized by selfish pursuit of discordant interests become a society in which realization of the "common good" is anything but utopian rhetoric? Neorepublicans have offered some possible answers, but they go only part of the way--and under present conditions can not go further--toward reconstructing a republican militia-surrogate.

This Article will advance two themes. First, unlike Levinson, I do not think that republicanism supplies a useful way to interpret the Second Amendment unless there are substantial changes in society. Second, unlike Brown, I do think that the Amendment's history offers an important regulative ideal in constructing a modern version of republicanism. The Article proceeds in four parts. Part I considers the extant scholarship and case law dealing with the Second Amendment, focusing on the colloquy between Levinson and Brown. Part II describes the role of the right to arms in republican thought. It first sketches the constant sense of danger that beset republicans: a republic was a fragile enterprise, always vulnerable to corruption. It then analyzes the corruption-battling functions served by the militia and the right to bear arms. Service in the militia trained one to a life of virtue, both self-sacrificing and independent; these virtuous arms-bearing citizens could block the designs of corrupt factions, whether those of demagogues among the people or despots among government ministers, and, if a corrupt faction should seize power, the citizens could resist, to restore the moral and political health of the republic.

Part III considers the implications of this tradition for a modern interpretation of the Second Amendment. In particular, I argue that because of the disappearance of the militia, the Amendment cannot have any literal meaning; at best, we can use it as a regulative ideal in interpreting other provisions. Finally, Part IV argues that the militia ideal is consistent with the rest of republicanism and discusses modern reforms based on that ideal, suggesting that universal service and measures to increase direct popular control of government can move toward serving the function of the old militia.

I. The Debate

A. Before Levinson and Brown

Before the recent dialogue between Levinson and Brown, serious discussion of the Second Amendment was notably limited. [16] The Supreme Court had offered little guidance; it has decided only four significant cases under the provision, none of them recent or definitive. [17] In 1875, the Court held that the Amendment limited the actions only of government, not of private individuals. [18] Later in the century, the Court twice held that the Amendment limited the actions only of the federal government and not of the states, on the grounds that the Bill of Rights did not apply to the states. [19] The Court decided these cases, however, well before it began to incorporate the rest of the Bill of Rights into the Fourteenth Amendment, so the

continuing validity of these decisions is uncertain. [20] In any event, these cases discussed only the actors against whom the right applied, not the scope of the right itself.

The Court seriously considered the scope of the right to bear arms in only one case--*United States v. Miller*, decided in 1939. [21] In *Miller*, the Court addressed a Second Amendment challenge to the National Firearms Act of 1934, [22] which prohibited, inter alia, possession of a sawed-off shotgun except in limited circumstances. The Court explained that the purpose of the Amendment was to "assure the continuation and render possible the effectiveness of [militia] forces," so that the government would not rely on standing armies. [23] But because the parties had not adduced "any evidence tending to show that possession or use of a [sawed-off shotgun] has some reasonable relationship to the preservation or efficiency of a well regulated militia," the Court could not "say that the Second Amendment guarantees the right to keep and bear such an instrument." [24] At a minimum, then, *Miller* limits the scope of the Amendment to arms suitable for use by militia.

Lower courts have suggested that *Miller* limits the right even further. If the Amendment's purpose is only to assure the "continuation" and render possible the "effectiveness" of the militia, then it may protect state governments against federal tampering with their militia, but it does not guarantee individuals any rights at all. [25] Some of *Miller*'s language, however, is in tension with such a reading. In the eighteenth century, the Court explained, the militia "comprised all males physically capable of acting in concert for the common defense," and "when called for service these men were expected to appear bearing arms supplied by themselves." [26] In other words, the Court strongly suggested that the Amendment guarantees a private right to own guns, at least by all males of arms-bearing age, so as to be ready for militia service. But the Court did not articulate that conclusion in so many words. It was enough to conclude that a sawed-off shotgun was not appropriate for militia use. [27]

Faced with this dearth of judicial instruction, commentators fall into only two groups--often called the individual rights and states' rights positions. The latter position relies on the language of the clause explaining the Amendment's purpose: "*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.*" According to this view, the goal of the provision is thus merely to guarantee the right of the states to maintain their militias, not to guarantee any right to individuals, and Congress has adequately protected the right of the states with the National Guard system. [28]

In contrast, the individual rights' view emphasizes that the Amendment grants a right to "the people" not to the "states." Moreover, the unorganized militia in the 1790's included every male of arms-bearing age [29]--and still does. [30] The Framers emphasized the importance of the unorganized militia in the constant struggle to forestall tyranny; one could not rely on the organized or "select" militia, as that body itself could become corrupt. [31] As a last step, advocates of the individual rights view typically assert that the Amendment enshrined a right to own guns not only for revolution but also for defense of the home and perhaps for hunting and target practice as well. [32]

B. *Levinson and Brown*

Professor Levinson injects important new insights into this debate. First, he brings the recent research to bear on republican ideology. Second, he carefully distinguishes between the two rights that other commentators have merged: the Second Amendment might protect an individual right to self-defense or a "collective" right to revolution, or neither, or both. Republican ideology, Levinson suggests, supports the right to revolution, but apparently does not concern itself with the right to self-defense. [33] Moreover, Levinson himself finds the right to revolution more "interesting" [34] and apparently believes that social change may have rendered the right to self-defense, but not the right to revolution, outdated. [35]

Levinson's implicit claim that republicanism has little to say about the right to self-defense and much to say about a right of resistance is, in my view, correct. [36] If the Second Amendment does provide a right to own guns for self-defense, republicanism cannot supply the intellectual foundation for it. But if Levinson is correct to tie a right of resistance to republicanism, he is not clear about who possesses that right--the states, individuals, or some other body. On the one hand, he considers the republican right as entailing protection for private, individual ownership of guns. Defining the republican militia as "all of the people, or at least all of those treated as full citizens of the community," [37] he attributes to that great republican James Harrington the view that liberty depends on independent citizens, and that to be independent of government, citizens must own arms. The Second Amendment thus serves to check government: "[T]he ultimate 'checking value' in a republican polity is the ability of an armed populace, presumptively motivated by a shared commitment to the common good, to resist governmental tyranny." [38] The Second Amendment thus guarantees to each citizen the ability to intimidate potentially tyrannical government with private arms.

On the other hand, Levinson calls the right to bear arms "collective," and he distinguishes it from an "individualist" right of self-defense. In what sense is this right collective? Levinson does not specify. It is plainly not collective in the sense that it must be exercised by the organized state militia: Levinson emphasizes that the republican militia includes every citizen, even those who are not members of the organized militia. At one point, he describes the citizenry as a "structure" that stands ready to defend liberty against those "other two structures," the state and federal governments. But he never explains how the citizens are yoked together into a "structure" rather than existing as loose atoms. The right described by Levinson seems to be collective in only two limited senses. First, it is a right held by individuals, though for the good of the whole: resistance to tyrants is service to the commonweal. Second, as a practical matter, a single individual cannot resist the government; he needs help from his friends in a collective surge of indignation. The citizenry is thus a structure only in the sense that all those atoms serve a structural role in the republican form of government: considered en masse, but not melded into any form of organization, the citizens may sufficiently frighten the government so that it will not become tyrannical. [39]

Wendy Brown launches a three-part attack on Levinson's right of revolution: it is not republican; it is no longer relevant in our changed world; and even in its original form, it is a part of republicanism better discarded. First, she maintains that the "republican argument for arming the citizenry is most powerfully elaborated not by the English thinkers Levinson cites, but in that passionate republican work, Machiavelli's *Discourses on the First Decade of Titus Livius*." [40] Focusing on Machiavelli's statist tendencies, she then claims that the "republican citizenry is not

armed against the state but *as* the state--an armed citizenry is the state's heart, not its opposition or counterweight." [41] The right of revolution, on the other hand, is a product of Lockean liberalism, "in which a diffident and depoliticized populace squares off against the state, in which there is no political heart at all but only hands and feet all armed against one another." [42]

This privileging of Machiavelli over all later republicans, in reading an eighteenth-century amendment, seems unnecessary. [43] As a significant early republican, Machiavelli may be relevant to the Amendment, but it is difficult to discern why he is more relevant than Harrington or Trenchard and Gordon. As Brown acknowledges, those later writers endorsed a right of resistance, [44] which belonged not to a liberal "diffident and depoliticized populace" but to an intensely active citizenry, for whom self-arming was an act of concern for the health of the state. [45]

Brown's second criticism of Levinson is more persuasive: republicanism needs a virtuous citizenry, but Brown "cannot imagine a less appropriate appellation for the contemporary American citizenry, which bears a shared commitment to almost nothing, least of all a common good." [46] If the citizenry is not virtuous, we have no assurance that it will use its arms in virtuous ways. So Brown predicts pernicious results if we arm our present citizenry: gun owners are likely to use them to rape women and to murder young urban black men. [47] Whatever the need for a right of resistance by arms in the United States, there is a high probability that guns will continue to be used in the future as they have been used in the past. There is no reason to believe that current American gun owners are either virtuous or representative. [48]

The republican concept of the universal militia, however, also poses a challenge to Brown's analysis. Recognizing that republicanism relies on a virtuous populace that we lack does not end the inquiry, but only frames it: what do we do now? For Brown, the answer seems self-evident. We should abandon republicanism or at least this aspect of it: "Like Levinson, I would prefer a republican order to a liberal-capitalist one. But we do not have a republican political order; we are not a republican citizenry And we cannot generate a republican order merely by interpreting our Constitution through a republican hermeneutic scheme." [49] But this imprecation is a counsel of despair. "Merely" reading the Constitution through republican lenses may not by itself create a republican order, but it may be one piece of the process. And republicanism offers us other ways by which citizens may achieve virtue: political participation, owning property independent of landlords or employers, and membership in a citizen militia.

Ultimately, Brown may discount the possibility of creating a virtuous populace through a militia because she has a deeper critique of the right to arms: "[E]ven within republicanism, we do not have to swallow it whole. The republican intellectual tradition includes a militarism, elitism, and machismo that is past due for thoughtful critique and reworking." [50] Republicanism appeals to many because it emphasizes community over separation and public dialogue over strict autonomy. In this sense, it shares many features with modern cultural feminism. [51] But contained within republicanism is this harsh "macho" kernel: the right to arms is a "bit 'gendered' . . . subduing with force, what it cannot discursively persuade, tame, or cohabit the universe with, and possessing with force what it cannot seduce." [52] Facing this apparent conflict within

republicanism, Brown, like others, recommends that we wean republicanism from its objectionable elements--in this case by abandoning the right to arms. [53]

This recommendation, however, assumes that the militia is on the periphery of republicanism and in conflict with its core. Rightly understood, however, the right to arms is thoroughly consistent with republicanism's other commitments. It does contemplate that citizens may sometimes have to take up arms to defend liberty. But it vests that right in a body notable for its interactive and collective nature, to prevent the politics of interest and to encourage the politics of the common good. If one believes in the bulk of republicanism, then, one should believe in the militia as well. The next part will develop this claim by putting the right to arms in context within the republican tradition.

II. The Right to Arms in the Republican Tradition

This part offers an historical reconstruction of the role of the right to arms in republican thinking. Fundamentally, republicans saw the militia as a response to the danger of corruption. In the first section below, I outline the nature of the republicans' fears. In the next section, I analyze the way in which the militia responded to those fears.

A republican government was thought to be one that pursued the common good rather than the private interest of a slice of society. But republics were inherently unstable, because a republican form of government depended on virtuous citizens, while citizens could be virtuous only in a republican government. As a result, corruption could arise either from a distortion of the form of government or from a public falling into self-interest.

The militia was thought to be able to restrain corruption because it was virtuous and possessed ultimate control over the means of force. It was virtuous both because it comprised the universal people and because it offered training in the habits of virtue. And as the people, it was both government and society. The state raised it and ensured that it was universal. Under state direction, the militia would repress demagogic revolts made in the interests of a few. But despite this tie to the government, the militia was a people's body. Its membership included all of the citizenry, and if the government should ever become corrupt, it could resist by arms. To offer these advantages, the militia had to be universal, not a subset of private persons or the state apparatus.

A. The Danger of Corruption

1. Republican Paradoxes

Eighteenth-century republicans shared certain views about the nature of human beings. Humans have public, political selves; they are capable of forming cooperative ventures that will benefit all. The polity itself is a universal association, "in which all types of men combine to pursue all human goods," that can achieve a universal good that is more than the realization of the private interests of a few. [54] At the same time, however, each individual has a private, particular self and self-interest, [55] and his public and private selves can come into conflict. A good state is

one in which citizens pursue the common good; a bad state is one that has been seized by a slice of society for its own narrow ends. [56]

Republicans hoped to induce citizens to pursue the common good, but in doing so they faced a problem: the virtue of the state and of its citizens are always interdependent. [57] To be virtuous, a citizen must live in a state that enshrines the common good; otherwise he can be no more than one bit of self-serving flotsam swirling around other bits, for there is no common good to serve. [58] The state, however, will never enshrine the common good unless its citizens are virtuous--but the only way for them to be virtuous is for the state to enshrine the common good. The causation is two-way: citizens make the state, and the state makes citizens. Neither can be virtuous unless the other is. [59]

This closed circle created a republican paradox: [60] citizens are simultaneously creatures and creators of the state. That paradox gave rise to another one: the problem of creating a republic--the problem of origins. Virtuous citizens would create virtuous states, and virtuous states would create virtuous citizens, but how does one secure either of these? The paradox lies in the self-levitating quality of republics: they somehow come into being, but humans might not be able to find a patch of terra firma from which to launch one. A republic thus depends on conditions being right; a republican form of government would not be viable at all times and for all peoples. [61] Those hoping for a republic might be unable to induce those conditions, and they might have to wait for history or providence to deliver a virtuous people, so that republican government becomes possible. [62] Some republican thinkers pursued the other end of the equation: they hoped for good government to make possible a virtuous people. [63]

Even if the miracle did occur, and a republican state somehow came into being, it was always in danger of slipping into corruption--the problem of maintenance. Because state and society depended on each other, if either began to lose virtue, each would quickly corrupt the other. Since neither could serve as an anchor, republicans saw the path to perdition as short, smooth, and slippery. And the world contained many hostile forces that might induce that slide; Fortuna, under various names, always lurked as a malevolent force. [64] So at the first sign of corruption, there seemed only a short time to save the republic before it was too late. [65]

This set of relationships is connected to another paradox: the complicated republican status of rights and autonomy. [66] In republican theory, citizens must, on the one hand, be independent of the state, so that they may critique it if it becomes corrupt: hence the republican denunciation of slavish subservience and praise of those brave enough to defy public ministers and even public opinion. [67] In order to attain this independence, citizens must have rights that cannot be affected by politics, so that the citizens will not be threatened by reprisals from a corrupt government. [68] This end of the paradox reflects one side of the interdependence between state and society: to have a virtuous state, there must be virtuous citizens.

At the same time, republicans believed that individuals are unable to be truly separate or fully independent, because they are products of the state. The very values that republican citizens hold are not given, but are the product of politics--hopefully deliberative, healthy politics, but politics nonetheless. [69] Citizens, moreover, must not use their rights to pursue their own self-interest ahead of the common good. Thus, the citizen cannot stand apart from the political process and

use it as a mere instrument of his desires. [70] This conviction reflects the other side of the state/society equation: to have virtuous citizens, there must be a virtuous state. For republicans, then, rights are not only the precondition for good politics, but also the product of politics, not to be invoked as trumps to disrupt the deliberative dialogue. [71]

Citizens must thus have sufficient autonomy to stand against the state when it errs, but they also must be aware that their autonomy exists only for the common good and because of the self-restraining virtue of other citizens. Republican virtue includes two components: a good citizen must be prepared to sacrifice himself for the good of the whole, and he must also be independent enough to know when to resist a corrupt state. There is no inherent contradiction here. Because citizens in a republic must always act for the common good, when the state is representing that good, the citizen must sacrifice his good to that of the state. In contrast, when the state is wandering, the citizen must resist. There is, however, a deep tension in the habits of mind required: the citizen of a republic is expected sometimes to be profoundly selfless, and sometimes profoundly assertive. He must have the intelligence to know when to be which and the emotional agility to shift modes when appropriate.

2. The Balance of Estates

Both problems--origin and maintenance--rested on fear of lack of popular virtue and susceptibility to corruption. As a result, republicans endlessly analyzed the causes and cures of corruption. By the eighteenth century, two primary themes had emerged from this discussion--the danger of an imbalance of estates, which emphasized corruption in government, and the danger of professionalization, which emphasized corruption in society.

Balance-of-estates theory presented society as naturally divided into three estates--the One, the Few, and the Many--each with its own political virtues and vices. Unchecked, any one of the three might misdirect the state to its own partial good; thus a republican polity should balance the estates against one another, allowing each to walk a distinct path to the universal good. [72] Maintaining that relationship, however, was never easy. [73] In the eighteenth century, concern about the balance of estates in Britain focused on the Crown. As the empire grew by trade and arms, so did the power of the Crown, through new military organizations--especially the standing army [74]--and through royal exploitation of newly developed financial institutions and techniques, notably taxes, credit, and banks. [75] The core of the fear was executive dominance of Parliament: with its expanded resources, the Crown could buy the loyalty of Members of Parliament (M.P.'s) by offering places and pensions in the royal service. [76]

During the imperial crisis, American colonials frequently expressed their grievances with Britain in similar terms: the tyrant George III had subverted Parliament, invaded historical colonial privilege, and appointed autocratic governors. [77] Upon achieving independence, the new states reacted to this fear of the executive by drafting new constitutions that curtailed executive power and expanded the power of the lower legislative house. [78] In the process, they began to alter the meaning of mixed government by insisting that the Few and the One should not consist of hereditary estates. [79] They felt that the creation of hereditary orders would give the Few and the One too much power, tempting them to subvert the balance. [80] Moreover, while most republicans believed that a natural aristocracy existed in America, they viewed this aristocracy as

one of talent rather than of birth, [81] which was assimilable into a broadly democratic frame of government. While the elements of government that reflected aristocratic influences might be less democratic than others, all would be directly or indirectly elected by the people. [82] In this manner, American republicans developed a system of democratic republicanism in which the One, the Few, and the Many ceased to be separate estates, and became instead distinct parts of a balanced government staffed by the people's representatives. [83]

3. Professionalization

In republican eyes, however, the threat of corruption was wider and deeper than the traditional language of balanced estates could accommodate. Because of the developing economy and empire, the whole fabric of English society during the eighteenth century seemed in peril of being rent into partial interests acting for their own ends. The new commercial society encouraged citizens to pursue selfish interests. [84] Perhaps more importantly, it gave them separate ends because it promoted the specialization of economic function. [85] English republican writers held up as an ideal the ancient republics in which every citizen fulfilled every function--working his own land and taking up arms to defend the republic. [86]

Many American colonial writers shared these worries about Britain's social character. In their view, the English people had made their peace with tyranny and so had come to prefer luxury to liberty. [87] More broadly, the degenerative effects of social development had fractured the English populace. [88] Americans, in contrast, retained a virtue that Britons had lost. They remained poised between barbarism and effete decay--sturdy but civilized farmers, independent and unspecialized. [89]

This American concern over professionalization as a cause of corruption reflected a subtle democratic drift away from the classical ideal of mixed government. Even within the balance-of-estates structure, republicans typically cast themselves as the champions of the liberty of the Many against the One, and this posture gave their rhetoric a populist tone. [90] But in standing against specialization, republicans cast themselves not as the representatives of any particular estate, but as those virtuous souls--the mass of the American people--who stood for a commonwealth against the corrupting tide of modernity. [91]

4. The Liberal Constitution and Democratic Republican Demands for a Bill of Rights

Immediately after achieving independence, one course of reform seemed particularly desirable to many Americans. Since the threat of overreaching arose primarily from the less democratic elements of government and since the body of the American people possessed uncommon virtue, the new constitutions should increase the role of the people in government. Ultimately, this role had its limits. Few republicans claimed that direct democracy was a practicable course in any of the new states; [92] virtually all conceded that a representative democracy must balance the branches of government against one another. [93] At the same time, however, republican reformers sought to redistribute the balance by limiting the authority of the executive, expanding the power of the lower house of the legislature, and increasing the dependency of the upper house on the will of the Many. [94]

The 1780's, however, brought new worries. To many, the new democratic legislatures seemed to be fora for pursuit of private interests, especially of the less affluent, rather than for discussion of the common good. America, it seemed, had entered modernity with the rest of the world, fragmented and self-interested. [95] One response to this crisis was the Federalists' embrace of liberalism. With an apparent sense of relief, they leapt off the tightrope of virtue into the chasm of appetite. Proclaiming that the bulk of the people would always be self-interested, they asserted that any sensible political system must use the structure of government not to inspire virtue but to limit the damage done by self-interest. [96] Taking the old rhetoric of mixed government and imbuing it with new meaning, the Federalists sought to remove power from local legislatures to a central government where different factions and branches of government could check one another. [97]

By the 1780's, it was too late to deny that all power derived from the people, but the Federalists gave the people a new role. The people mythically erected the Constitution that delegated power to each of the components of a distant government, and they participated from afar in the selection of their representatives. Otherwise, they essentially retired from politics; they had no direct hand in their own government. Meanwhile, their representatives carried forward the messy business of mutual limitation. [98] No longer would the people have to be virtuous for government to be just and stable.

By the early 1790's, then, many of the nation's leaders had adopted a largely liberal ideology, and the decade as a whole was one of complex interaction between new ideas and old, with both amply represented. [99] But even after the adoption of a more liberal Constitution, some American thinkers retained old republican convictions. [100] They continued to hope that prompt action on both social and governmental fronts might preserve a truly republican America. [101]

These thinkers, predominantly Anti-Federalist republicans, feared the central government because they believed that it would be dominated by economic elites, distant from the people, acting to pursue their own self-interest. They resisted the adoption of the Constitution in order to keep power in their more egalitarian and democratic state assemblies, [102] and they urged the creation of a Bill of Rights that would limit the damage that the central government could do. [103] Thus, while over much of its history republicanism may have been associated with wealthy elites who possessed the leisure to devote themselves to politics, at this Anti-Federalist moment, republicanism belonged in large part to men with back-country accents who feared such elites. [104] The Second Amendment grew out of this reaction--a republican avatar, perhaps, in a growingly liberal age. Thus, even if liberal ideas had begun to supplant republican ones by 1792, [105] it is appropriate to read the Second Amendment in a republican light. [106]

B. Arms and the Militia in Republican Thought

1. The Problem of a Standing Army

The Second Amendment begins with the claim that a "well regulated militia" is "necessary to the security of a free state." This language implicitly refers to an old set of republican fears and hopes: a militia could help to limit corruption, unlike a standing army, which would be part of

the problem. As Elbridge Gerry stated during congressional discussion of the Amendment: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty." [107] Liberals, by contrast, little feared a standing army and little valued the militia. [108]

Republicans believed that the state must arm itself to resist foreign aggression and to keep civil order. But the distribution of arms caused them great anxiety, because whoever held the weapons and real property within a republic also held ultimate control. [109] In arming itself, the state had two options: a standing professional army or a popular militia. The former posed two great threats of corruption. First, it could become a tool of executive usurpation. Second, the army posed a risk of factionalism and professionalization.

Evidence of the former threat was ample. Standing armies arose in England as a tool of the Stuart monarchs' ambitions for power, and memories of that time remained vivid in republicans' minds. [110] The standing forces were at hand to tempt the King to adopt and enforce unpopular policies; its members would follow his will rather than the common good because they depended on him for their livelihood. [111] The army was, moreover, one of the chief avenues for subversion of Parliament, as many M.P.'s held places in the army. [112]

American colonists were familiar with the consequences of executive control of the military. Throughout the eighteenth century, colonists experienced friction with the contingents of British regulars stationed near them. [113] Following the Seven Years' War, this friction increased dramatically when Britain decided that the colonists should pay for their own defense. For the first time, the imperial government levied a tax on the colonies for revenue purposes, [114] and that revenue, ominously, went to the upkeep of the standing army. When the colonists refused to pay, claiming that taxation without representation was tyranny, [115] the imperial government ordered the military occupation of Boston to enforce the policy. Perhaps most alarmingly, the occupying army was made up not only of British regulars, but also of Hessian mercenaries. [116] The colonists were experiencing a republican nightmare: an unrepresentative government was using a standing army against them to enforce an unjust policy. [117]

Like English radicals, many American republicans blamed George III for these abuses. [118] Others recognized that Parliament, controlled by conspiratorial ministers and placemen, was at least as complicitous as the King in the new policies. [119] It made little difference to American republicans, however, whether Parliament or the King controlled the standing army, since in either case it was not subject to the colonists' own legislatures. [120] After the Revolution, the framers of the new state constitutions took pains to ensure that the state military was under legislative, rather than executive, control. For some, this arrangement ameliorated the worst fears of a standing army. [121]

A standing army, however, posed a second threat: regardless of who controlled it, the very existence of a standing army provided the opportunity for social corruption through professionalization. The army was a symptom and product of modern specialization of economic function, because soldiers were trained to a particular trade--fighting--and sought to maintain their particular interests. [122] Thus, the army desired foreign wars to justify its existence, ample taxation to support it, a strong executive to collect the taxes, and docile citizens to pay the taxes.

[123] The American republican Joel Barlow, in denouncing European systems of government, put the idea pithily: "Thus money is required to levy armies, and armies to levy money; and foreign wars are introduced as the pretended occupation for both." [124] Soldiers thus contributed to the breakdown of the common good in much the same way that any other professional group did. In addition, a standing army posed a special threat: it controlled the means of force. [125] As society developed and diversified, many ignominiously chose to surrender the sword to a professional army. As a consequence, those who surrendered the sword to the standing army gained a luxurious way of life but lost their moral character and their only guarantee of liberty in the bargain. [126]

2. The Militia, the Balance of Estates, and Centralization

In republican theory, the militia offered protection against all of these dangers. [127] The militia was viewed as the universal people armed--the whole people, the republic. This *armato populato* did have one limit: it included only citizens, not all residents. [128] Within this limit, however, the militia reflected the most populist strand of republican thinking. To republican thinkers, identification of the militia and the people made the militia incomparably more attractive than a standing army.

Initially, the existence of a citizen militia was thought to limit the threat of executive usurpation. From the beginning of the tradition, theorists had closely identified the militia with the Many, to give the Many a check on the monarchical and aristocratic elements of government. [129] By the 1780's, however, the balance of estates had come to be less central to Americans. Republicans had moved toward purer democracy, and military forces had been under the control of legislatures. [130]

A new issue, however, soon replaced concern about executive usurpation: fear of the excessive concentration of power in the central government. This fear went to the heart of the debate between Federalists and Anti-Federalists over the adoption of the new Constitution. Traditionally, militia forces were local bodies, and prior to the 1790's, republicans generally believed that this proximity to the people would prevent their capture by malignant governmental actors. [131] By the 1790's, however, many had lost faith in the local militia. At times the militia had sided with the troublemakers in domestic insurrections after the Revolution. Many concluded that these insurrections were not legitimate forms of resistance, but constituted sedition against legitimate authority; it followed that the militia might also be seditious. [132] Abandoning trust in the militia [133] (and contrary to received republican wisdom), [134] the Framers of the Constitution gave Congress power to raise a standing army and to regulate state militias. [135]

The Federalist defense of this decision was even more alarming. In startlingly un-republican fashion, Alexander Hamilton argued for the creation of a strong and modern state, distinct from its population, with sufficient means to carry out its will. [136] In particular, a standing army would be necessary to repel foreign invasion because "[w]ar, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." [137] More disturbingly, this standing army might be turned against the states themselves: "If [an] insurrection should pervade a whole State, or a principal part of it, the employment of a different

[non-militia] force might become unavoidable." [138] The alternative, in Hamilton's mind, was chaos. With no firm hand from above, individual states or regions would inevitably erupt in constant civil war. [139]

For Anti-Federalist republicans, such sentiments were like a fireball in the night. They feared that the new central government would be dominated by the Few, distant from the people, and lustful for power. [140] Hamilton's writings seemed to promise that the government would use its army in repressive ways. The Anti-Federalists had not lost faith in the virtue of a people's militia, [141] and they resisted the Constitution because it would take power away from the local legislatures, which were more democratic and more devoted to the common good. [142] Even some Federalist defenses of the new government implicitly accepted the republican premise that the militia is the ultimate bulwark of virtue. Madison, for example, argued that if the federal government sought to subvert the militia, the states retained the constitutional power to protect it. So if Congress should ever use standing armies to advance tyrannical designs, they would be outnumbered and outfought by liberty-loving militia members. [143]

These reassurances were not, however, enough to allay the fears of Anti-Federalist republicans, and a number of state legislatures approved the Constitution with recommendations that Congress adopt a bill of rights. Virtually all of these proposals included some version of the right to arms, with a range of components: some sought to return complete control of the militia to the states, some sought to ban standing armies, but all sought to guarantee the right of the people to keep and bear arms. [144] Supporters of the Second Amendment thus inscribed faith in the local militia--not liberal concern about individual self-defense--into the Constitution: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Second Amendment therefore sought to protect local democracy by protecting popular, public military bodies. The states would always have an armed populace from which they could form a militia. The federal government could regulate the use of that militia, but could not disarm or disband it. As a result, state militias could always check the distant politicians in Washington. [145] On military policy, the text of the Constitution and the Bill of Rights are thus chronologically inverted compared to the general development of political ideas: the 1787 Constitution represented the new liberal mood, and the 1792 Second Amendment the older republican tradition. [146]

3. The Militia and Universality

Overconcentration of power in the central government was not, however, the only fear from which the militia offered protection. Republicans hoped that the militia would check state government as well as federal: state constitutions, too, contained right to arms provisions. Many hoped that Congress itself would rely on a militia, rather than on a standing army. [147] Even apart from its association with local governments, therefore, the militia promised virtuous control of force.

This trust in the virtue of the militia rested on its rhetorical identification with the whole of the citizenry--an equation with three significant conceptual results. The first focused on the character

of the American public: because the citizenry was or could be virtuous, the militia was or could be virtuous. [148] Second, as militia members were citizens and property holders, they had a stake in the well-being of the republic--unlike mercenaries or professional soldiers, who were committed only to their own fortunes. [149]

Most important, the militia would be virtuous because it was thought to include all of the citizens of the republic. By definition, this universality reflected the common good, rather than the good of a narrow slice of society. The militia was nothing more or less than the whole people in their military capacity. [150] Americans incessantly repeated this theme--rather than the importance of individual self-defense--in support of the militia and the Second Amendment. State proposals for the Amendment typically described the militia as "the body of the people" [151]--a phrase denoting the whole or the bulk of the community. [152] Richard Henry Lee explained: "A militia, when properly formed, are in fact the people themselves . . ." [153] Similarly, George Mason asked: "Who are the militia? They consist now of the whole people, except a few public officers." [154] In a much-quoted passage, Patrick Henry maintained: "The great object [of the Second Amendment] is, that *every* man be armed." [155]

As the people, the militia could not act against the general good because the general good and their good were one and the same. Tench Coxe declaimed: "THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY . . . Who are the militia? *are they not ourselves*. Is it feared, then, that we shall turn our arms *each man against his own bosom*." [156] Samuel Adams argued: "The Militia is composed of free Citizens. There is therefore no Danger of their making use of their Power to the destruction of their own Rights, or suffering other to invade them." [157] To be universal, the militia must comprise all of the citizenry. Republican writings, of the Anti-Federalist period and before, therefore insisted that the whole people should be armed, and contrasted this universality with the partiality of a standing army or a select militia. [158]

The republican militia member was thus envisioned as the quintessentially unspecialized citizen, Horatio at the Plow, whose own interests reflected the general good. At one moment, he controlled policy in his enfranchised role; at another, he controlled resources in his propertied role; and at a third, he controlled force in his armed role. [159] Indeed, for some republicans the citizen's status as militia member may have been more significant than his status as voter, because it was a more direct exercise of self-government. Most American republicans conceded that direct democracy on any scale was impracticable, but understood that by foregoing such immediate citizen participation in government, they lost an important part of the republican tradition. [160] After the Federalists managed to make representation even more ephemeral, the citizen as franchise holder was left still further from the reins of governmental power. As a militia member, however, the citizen could still directly participate in politics by intimidating would-be despots and demagogues. [161]

The militia's two features--decentralization and universality--can thus be separated, and they are each independently important. But they are not in fact radically distinct, because both proceed from the same fear that a small group of powerful citizens (in an oligarchic central government) could come to dominate the republic by control of the means of coercion (held by a select militia

or standing army). The solution was to vest arms in a universal body under the control of democratic local legislatures.

4. The Militia and Training in Virtue

The virtue of the militia therefore rested upon and reflected the virtue of the citizenry as a whole, because they were one and the same. But the militia was more than a passive mirror of society; it also acted upon its members to instill civic virtue. As noted before, the virtuous citizen was expected to stand apart from the state to criticize and correct it when it began to fall into corruption. Yet, he was expected to simultaneously subordinate his particularistic interests to the good of the state as long as the state stayed on the paths of virtue. [162] To do so, the citizen had to judge when he could refuse the demands of the state as corrupt, but he could not let his own separate interests cloud his judgment. Property helped the citizen to balance these conflicting responsibilities, by giving him independence of judgment as well as a stake in the well-being of the republic. [163] Service in the militia was yet another means of training the citizenry to civic virtue.

The self-sacrificial aspects of militia service were obvious. Membership was service to the state that always disrupted one's chosen round of activities and often involved hunger, cold, disease, and danger. [164] The militia member was expected to bear these burdens with the knowledge that he was keeping the republic safe. The experience of working together with fellow citizens could cement this perspective of self-sacrifice to the common good. Militia service required cooperation among citizens and subordination to orders, stimulated a commitment to comrades that would become a devotion to the public that they represented, and was filled with exhortation to virtue in sermons and speeches. [165] Many veterans of the Revolution recalled military service as the emotional high point of their lives; by the 1780's they yearned for the "rage militaire" that drew Americans together in the war. [166]

Militia service also served to engender virtue by inducing the experience of independent self-government. In republican theory, arms and property constituted the necessary material bases for the autonomous political personality of the citizen, who was dependent for his safety and livelihood only on the body of his fellow citizens, not on the state apparatus nor on particular private individuals. [167] Conscious that they directly held the reins of coercive power, the people would never accept that governors governed and citizens obeyed. As Joel Barlow explained, "A people that legislate for themselves ought to be in the habit of protecting themselves; or they will lose the spirit of both." [168] Thus, republican commentators denounced those supine peoples who, for comfort and convenience, surrendered their arms--along with their liberty--to a standing army, [169] and expressed admiration for the independent, "manly," civil but not servile citizen-soldier-freeholder, committed to the common good but not enslaved to the state. [170]

5. The Rights of Resistance and Revolution

To entrust the means of force to the militia was thus to entrust it to the body most likely to use it in virtuous ways. This commitment of force to virtue was thought to have two important results. First, quite apart from any actual act of resistance, the knowledge that citizens possessed arms

was likely to affect the behavior of both state officials and citizens. State officials would be loathe to trifle with the people's liberties, knowing that citizens had the wherewithal to defend those liberties. [171] In contrast, republicans drew from history the lesson that when despots sought to undo a republic, they began by disarming militia members. [172] Republican thinkers also believed that possession of arms changed the character of the people as well, making them more independent, more suspicious of their government, and less willing to tolerate the slightest tyranny. It was difficult and frightening to resist despots and all too easy to accept early incursions. But down that path--and not far down it--lay slavery. [173] A people armed, aware of its own empowerment, would not start down that path.

As in the case of the militia as a training ground for virtue, republicans had some first hand experience with the benefits of the militia in resisting tyranny. Traditionally, to enforce their decisions, colonial governments had to rely on the *posse comitatus* and the militia. Colonial records are full of complaints that the militia, reflecting the sentiment of the people, refused to enforce edicts perceived as unjust, or even participated in popular resistance to them. [174] Colonial culture accepted some measure of violent resistance as a normal part of life, although those in authority never ceased to complain of that fact. If the governors had lost touch with the people or disregarded their wishes, it seemed natural to the people of the colonies to go outside normal channels so as to make their will directly felt: to riot, to burn royal ships in protest of impressment, to close down courthouses, to assault officials or to destroy their property, or any of the thousand other courses of action of which their not very obedient minds could conceive. [175]

In the end, however, if the threat of force was to have any meaningful effect, the people had to be prepared to take up arms to oust tyrannical rulers and replace them with citizens committed to the common good. This right of resistance is the second general result of entrusting force to the militia. It is the *only* purpose of the Second Amendment explicitly mentioned during its discussion in Congress. Elbridge Gerry declared: "This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government." [176] He explained that the purpose of a militia is to prevent a standing army, and that when governments intend to invade the people's liberties, they first disarm the militia. [177] No one contradicted him or suggested a different, liberal purpose for the provision. [178]

Republicans were aware of the danger implicit in vouchsafing this right of resistance in the citizenry and sensitive to the charge that they were inciting violence. They developed a number of limits on the right: It must be a product of the "body" of the people, i.e., the great majority acting by consensus; it must be a course of last resort; its inspiration must be a commitment to the common good; and its object must be a true tyrant, committed to large-scale abuse, not merely randomly unjust or sinful in private life. [179]

An uprising that failed to meet these criteria was considered an illegitimate rebellion, rather than an act of true republican resistance. The American Revolutionaries believed that they had direct experience with the distinction. The War for Independence was resistance to tyranny, but the various uprisings against the new governments--Vermont's drive for independence, the Carolina Regulation, Shay's Rebellion, New York tenant protests, the Whiskey Rebellion, and others--were all rebellions. [180] Such rebellions were no better than tyranny, and the rebel forces little

different from standing armies, inasmuch as they pursued a partial interest rather than the common good. [181] This threat to the commonweal could come as easily from a demagogue as from a despot, and the universal militia was supposed to suppress insurrections by private groups as well as usurpations by public ministers. [182] In resisting a tyrant, the militia was acting against the state apparatus, and in suppressing a rebellion it was acting for the same apparatus, but in either case it was pursuing the common good.

Traditionally, the republican function of the militia may have been limited to this right of resistance, rather than to a true right of revolution. The former is characteristic of more hierarchical forms of republicanism; the people had the right, when abused, to replace tyrants or to eliminate demagogues acting against the common good. [183] By contrast, it is yet a further step to grant the people a right of revolution, [184] a right to reorder society top to bottom, "to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." [185] But in practice, the line between resistance and revolution was not sharp; once the American revolutionaries had rejected British rule, they were of necessity compelled to put a new form of government in its place, and accordingly rewrote their state constitutions to provide for democratic government in the interest of the common good. [186] Thus, by war's end, American republicans had come to embrace a right of revolution along with a right of resistance.

Lockean liberals also endorsed a right of revolution, so that unadorned references to such a right in the 1780's could be either liberal or republican. In theory, a liberal right to revolution might differ substantially from a republican one. According to liberals, individuals enter the social contract for their own ends, reserving certain rights of autonomy; if the government violates those rights, citizens may take up arms to insist upon the original terms. [187] By contrast, a republican revolution is made not for a cumulation of individual ends but for a truly common good. [188] In the 1780's, however, the line between the two was not so distinct. [189] Republicans may have borrowed the ideas of the social compact and the right of revolution in part from Locke's circle [190] before converting them into an idiom of the common good. For republicans, moreover, an important part of the commonweal was the liberty of citizens to ensure their political independence. [191]

As a result, the Anti-Federalist framers of the Second Amendment may not have thought consciously about whether they were relying on liberal or republican rights of revolution. Indeed, they may have relied on both rights without worrying about inconsistency. [192] But in context, their primary loyalty seems clear. They self-consciously cast themselves as defenders of the War for Independence, a revolution made for republican principles. They gave the right to bear arms to a militia--a sacred concept in the republican tradition but one that Locke does not even mention. [193] They feared a central government created to protect Lockean accumulation of property and dominated by economic elites. And they sought to return the means of coercion to universal bodies of virtuous citizens under the direction of local democratic legislatures.

6. *Coping with the Paradox*

The idea of the militia thus responds to the republican paradox that without a virtuous state there can be no virtuous citizens, but without virtuous citizens the state will not be virtuous. It does so

by eliding the distinction between state and society. In republican thought, the militia had to be a body summoned, trained, and organized by the state. Without state sponsorship, the militia might not be "well regulated," nor could members gain experience in self-sacrificing service to the state. More importantly, it was critical that the militia be somehow universal; otherwise force would belong only to a slice of the population. But the state alone was truly universal and could constitute the militia as a universal organization. Without state supervision, the militia might be only a number of partial bodies--private armies asserting their private wills. Such an analysis reflected one horn of the paradox: to be moral, the citizen must exist in a virtuous state, which would constitute a universal militia. So in normal times, the militia was thought of as a state body.

But for republicans, there was danger everywhere, including state supervision of the militia. The state might become corrupt and seek to corrupt the militia--by dismantling it, by recruiting only from a slice of society, or by bribing its officers. In that case, the militia was expected to draw on other aspects of its character: its independence of mind and its capacity to take government directly into its hands. Members would remember that although the militia was gathered by the state, it was composed of, and identified with, the body of the people. The training in virtue acquired under a benign state would now stand it in good stead in resisting a corrupt one. Such a state of affairs could not last for long. Without the frame of a republic to hold them together, the pieces of a people would become disjointed, devolving into pursuit of self-interest. Republicans hoped, however, that the militia could fill the gap for the time necessary to restore political health. This analysis reflected the other horn of the paradox: without a virtuous and independent citizenry, the state itself will never be virtuous.

Lacking a state apparatus, citizens might succumb to the corruption of atomism, yet with one, they might succumb to tyranny or oligarchy. The militia, therefore, had to be ever vigilant, like pilots of a ship, trimming their sails in response to the more pressing danger. On the one hand, should a threat come from the state, the militia was to assume the character of society--independent, aggressive, suspicious of public ministers. On the other hand, should a threat arise from private groups, the militia was to bear the aspect of the state--self-sacrificing, participatory, hostile to private power.

The militia thus helped to resolve the paradox by an impaction of all the components of a republic into itself. If the state could not have virtue without virtuous citizens, then the militia would supply a virtuous citizenry; and if citizens could not have virtue without a virtuous state, then the militia would provide virtuous state supervision. The danger in a right of resistance was that the criteria were not self-applying; the line between resistance and rebellion was often in the eye of the beholder. But eighteenth-century republicans felt that the safest place to commit the right to judge was to the citizen militia.

III. The Modern Meaning of the Second Amendment

The place of the right to arms in the republican tradition is thus central and profound. I will argue in this section, however, that a modern republican interpretation of the Second Amendment presents great difficulties. In Sections A, B, and C, I argue that the republican tradition offers no guidance for judicial mediation between the competing contemporary legal claims that the

Amendment only supports the modern national guard or that it also supports a private right to arms for individual self-defense. The republican tradition justifies giving arms to a universal militia of a type which does not exist today. As a result, under modern conditions, the literal wording of the Second Amendment is meaningless. On the other hand, I argue in Section D that the Amendment can serve as a regulative ideal for courts, who could try to keep its spirit alive by reading other provisions of the Constitution to serve the same ends--by protecting property as a means to political participation or by restricting the power of the army and police. Ultimately, however, these judicial strategies can offer only limited change; in any event, in republican terms, the courts are not the best fore in which to seek reinvigorated popular control. I therefore consider in the next part other, nonjudicial options for securing the ends served by the militia.

A. Personal Right to Self-Defense

The republican tradition does not support a personal right to own arms for self-defense. The republicans were intensely political and saw the right to arms as a political phenomenon. The contrary vision typically espoused by the advocates of a private right to arms could hardly be more different: each man's home is his castle, and he has a natural right to defend himself, his family, and his property against threats from the outside world. [194] This vision, embracing frontier self-reliance and rugged individualism, is a deep part of American tradition, [195] but not the American *republican* tradition. [196] Whatever else may be laid at the door of republicans, they are not responsible for the National Rifle Association or its individualist vision.

As it is virtually impossible to prove a negative, I cannot claim that none of the proponents of the Second Amendment ever embraced a nonrepublican belief in the right to own arms for self-defense. Yet the dominance of the republican tradition in their thinking about the Amendment makes it unlikely that the primary concern of the provision was self-defense. [197] As I have argued, the discussion of the right to arms was saturated with republican concepts and rhetoric, including the language of the provision itself, with its assertion that "a well regulated militia" is "necessary to the security of a free State." The references to a popular right of resistance are countless; in contrast, the references to an individual right to arms for self-defense are quite rare. [198] I do not mean to argue that one could not construct a modern constitutional argument for a right to own arms for self-defense, [199] or that all eighteenth-century republicans rejected such a right as a matter of general philosophy. Rather, I mean to argue that that right was, for them, a peripheral issue in the debates over the Second Amendment. [200] This secondary status is critical because, as I will argue shortly, under modern conditions an individual right to arms is positively counterproductive to the goals and ideals implicit in a collective right to arms for resistance. [201] As the latter was at the center of the republicans' concern and the former on the periphery, a modern version of a republican Second Amendment would not include a private right to arms for self-defense.

The modern implications of a private right to arms differ radically, depending on whether it is a right for resistance or a right for self-defense. Modern analysts may assume that a private right to own arms automatically includes a right to own arms for self-defense, but that assumption is anachronistic. [202] The central issue in gun ownership for contemporary America is personal protection, and its discussion revolves around two sets of private rights or interests: the right of some individuals to be safe (or feel safe) by having guns, and the right of others to be safe (or

feel safe) from those who should not have guns. In contrast, the central issue for the supporters of the Second Amendment was the allocation of political power, and its discussion revolved around two political actors, state and society, entwined in the militia.

B. The Right to Resistance Outside of a Universal Militia

Republicans believed that only a universal militia could safely hold arms, and the Second Amendment makes this assumption express: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The key issue is thus the meaning of the term "Militia." Those who support a states' rights view of the militia seek to identify the Amendment's militia with the modern national guard. [203] The guard, however, is a select body, only a fraction of the population. In contrast, as advocates of the individual rights view have maintained, [204] another meaning of militia was current in the 1780's: the unorganized militia included every male of arms-bearing age [205]--essentially all the citizenry at that time--and a vestige of that definition persists in the United States Code to this day. [206] Because the Amendment describes the right to arms as a right of "the people" it seems probable that it used "Militia" in this broader sense.

The republican tradition supports this broader reading: the militia had to be universal. Any smaller body, any "select militia," suffered from the same defects as a standing army, because it was only a segment of the citizenry. The universal militia, by contrast, was the people under another name; [207] it could not turn against the people because it was the people. [208] As the National Guard is not universal, it cannot serve as a substitute. [209]

Republicanism would also eschew any construction of the right to arms as a right only of the state government against the federal government, rather than a right of the people against all government. [210] The militia was a forum in which state and people merged, in which society could check state corruption and the state could check private corruption. The right to arms is not a right of the state alone, nor a right of persons alone, but a right of the militia, which embraces both. The Amendment may give states the right to block efforts of the federal government to dismantle their militias. But it also gives the people the right to intimidate state government and ultimately to revolt.

The history of the clause supports this view: the Second Amendment was copied from right to arms provisions in state constitutions, [211] and the debates at the time reveal no suggestion that the scope of the right changed when adopted into the federal Bill of Rights. But state bills of rights were not a limit on Congress' ability to tamper with state militias; they were a limit on state governments' ability to tamper with citizens. So the state right to arms--and by implication the federal right as well--had to be a right of the people against government. [212]

By the same token, however, those who support an individual rights view of the Amendment are mistaken in equating the people's militia and the universe of private gun owners. For one thing, the militia not only may be universal; it must be, because any smaller body would reflect only a partial interest. The threat of corruption may lurk as much in insurrection by private force as in governmental tyranny. Second, while the militia must not be dominated by the state, it also must not be wholly private.

Participation in the militia gave citizens an education in civic virtue, prompting them to associate possession of weapons with service to the republic. They also learned to be independent, but as a political body devoted to the common good, not as private individuals. They were independent not from the world, but from whatever forces were seeking at the moment to corrupt the republic--whether state ministers or popular demagogues. [213]

Gun owners today do not comprise a universal militia. Not all citizens own guns. Some people in almost every demographic category own guns, but ownership is concentrated in a fairly distinctive group. American gun owners are overwhelmingly male [214] and married, [215] more Protestant than Catholic, [216] more white than black (in absolute numbers), [217] generally middle class, [218] and reside primarily in rural areas. [219] Many more people own guns in the South than elsewhere in the nation, [220] and within the South, white gun owners exhibit greater hostility to blacks than do white nonowners. [221] Americans own guns for a variety of reasons, [222] but I have observed that those who view gun owning as political expression do so for specific reasons. [223] Among themselves, such owners often wistfully talk about a revolution against the government to restore a time in which people like them--honest, self-reliant, simple people--would again have their due. [224] Such people may believe that their welfare is equivalent to the common good, but it is not. [225] If we have an armed revolution, it will be in the interests of these citizens, not of the population as a whole.

Gun owners, moreover, have not formed a militia: they have not assembled into a collective body to acquire training in virtue or the habit of associating arms bearing with dedication to the common good. Many urban dwellers probably have little experience with guns but own one for self-defense; they associate firearms with fear of their fellow citizens, not militia sorority. [226] Most gun owners use their firearms primarily for hunting, [227] and these owners may feel some bond with other hunters, but only with other hunters. [228] And then some--the "survivalists"--own guns precisely because they predict that a cataclysmic event, such as an invasion or a revolution, is in the offing. Among themselves, survivalists may display some qualities of a militia: they are trained, vigilant, and committed to each other. But they have no bond to the rest of the republic; indeed, they suspect that most others will, and perhaps should, perish in the coming conflagration. Despite the self-image of gun groups, then, a gun is not like an amulet; it does not have magical properties that convert its owner into a model republican citizen.

The eighteenth-century republicans were ready to face great risk, but they were far from insensible to danger. They believed in a right of resistance, but they gave it not to some random collection of individuals but to the people *as a whole and only as a whole*. My disagreement with a private right interpretation of the Amendment is not that it takes the provision too seriously, but that it does not take it seriously enough. The vision of the Amendment is not of a nation in which all may own arms but of one in which all are *in fact* armed. If only a small portion go armed, the hope of the Amendment will have failed as surely as if the government had prohibited arms bearing altogether. Corruption--domination of politics by a narrow slice of the public--can occur through the machinations not only of the state but of private parties as well. The undue political influence of the National Rifle Association is precisely the nightmare of all true republicans, all true believers in the Second Amendment.

Two objections might be made to this general argument. First, the literal requirement of universality may seem wooden and extreme: if even one citizen is omitted from militia service, it would seem to doom the whole enterprise. But it is hard to believe that anyone could have seriously intended the Second Amendment to rest on such an implausible background assumption. As I will consider in the next section, republicans did seem rhetorically to presuppose literal universality, but in practice they never adopted truly universal militias. We may then understand the concept of the militia as a regulative ideal or as a symbol for a political function: republicans sought to give over the control of arms to a body constituted in such a way that we should have confidence that it would represent the body of the people, rather than any lesser faction. Such a body would have to be very broadly representative, potentially open to everyone, and trained in virtue. Even under these lesser requirements, private gun owners do not qualify as a militia: they still reflect particular interests [\[229\]](#) and are still random atoms. [\[230\]](#)

Second, some might argue that if some citizens fail to own arms, they have only themselves to blame: the vision of the universal militia depends on private dedication to the state, as reflected in the civic act of firearms possession. But this response would misconceive the fundamentally political nature of gun ownership by construing it as an individual right and responsibility. The argument rests on an implicit analogy to other provisions in the Bill of Rights designed as protections for the individual against acts of state abuse, such as the Fourth Amendment. The Second Amendment, in contrast, is a constitutive or structural provision: it forecasts the relationship between the state and the people as a whole. Its essential goal is not to preserve liberal rights of individual autonomy, but to ensure that ultimate power remains with the universal militia. If the militia is less than universal, the harm falls not only on those who failed to buy guns, but on the republic as a whole, because the means of force lies in the hands of a special interest. [\[231\]](#)

Republicans did not intend to leave the universality of the militia to the chance decision of every citizen to arm herself. The state was supposed to erect the necessary scaffolding on which the militia could build itself, to muster the militia and oblige every citizen to own a gun. [\[232\]](#) Some even argued that if the citizen could not afford a firearm, the state should supply one. [\[233\]](#) Even if every private citizen did buy a gun on her own initiative, moreover, those purchases would still not generate a militia; without training in virtue and the experience of public service, citizens would be nothing more than armed but unbonded atoms.

The identification of the militia with the National Guard is thus too state-focused, but the identification of the militia with individual gun owners is too focused on private persons. In the years since the Revolution, state and society have changed so that constitutional thinking views the government and citizens as distinct and often adversarial actors. So it may seem natural to cast the Second Amendment as a simple right of liberty-loving private persons to take up arms against scheming government ministers. But that description is, in my view, an oversimplification. The Amendment guaranteed the right of a state/society, unified in the militia, to resist any threat of corruption, from private parties or state officials.

C. The Right to Resistance Inside a Militia

1. The Absence of a Constitutional Mandate

The militia is so central to republican thinking that it is surprising that the proponents of the Amendment did not secure a constitutional mandate for one. Republicans themselves sensed the lack, believing that the state had an obligation to constitute a militia. [234] Article I gave Congress considerable power over the composition of the militia, [235] and during the debates on its adoption, Anti-Federalists expressed fear that Congress might use its new power to raise a select militia and dismantle the state militias. [236] Before the ratification of the Bill of Rights, Richard Henry Lee maintained: "[T]he constitution ought to secure a genuine [militia] and guard against a select militia, by providing that the militia shall always be kept well organized, armed and disciplined, and include . . . all men capable of bearing arms." [237]

But although some of the amendments proposed by the state legislatures included a prohibition on standing armies--Madison ignored these in drafting his version--none included a constitutional mandate for a universal militia. [238] During Congressional discussion of the Amendment, Elbridge Gerry proposed that it be revised to mandate a federal duty to assemble a militia, but his motion failed without a second and without discussion. [239] The Second Amendment thus emerged as a guarantee that all citizens may keep and bear arms, so that the states would have the material with which to create their militias, and perhaps some limited, not very clear protection for those militias [240]--but no guarantee that there would be a militia. [241]

Why did the Framers fail to ensure for their posterity what they believed to be the indispensable institution of a universal militia? From early on, republicans exhibited a rather severe slippage between rhetoric and reality. [242] Many states did, in a general sense, require that all citizens own arms and serve in the militia, [243] but they also departed from this ideal in important ways. For one thing, as the frontier receded, serious military action moved away from the centers of population, and so states came to rely on expeditionary forces, which were drawn from volunteers--usually poor--and professional soldiers. The militia, in contrast, began to rust on the homefront, turning out primarily as an occasional police force. [244] When it did turn out, it did not include all, or only, citizens. Rich men could purchase exemptions by paying poor men to go in their places, [245] and even those who were not citizens of the state were subject to militia duty. [246] The states' military forces had come less and less to resemble the military incarnation of the citizenry assembled.

During all of this time, republicans continued to insist that only a universal militia was appropriate for a true republic--but they did not follow through, and did not persuade others to follow through, on the commitment. The reason seems plain: on the one hand, they were not prepared to surrender the universal militia as a necessary concept, but on the other, they could not persuade themselves or others to undergo the massive sacrifices involved in universal service. [247] As a result, they were left in a state of anxiety: they insisted that the militia must be the whole people, but they knew that in fact it was not. [248] They thus left a dual legacy: to make sense, the Second Amendment requires a universal militia but does not assure that we will have one.

Over the decades, Americans have come to exploit that discrepancy. As it became plain that the *armato populato* would never become a reality, republicans began to express their sad disappointment in a population that shirked its civic duty to arm itself. [249] Today, only a small

portion of American citizens are enrolled in the armed forces, the National Guard, or law enforcement organizations. Technically, all males aged seventeen to forty-five are members of the unorganized militia, [250] but that status has no practical legal significance. Such "militia members" are not required to own guns, to drill together, or to learn virtue. The statutory provision creating this "universal militia" is nothing more than a dim memory of a distant hope.

2. The Republican Meaninglessness of the Amendment

From the beginning, then, the republican defense of the Second Amendment sought to deny reality, because it assumed a universal militia when there was none. Advocates of the individual rights interpretation of the Amendment thus have substantial precedent for refusing to recognize that we do not have such a body. Indeed, these commentators might argue that if we really wanted to follow the example of early republicans, we would guarantee a right to arms while willfully ignoring the absence of a universal militia.

There are, however, severe problems with this approach. First, whatever the discrepancy between rhetoric and reality, republicans still clung to their insistence that the rhetoric should become reality, by the creation of universal militias. We no longer even contemplate that possibility. There is no chance that any modern legislature will impose universal militia service. Second, the gap between rhetoric and reality has grown drastically over time. In the 1780's, most citizens owned arms, but today many fewer do. [251] This change has two significant consequences: if there should be a revolution it would be for the benefit of a smaller portion of the population, and the revolution would be much less likely to be successful. The absence of a universal militia is now severe and chronic, and self-deception about its existence has become impossible.

As a result, for judges trying to interpret the Second Amendment, republicanism suggests that the Amendment, as worded, is meaningless. To make any sense, the Amendment presupposed an institution now gone. Allowing private parties to own arms would serve no republican purpose, but neither would denying them arms. For republicans, all we can really do is try to create a republic again, as I will discuss in Part IV.

D. Alternative Judicial Uses of the Amendment

In this situation, judges might be inclined to use sources other than the republican tradition to give meaning to the Amendment. This process involves issues of constitutional interpretation that are beyond the scope of this Article, but a range of options seems possible. On the one hand, following the strictures of strict constructionists, some judges might focus only on the literal language. Unfortunately, if the commentators are any guide, that device will not yield a clear result. [252] Perhaps more importantly, the literal language, standing alone, is an exceedingly narrow basis for interpretation. Even the most strict constructionists would look to the original understanding in addition to the language [253]--but again, that intent can have no meaning today. Faced with these difficulties, one might conclude that the Amendment is literally outdated, made irrelevant by events, and therefore should have no meaning at all--as if the Constitution required Congress to keep a Carolina Parrot, now extinct, as a mascot. Courts would then read the provision as a dead letter.

It is possible, however, for courts to update the Amendment in a variety of ways. This course might be the best one since the Amendment does exist and does serve a function in the scheme set up by the Constitution. One style of updating would read the Amendment, as applied to the states through the Due Process Clause, in the way that Justice Harlan read the Due Process Clause: whatever its original meaning, the Amendment has become a part of the living tradition of the American people, part of our scheme of ordered liberty. [254] In that process, the provision has taken on a new meaning, as a liberal right to arms to secure individual autonomy against private assailants or even the government. Whatever one thinks about that vision, it is deeply embedded in large parts of the American psyche. [255]

Courts could, however, seek to update the Amendment in a more republican fashion, and that course has the dual advantage of being more true to the original context and, for some, more appealing because it is more republican. One way to do such updating would be for courts to order the kinds of reforms that I consider in the next part, reforms that would serve the same function as the old militia--a reconstituted militia, universal service, workplace democracy, and the like. But even if those reforms might be appropriate as legislation, judicial enforcement suffers from familiar problems. For one thing, courts are not the best institutions for supervising such massive and complicated social change. [256] For another, even if a court viewed originalist theories dimly, it would face great obstacles in mandating workplace democracy or even a universal militia on the basis of a provision that on its face does no more than guarantee a right to arms. Such an order might prove unenforceable, as the public would likely resist it tooth and nail as illegitimate. Such a situation is not an auspicious beginning for a plan designed to create a virtuous, public-regarding populace.

There are, on the other hand, judicially manageable ways for courts to update the Amendment. The right to arms and the universal militia were significant structural elements in the polity contemplated by the Constitution and its amendments, read as a whole. With their demise, there is a hole in the fabric of the document where they used to be. To mend that hole, courts might stretch the other fibers of the constitutional fabric to cover it, by reading other parts of the Constitution in such a way as to serve militia-like functions. An updated Second Amendment would thus have no independent content but would be a shadowy gravitational presence in interpreting the rest of the Constitution. In particular, after the demise of the Amendment, the people as a body no longer have the ability to resist government outside the normal channels. So new interpretations should seek to increase the influence of the people over their government. [257]

Several examples may illustrate this idea. First, courts could use the gravitational pull of the Second Amendment to create constitutional space for legislation that might otherwise be suspect. Several of the neorepublican proposals that I consider in the next part--such as campaign finance reform or proportional representation [258]--might violate current law. Courts might conclude that these reforms are designed to serve some of the functions of the Second Amendment, and since the courts cannot enforce the Amendment, they should allow these reforms instead.

Second, courts might read the constitutional protections of property in new ways. [259] Like the right to arms, the republican function of property rights was to ensure independent, virtuous citizens. Also like the right to arms, republican attitudes toward property rights contained a

tension: on the one hand, the state should not tinker with them, so as to allow real independence; but on the other, the distribution of property needed to be universal, so that some citizens would not dominate others. [260] If free exchange did not produce universal ownership of property, the state had to decide whether to redistribute. [261] In the case of the right to arms, the state had made that decision: it required universal membership in the militia. But in the case of property, republicans sought to avoid the conclusion that the state had a proper role in universalizing property. Instead, they hoped that the market, accompanied by geographical expansion, would take care of the matter by producing relative equality. [262]

To persist in such a belief today is self-deluding. Those with property dominate politics in a way that the republicans would find appalling, [263] and, with the practical demise of arms as a check on government, the equal distribution of property has become especially important. In particular, republicans may have been uncomfortable with a state role to ensure universal property ownership, but they were not at all uncomfortable with a state role to ensure universal ownership of the means of force. With that latter role gone, however, the state function of ensuring universal popular control of the government is more constricted than contemplated by the Bill of Rights. One natural path of reexpansion is for the state to have a larger role in ensuring universal property possession.

Thus, courts could reconceive property-rights as the necessary basis for political participation, not simply as protection for private expectations. [264] That reconception would, *inter alia*, involve less protection against the redistribution of traditional property rights, [265] which have led to the present inequality of power, [266] and more protection for newer forms of property. As Nedelsky has elaborated, traditional "property no longer provides people with the basis for independence and autonomy in the eighteenth century sense." [267] Two centuries ago, a farmer's land or a craftsman's tools may have provided some "real independence," but the salaried employees, welfare recipients, and shareholders of today are dependent on a web of relationships. [268] Courts might therefore place less emphasis on traditional property and more on statutory welfare and other kinds of property that provide autonomy in the modern world. [269] The "new property" [270] cannot provide complete independence, because it originates in an act of the legislature, is distributed through the bureaucracy, and depends on the courts for its continuing protection. [271] But traditional property, too, has depended on state support. [272] And complete independence was never part of the paradoxical republican ideal: we must have rights in order to direct the state, but we cannot have rights without state protection. [273]

Third, the disappearance of the militia should create a heightened constitutional suspicion of the standing army and the police. Those bodies have, in a sense, usurped the militia's control of the means of force, and they have systematic interests in making their hold more effective at the expense of the liberties of the people. Unless we revive the militia, the republican nightmare may be inevitable, as the populace stands effectively disarmed before the might of the state. But courts can at least try to restrict that tendency by applying the Constitution stringently against the military and police. [274]

This suspicion should be at its height when the standing army and the police come into contact with the general populace and seek to restrict citizens' control over their own lives. [275] For example, the Supreme Court should not have deferred to the military's claims of necessity in the

Japanese-American internment cases. [276] Similarly, criminal procedure cases that expand the discretion of the police at the expense of individual liberties represent a troubling direction for the Court. [277] On the other hand, resolving such cases from a republican perspective is not easy, because the police are viewed as seeking to control "rebels"--i.e., criminals seeking to disrupt the common good--and as deserving whatever discretion they need and are unlikely to abuse. For republicans, it may be better for some more truly popular body, like the militia, to control crime, but that is not currently an option. So in this imperfect world, the Court must walk a tightrope: it must allow the police, whom it cannot trust, to control crime, which detracts from the common good, but without allowing them to intimidate law-abiding citizens, which also detracts from the common good. One thing that the Court should not do, however, is what it seems to be doing: basing constitutional decisions on apparent confidence that the police generally act in good faith. [278]

IV. Republican Reform

A. *Advisability*

None of the interpretations of the Amendment proposed in the last part can secure all of the ends that republicans hoped that it would. Judicial strategies can ultimately offer only limited change; moreover, in republican terms, the courts are not the best forum in which to seek popular control. In this section, I will consider whether it is desirable for modern republicans to seek a contemporary surrogate for the militia outside of the courts. Any adequate substitute must serve several functions. First, the militia reflected and induced virtue. It was universal, so as to reflect the common good; and it offered training in virtue, making citizens independent and self-sacrificing. Second, the militia increased citizen control over the government. It allowed citizens to participate directly in their own self-government, not just through the process of representation, and it consigned to them ultimate control of the means of force. The two functions served by the militia were intimately linked; republicans wanted to consign force to virtue.

1. *Virtue Functions*

In the twentieth century, the first function--the militia's connection with the common good--has become more problematic, because of the diversity and expansion of the citizenry. Historically, some republicans expressed a desire for a homogeneous population, so that every citizen would have the same good. [279] When republicans occasionally acknowledged the fact of diversity, they offered a number of responses. Some argued teleologically that despite superficial diversity, humans shared the same essential nature--a civic personality--and should be encouraged to realize that nature. As a result, in the end, the population was ultimately homogeneous with regard to everything that mattered. [280] Other republicans argued that citizens were naturally divided into three estates; the challenge of political theory was to cause each to serve the common good in its own way, with its own virtues. [281]

But how do we define the common good today, when most are not prepared to believe in a homogeneous citizenry, ascribed *teloi*, or natural estates, when each individual has a right to be different, and when voices from the margin are praised, not denigrated? [282] Neorepublicans

have tried to retain the universalism of the republican tradition while not disparaging modern diversity. They have proposed an inclusive republicanism, based on persuasive dialogue between citizens. Individuals enter this dialogue with different ends, but through conversation, they shift their self-understandings, reaching for the perspectives of others, and drawing upon a shared past of normatively authoritative recollections. [283] The hope is not for a unitary common good, but for a participatory process such that "everyone subject to a law-like utterance can actually agree that the utterance warrants being promulgated as law." [284]

If a militia-surrogate must serve this new ideal, it is more difficult to design its structure. Under the old vision of the commonweal, the task was merely to ensure that the means of power resided with the body of the people, who shared one good. Private armies might rebel against the public good, but the militia, as the rest of society, would suppress the rebellion. The situation is quite different if all of society is like the rebels, each segment with a separate interest, richly diverse and dissentient. The neorepublicans' answer is that the citizenry must be transformed through dialogic persuasion, to recognize their sameness in their difference. But that prescription is a much taller order even than giving the means of force to citizens.

It is not, however, much greater than what the older republicans, at their most optimistic, hoped of the militia. They too believed that service in the militia could transform citizens by molding them into a public-spirited, organic body. [285] A modern version of the militia might induce the modern version of this civic transformation: it might bring citizens together into self-revisory dialogue. The exact nature of the transformation is different, but the essential function of the militia is similar.

The primary difference between the two visions of civic transformation is that the nature of the proposed modern transformation is much more vague than the older version. The old militia was supposed to make citizens civic-minded and critical, and both of these qualities seem familiar to us today. In contrast, dialogic self-revision is a relatively new idea. Its parameters are not yet clear, and neorepublicans tend to talk about it in tentative or general terms. [286] Moreover, because it is a reformative ideal, it has no real world referents. No one can point to an example of the kind of dialogue that he would like to see, because none yet exists. As a result, conceptualizing modern analogues to the militia is difficult in part because the function that it is supposed to serve is not yet in sharp focus. This problem--of vagueness and incompleteness--may be a part of all neorepublicanism and even of all new intellectual movements. As I will discuss below, however, the militia ideal makes the problem especially acute. The still-vague self-revisory dialogue is supposed to reform the people so that it would be wise to commit to them possession of the ultimate means of force.

The expansion of the citizenry creates another problem besides the simple fact of diversity: the citizenry now includes members without, perhaps, the requisite material conditions for full participation. In the 1780's, only male property-holders--in some states only white male property-holders--could be citizens and thereby militia members. [287] Today, the citizenry is vastly larger, and hence the militia would be as well. Abandoning the racial and gender based exclusivity of the militia creates no republican difficulty, because no part of republicanism affirmatively requires race or gender bias. Eliminating the property qualification, however, is not so easy. According to republican theory, only those with property can have the independent

judgment necessary to be good citizens, [288] but not all citizens today have the requisite economic independence. [289] A republican politics may therefore not be possible with the present citizenry.

Again, however, it is premature to despair of remedying the situation. Property qualifications on the franchise served the same end as bearing arms: ensuring that citizens had the requisite power independently to follow the common good. As long as citizens are subject to economic tyranny by private actors or governmental tyranny by public ones, they cannot be virtuous. The virtue functions of the militia thus depend on the power functions of the militia: a citizenry can be virtuous only if also powerful. By the same token, even a dramatically expanded citizenry could be virtuous if it were possible to find ways to empower them through militia [290] or property [291] surrogates.

2. Power Functions

The militia ideal sought to increase the direct control of the virtuous populace over their government, outside the normal channels of representation. In its most restrictive version, the militia's right of resistance was defensive and occasional: when tyrants abused their power, the people could remove them from office and select new rulers. But by the 1780's, the concept of the militia had become part of an ideal of constant citizen involvement in government. Anti-Federalists sought to protect local militias so that the militias could protect local legislatures, because those legislatures were more democratic than Congress. Service in the militia was thought to transform members into active citizens, committed to the public good but suspicious of government, confident in their right to disagree. As a result, citizens' conduct at the polls would reflect not fear or deference, but independent assessment of the commonweal. Militia service itself, moreover, was a form of political participation, because the militia always had to appraise the decisions of the government. If those decisions departed from the commonweal, militia members should first refuse to enforce them, then resist them, and eventually either oust the persons in office or reform the government. [292]

This function may be the most terrifying aspect of the militia. Many might find it better to regularize power by surrendering it to "responsible" decisionmakers. That fear is not irrational, even in republican terms, for we are caught in the problem of origins, of how to get a republic off the ground. In republican theory, only a virtuous citizen militia can be entrusted with the means of force to resist state authority, but citizens will not be virtuous until they are already participating in policymaking under a republican form of government. The problem of origins is different from that of maintaining an ongoing republic, and the appropriate approach to the two problems may be very different. If we were already in a republic, there would be little excuse for failing to entrust the means of force into the people's hands. No course is without peril; in a republic, giving arms to the people is safer than giving arms to the government.

In nonrepublican politics, however, it is right to fear even the body of the people because they may not be virtuous. We might seek to change that situation, and opportunities for the exercise of virtue may always involve some risk. There is, however, no reason to court disaster by rapid, wholesale change. It is not surprising that much neorepublicanism is incremental in its reform program. We may ultimately make dramatic changes, but more limited po