2001

The Unsettling of the West: How Indians Got the Best Water Rights

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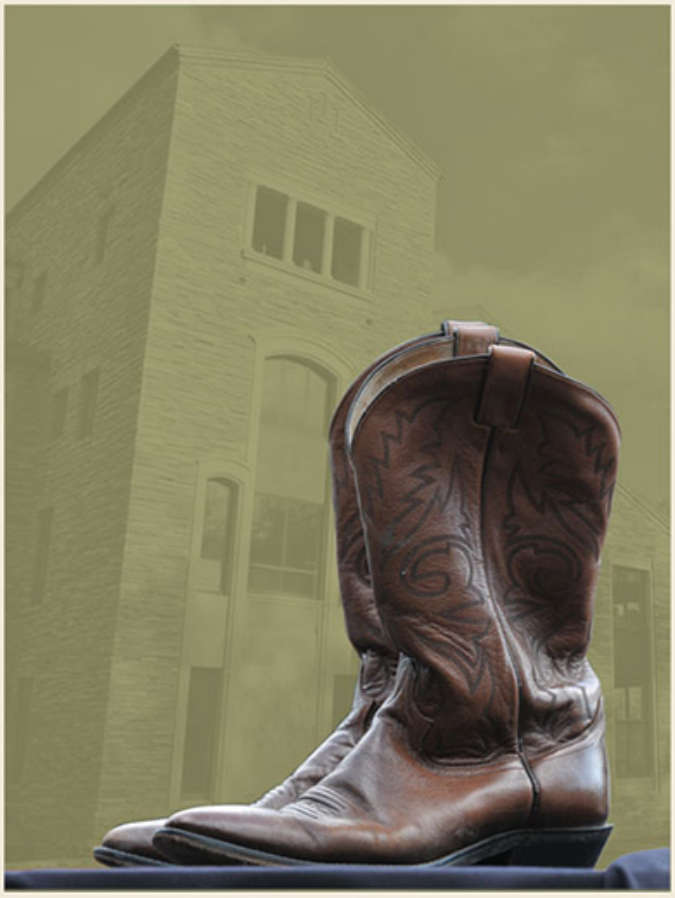

David H. Getches, *The Unsettling of the West: How Indians Got the Best Water Rights*, 99 MICH. L. REV. 1473 (2001) (reviewing John Shurts, Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s-1930s (2000)).

THE UNSETTLING OF THE WEST: HOW INDIANS GOT THE BEST WATER RIGHTS

*David H. Getches**

INDIAN RESERVED WATER RIGHTS: THE *WINTERS* DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S-1930S. By *John Shurts*. Norman: University of Oklahoma Press. 2000. Pp. xv, 333. $39.95.

A single, century-old court decision affects the water rights of nearly everyone in the West. The Supreme Court's two-page opinion in *Winters v. United States*[1] sent out shock waves that reverberate today. By formulating the doctrine of reserved water rights, the Court put Indian tribes first in line for water in an arid region. Priority is everything where water law typically dictates that the senior water rights holder is satisfied first, even if it means taking all the water and leaving none for anyone else.

In the West, water rights belong to "prior appropriators." The earliest users of water secure legal rights to continue using water, superior to the rights of all who come later. So when there is not enough water for everyone, users are served in order of their priority, with the latest users bearing the full impact of shortages. *Winters* held that the Fort Belknap Reservation in Montana had rights superior to their non-Indian neighbors who had begun using water first. The Court's rationale was that the very creation of the Fort Belknap Reservation out of the much larger territory ceded by the tribe effectively "reserved" the tribe's future right to use water. The decision threatened the water uses of the white settlers near Fort Belknap and, as precedent, it profoundly threatened to disrupt the expectations of all water-using neighbors of reservations where water might be used someday.[2] In the real world of water use, though, Fort Belknap and other reservations still despair of the lack of water.

In his probing history, *Indian Reserved Water Rights*, John Shurts[3] concludes that the *Winters* doctrine of reserved water rights is "per-

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1. 207 U.S. 564 (1908).

2. *Id.* The reserved rights principle was extended by the Supreme Court to secure water rights sufficient to fulfill the purpose of all lands reserved for federal purposes, as well as for Indian reservations. *See* Arizona v. California, 373 U.S. 546 (1963).

3. Adjunct Professor, Northwestern School of Law of Lewis and Clark College, Portland, Oregon.

haps the most potent force at the command of western tribes in their attempt to protect their lives, resources, and society" (p. 124). Nevertheless, he finds the Supreme Court's decision that created such an asset to be less remarkable than other historians have indicated. He uses original historical research to document how "the litigation and its outcome fit well within the existing legal context and into on-going efforts at water development in the Milk River valley" where it arose (p. 4). The book explains that the *Winters* decision was not more controversial locally because some non-Indian neighbors actually gained from the outcome. By telling a new and fuller story, Shurts also corrects the illusion that prior appropriation was so entrenched at the time of the case that lawyers and courts would not consider applying any other rule. He points out that in some quarters of the West other approaches to water allocation were still being debated. He also presents several examples of how the doctrine was, contrary to others' observations, a serious topic of government activity in the years following the decision.

In Part I, I argue that the West was sufficiently committed to the appropriation system in 1908 that the only likely departures from it were expedients to accomplish broad social goals. Thus, if *Winters* had been simply a water law decision, I believe that its apparently anti-settler thrust would have been genuinely revolutionary. But, as I offer in Part II, the case can be best understood as an Indian law decision. In Indian law, there is a tradition of upholding foundational principles that buck contemporary trends in order to protect Indian rights.

Shurts has also assembled new evidence concerning the aftermath of *Winters* that he uses to set right a misimpression that *Winters* lay dormant for seventy-five years after it was decided. Shurts may have succeeded in defusing the arguments of those who say they were caught by surprise by the government's latter-day assertions of the doctrine. But, as I discuss in Part III, learning the history does not alleviate my suspicions that the government acted only when it was consistent with the interests of non-Indians, and that it actually did little with the mighty doctrine to advance the Indians' welfare.

The doctrine of Indian reserved water rights lies at the intersection of two fascinating, essentially unique fields of law. The development of each field provides a rich study of American legal history rooted in the American West. But the evolutionary patterns of jurisprudence in each field are radically different. Only the traditions of Indian law can explain how the Supreme Court could so threaten to disrupt the pageantry of national expansion led by yeoman farmers settling hostile lands.

I. RESERVED RIGHTS AS A WATER LAW ABERRATION

A. *Water Law: A Tradition of Economic Expedience*

Water law has always been a malleable instrument of economic progress. Consider the fountainheads of the prior appropriation doctrine. One involved miners competing for water from the same stream on federal public land.[4] California, like many new states, had adopted a gap-filling statute that made the common law of England the rule of decision in the absence of statute. The common law followed riparian principles, recognizing a property right in those along a stream to use the water in its natural course. A miner who began digging gold from the bed of a California stream, aided by the flowing water, found that another miner had diverted water away from the stream through a canal for the benefit of himself and other miners and that this interfered with his mining on the stream. But when the miner along the stream invoked the riparian doctrine, the California Supreme Court rejected his claim.

The court found that the plaintiff technically was not a riparian because he was there under a mining claim rather than as a landowner. All the land was public and therefore the miners were essentially trespassers. Because the United States, as owner of nearly all the land, tacitly allowed the mining, and because the custom among the miners was to allow the first person who claimed the minerals and began working them to have a legal right to them, an analogous principle should apply to water. The court opined that any other rule would work to the detriment of the large number of mines that were not adjacent to the stream. But prior appropriation would protect miners who take "waters from their natural beds, and by costly artificial works [conduct] them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development."[5]

Some years later, a bigger leap was made by the Colorado Supreme Court in *Coffin v. Left Hand Ditch Co.*[6] In the 1860s, Colorado had adopted territorial statutes that seemed to adopt riparian water law. One statute gave persons with possessory rights to land along a stream rights "to the use of the water of said stream." Another prohibited diversion of water "from its original channel to the detriment of [anyone] along the line of the stream" and required that enough water be left in the stream for the use of those along it. Settlers with fee simple to their lands — not just a mining claim on public land as in

4. *See* Irwin v. Phillips, 5 Cal. 140 (1855).

5. *Id.* at 146.

6. 6 Colo. 443 (1882).

the California case — began farming along the St. Vrain River. During a particularly dry summer, they noticed that their water supply was inadequate. On investigation they found that someone had put a dam far upstream and was taking water out of the St. Vrain through a ditch, across a low divide, and into Left Hand Creek for irrigation of lands in another watershed.

The outraged riparians tore out this diversion, provoking the Left Hand Ditch Company, owner of the dam, to sue them. The court then ruled in favor of the ditch company that had dried up the stream because its diversion had begun before the riparians started actually using water. It disregarded the riparian statutes under which the defendants claimed their rights, saying that it was unbelievable that the legislature would have intended the unsavory consequences that would result from applying the statutes. The court said "the doctrine of priority of right by priority of appropriation for agriculture is evoked . . . by the imperative necessity for artificial irrigation of the soil." By contrast, the riparian doctrine urged under the statutes "would be an ungenerous and inequitable rule . . . [and] would prevent the useful and profitable cultivation of productive soil."[7]

Now, of course the court was correct that a rule limiting water uses to those along the stream would not reward the investment of people who had decided to take it to lands away from the stream in violation of the statutes. And, more broadly, there was a legitimate concern with the potential inutility of all nonriparian lands if they could not lawfully get water.

To be sure, riparian doctrine sounded rigid and impractical. Under the pure version of the doctrine, every landowner "upon each bank of a river is entitled to the land, covered with water, in front of his bank . . . [and in] virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction."[8] A right to use water "without diminution or obstruction" of the source once sounded less absurd than it now does. The rule served to mediate the rights of mill owners along streams, where the typical problem was one mill owner damming up the river to regulate the speed and timing of flows in order to optimize the water power available to the mill. An alteration of flow could work to the detriment of other mills, so the rule was that everyone could use the river's flow for power but could not alter natural conditions.

The riparian rule was not designed for one who needed to dam up the stream to get enough power for a big mill, and it certainly did not work for anyone who wanted to consume water or use it away from the stream, as that would diminish the flow. No problem. Where it was

7. *Id.* at 449-50.

8. Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C. D. R.I. 1827) (No. 14, 312).

a court-made doctrine, courts could modify it. So diversions that diminished natural flow were allowed under various theories.[9] And uses on "non-riparian" land apart from the stream, even land in other watersheds, were all allowed contrary to blackletter law — so long as they were "reasonable."[10] Presumably, any such use could be enjoined but most courts simply conditioned non-riparian uses on payment of actual damages and enjoined only unreasonable uses.[11]

Courts that avidly rejected riparianism and embraced prior appropriation usually referred to the inflexibility of the doctrine and the inherent unsuitability of such a law to the necessities of the arid West.[12] This was nonsense, because riparian law could have been adapted to the conditions and needs of the West as well as it had been to those of the East.

When a court applied riparian law too rigidly, states rushed to change their statutes or constitutions. When the California Supreme Court decided that downstream landowners had a riparian right to allow the river flow across their land to nourish grasses that provided feed for cattle on the land,[13] it had the effect of prohibiting development of hydroelectric dams upstream because their impoundment of water would significantly interfere with the natural flow. Fearing that progress would be stopped in its tracks, the state proposed, and the voters passed, a constitutional amendment limiting riparian rights to the water "reasonably required" for beneficial uses and reasonably diverted.[14]

Suppose the *Coffin* court had applied riparian law and the Coffins, with their lands along the river, had won. If the ditch company served farmers whose uses were more valuable, it could have continued diverting and paid damages or bargained for an appropriate payment. The market would have allowed adjustments. Instead, *Coffin* and the prior appropriation system recognized a property right to the specific quantity of water that had actually been diverted. In any event, the Coffins' use would be limited to what was "reasonable."

The real problem with riparianism was neither its eastern roots nor its inflexibility. In fact, it may have been *too* flexible for the West. It required courts, agencies, or officials to weigh the contentions of every water user who claimed a reasonable use, and these institutions were

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9. *See id.* at 474.

10. *See, e.g.*, Stratton v. Mt. Hermon Boys' Sch., 103 N.E. 87 (Mass. 1913).

11. *Id.* at 89. Modern courts simply consider nonriparian use to be an "important" factor in determining reasonableness. *See* RESTATEMENT (SECOND) OF TORTS § 855 (1979).

12. *See, e.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446-47, 449 ("The doctrine . . . is evoked. . . by the imperative necessity for artificial irrigation of the soil.").

13. *See* Herminghaus v. S. Cal. Edison Co., 252 P. 607 (Cal. 1927).

14. *See* CAL. CONST. art. X, § 2 (formerly art. XIV, § 3).

lacking in the old West. The simplicity and greater certainty of prior appropriation, by contrast, allowed the users to monitor and enforce the law themselves — at first.

To get a water right required only a diversion for a beneficial use; the date of the first diversion determined priority of the right. But prior appropriation soon proved too simple and too inflexible for a changing society. Suppose a city proposed to take water out of the stream but did not divert it for a year because of the time needed to build canals and reservoirs. So long as there was no diversion and water was not put to a beneficial use, other users could come to the same stream and divert water, getting a water right that was prior in time to the city's. To allow time to build diversion facilities, then, courts ruled that the diversion and beneficial requirements — the essentials of the doctrine — need not be satisfied in order to secure a priority date.[15] If there was evidence of intent to divert, and if work on the diversion continued with reasonable diligence culminating in an actual diversion sometime in the future, the priority date would relate back to the first manifestation of intent. Sensible as this new rule may have been, given the realities of water development for a growing economy, it changed the basic nature of the doctrine. And proving the subjective requirements of intent and due diligence demanded the involvement of courts, agencies, and officials.

Prior appropriation by definition protects prior users from the acts of subsequent users. But what if a prior user wanted to change the place where water was taken from the stream and the move made it more difficult for a junior user to use water? Courts in appropriation states have only allowed changes in the point of diversion and changes in the type or timing of use on the condition that they not harm other water users, including juniors.[16] This embellishment of prior appropriation law adds another complication. Engineering evidence of the impacts on junior users resulting from the senior user's change has to be weighed by a court or agency.

The prior appropriation system was created to work out competing uses among private parties with water rights. But the general public was impacted when the first user to get to the water monopolized it for a wasteful project or if there was no water left for future generations, for fish, or for recreation. Consequently, most states adopted constitutional or statutory requirements that water rights would be recognized only if they were consistent with the "public interest" or the "public welfare."[17] Leaving aside criticisms of the spotty effectiveness of such

15. *E.g.*, Sand Point Water & Light Co. v. Panhandle Dev. Co., 83 P. 347 (Idaho 1905).

16. *E.g.*, McDonald & Blackburn v. Bear River & Auburn Water & Mining Co., 13 Cal. 220, 239-40 (1859).

17. *See* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 263-81 (4th ed. 1993).

provisions, they surely introduced subjective factors that required institutions like courts or agencies to exercise discretion, and they fundamentally altered the simple, priority-based doctrine. The courts have upheld extremely broad discretion in water officials under the banner of public interest. So important is the public interest in water that even where laws were silent, the California courts superimposed a "public trust doctrine" requiring the public interest to be considered before rights are allocated.[18]

Part of the mythology of the West is that the prior appropriation doctrine is inexorably linked to the West's aridity. Shurts convincingly rejects this myth (pp. 36-40). As its evolution shows, the essence of water law has been to change rules as necessary to fulfill the social and economic goals of the time. Shurts joins other revisionist historians in attributing the evolution of water law to the perceived "needs of an emerging market capitalist society" (p. 38). This was the conclusion of Morton Horowitz concerning riparian law in his famous *The Transformation of American Law, 1780-1860*,[19] as well as of noted historians of the prior appropriation doctrine like Donald Pisani and Donald Worster (pp. 38-40). Whenever either doctrine, riparian or prior appropriation, had to be altered to fit social and economic needs, courts or legislatures would act.

B. *The* Winters *Doctrine: A Misfit in Contemporary Water Law?*

Establishing that prior appropriation was not the only system that conceivably could have worked in the West does not mean that any other system was politically viable at the time of *Winters*. The doctrine had become the dominant, if not exclusive, method of water allocation in the West. This fact caused most observers to find the Supreme Court's decision in *Winters* surprising. It seemed to fabricate a new system that risked producing results *contrary* to well-accepted ideas of what was progressive and desirable for social and economic welfare of the expanding West. The Court must have understood that on rivers where there were Indian reservations *Winters* could disrupt established economies and retard future growth. And the Court surely knew that removing the requirement of use as the basis of water rights, would undermine prior appropriation as the rule of choice in the West.

Shurts addresses this apparent anomaly by questioning the assumption that prior appropriation was so entrenched in 1908 as to admit no other rule. Distancing himself from Norris Hundley, the emi-

18. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 718-24 (Cal. 1983).

19. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 40-47 (1977).

nent historian whose account of *Winters* has been the standard,[20] he asserts that the government had at its disposal other legal theories that could have justified water claims for the reservation and that some were part of the fabric of western, even Montana, water law. In particular, he argues that the doctrine of riparian rights was still viable and that this fact made it more plausible that a court might depart from prior appropriation. To bolster the plausibility that an alternative theory of water law could succeed, he cites evidence that the Indian reserved rights doctrine actually was compatible with non-Indian goals (pp. 27-34).

Shurts's research does build a strong case that some non-Indians stood to gain when the Fort Belknap Reservation was awarded water rights superior to its upstream neighbors. But I believe that he strives too hard to recast the context framed by Hundley. I remain unconvinced that the survival of vestiges of riparian law made it a viable alternative for the attorney litigating the case or for the Supreme Court. By focusing on the existence of local non-Indian self-interest, the author does help explain how local non-Indians might have supported prosecution of the case and the results of the decision. Yet, the reserved rights doctrine surely threatened more non-Indian water users across the West than it benefited.

In the West, riparian rights have been most important in states along the Pacific coast and those straddling the one-hundredth meridian that generally divides the humid east from the arid lands beyond. Although Shurts and others have successfully debunked any essential connection between climate and doctrine (pp. 38-40) it does not follow that riparian law ever stood a chance of acceptance throughout the West. Riparianism was considered to be starkly inflexible and so it rapidly diminished in importance. Some states initially embraced it, as in Colorado, before roundly discarding it. Others accepted it indirectly, incorporating the common law by reference.

Riparian law had its greatest influence in California. The situation there was skewed because a few politically favored magnates reaped fortunes by abusing the natural flow extremity of riparianism. Henry Miller, the legendary cattle baron, won the "right" to have seasonal flows of the copious San Joaquin River sprawl across his Central Valley hay meadows, unimpeded by the uses of any upstream farmers or ranchers.[21] Yet the state constitution was amended to correct this extravagance and tame the potential of riparian rights by requiring them to be reasonable relative to other water uses.

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20. Norris Hundley, Jr., *The* "Winters" *Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIST. Q. 17 (1982).

21. Lux v. Haggin, 10 P. 674 (Cal. 1886); *see* DONALD J. PISANI, FROM THE FAMILY FARM TO AGRIBUSINESS 191-249 (1984) (discussing *Lux*).

State laws in California and other states continually whittled away at riparian rights. The dominant economic interests in the West were, on balance, better served if those who settled the vast lands in between the West's sparsely located waterways could get water rights rather than if those who happened to take up homesteads or mining claims along the rivers had a monopoly on water. So most states simply replaced riparian rights with prior appropriation. Some states abolished riparian rights except to the extent they were actually used as of some arbitrary date. This wiped out any special value of riparian rights, as distinguished from appropriative rights, by tying them to use. California perpetuated the fiction that riparian owners had inchoate water rights that they could start using at any time in the future. But this was rendered almost meaningless by statutes effectively subordinating unexercised rights to all water uses that existed at the time rights in the river were adjudicated.[22]

Not only was the sun setting on riparianism in the West as a matter of law by the early twentieth century, but politicians and development interests spoke out zealously against it while venerating prior appropriation. Shurts recognizes the western mindset: "[People] whose lives depended in part on the use of water or rights to water use were accustomed to thinking primarily in terms of the prior appropriation system" (p. 65).

Shurts correctly points out that riparian law had been repudiated in Montana when the *Winters* case was filed (p. 43). An 1865 territorial statute replaced it with prior appropriation. Nevertheless, he argues that two rather ambiguous territorial cases showed that riparian law was considered by some judges to have vitality. But then Montana became a state in 1889, and revised its water laws in 1895 in part to clear up any ambiguities that had led judges in such cases to opine that a modified riparian system might exist. Shurts acknowledges that the revision "put an end to arguments against the existence or reach of the prior appropriation system based on uncertainties or ambiguities in prior statutes and court cases" (p. 46).

But Shurts still reads a 1900 case[23] as keeping open the possibility that fragments of riparian rights lurked in Montana. In that case, dicta suggested that if lands unaffected by anyone's appropriations had passed into private hands before the 1895 code the owner might be able to claim riparian rights. I have trouble reading the case as holding out any realistic hope for riparian rights claims. Apparently others saw it this way, too. The Montana Supreme Court said several years later, in a case specifically repudiating a riparian claim, that "since the or-

22.. *See* Rowland v. Ramelli (*In re* Waters of Long Valley Creek Stream Sys.), 599 P.2d 656 (Cal. 1979) (upholding the legislature's grant of authority to the water board to limit riparian claims).

23. Smith v. Dennif, 60 P. 398 (Mont. 1900).

ganization of Montana territory — a period of more than fifty years — no owner, claimant, or occupant of riparian land has ever asserted in the courts the common-law doctrine of riparian rights, as applied to the use of water, until the present action was instituted. . . ."[24]

Shurts seems to conclude that Carl Rasch, the young United States Attorney who litigated *Winters*, did nothing out of the ordinary when he pursued riparian rights for the Fort Belknap Indian Reservation. He says that "any competent attorney for the government would have to have been aware of these legal possibilities" (p. 61). But Rasch must have known it was a longshot when he argued for riparian rights in the trial and appellate courts. He was entirely unsuccessful in these attempts, yet he won when the Court based its decision in favor of the Indians on another theory that was not part of the water law of any jurisdiction — reserved rights.

As applied to water, reserved rights created the same fundamental problem as riparian rights in the context of a prior appropriation system. The prior appropriation doctrine was bedeviled by the characteristic of reserved rights that allowed them to exist without any use of water. This would enable reserved rights holders to start using water years after an appropriator had begun using it, and defeat the appropriator. It is this issue that led to the widespread and bitter reaction against the decision in *Winters*.

As soon as the decision was handed down, the Montana legislature enacted memorials vigorously denouncing it and predicting that it "will seriously and permanently stifle prosperity" (pp. 65-66). And outside Montana there was a chorus of indignant criticism.

Shurts finds evidence that these views were not universal. Some local news accounts treated the outcome in *Winters* as a matter of fact rather than with the outrage and near panic that were expressed by members of Congress and others who viewed it from a national or regional perspective. Non-Indian water users who diverted water below the Fort Belknap Reservation would benefit if the reservation's priority could command the flow of water past the upstream non-Indians. These downstream users were — like most water users — more interested in getting water than in doctrine. Non-Indians in the area also could benefit politically because the greater demand on the Milk River gave weight to their campaign for construction of a federally financed water project. Moreover, it appears from Shurts's account that non-Indians were doing most of the farming on the reservation and would be the primary beneficiaries of the "Indian water" (pp. 78-82).

The presence of local support may help explain why the U.S. Attorney might pursue a controversial case vigorously. But it does not undermine the idea that attorney Rasch acted boldly — whether it was

24. Mettler v. Ames Realty Co., 201 P. 702 (Mont. 1921).

for the sake of the nation's obligations to Indians, or to please his chosen faction of non-Indian irrigators, or some combination of the two. He pursued riparian law after it had been largely rejected in Montana and much of the West and when it was eschewed by the government who employed him. After all, his world consisted of more than a group of settlers in the dust-bitten, chilly frontier towns of northern Montana. Rasch's professional life and his future were tied to pleasing his superiors in Washington. They were, it seems, quite preoccupied with doctrine.

Federal policy, and the federal litigating position in water cases, plainly embraced prior appropriation as the water law doctrine of choice for the West and disfavored riparian law. The reasons for this ranged from a perception that appropriation would advance the crusade for the Reclamation Act program of federally subsidized dam building across the West, to a desire to prevent inconsistency in the government's litigating position at a time when it was trumpeting the prior appropriation doctrine in the United States Supreme Court.[25] The President of the United States had delivered a message in 1901 emphatically stating the national policy of favoring prior appropriation (p. 96). And it was the conventional wisdom that if riparian law persisted, "the development of the entire arid West [would] be materially retarded, if not entirely destroyed" (p. 97; alteration in original).

Shurts illustrates the pervasiveness of such attitudes. He cites the views of a government attorney that "practically all the wealth now existing in the arid region was created by and is dependent upon the doctrine of the appropriation of waters" and that "should the doctrine of riparian law be now established in said arid region, further development would cease, the Reclamation Act would become inoperative, existing wealth would be destroyed and the country [would] practically become depopulated" (pp. 92-93).

As Shurts discovered in his research, Reclamation officials had their sights set on eradicating riparian doctrine and enshrining prior appropriation so that they could make "rights to water wholly dependent on diversion and actual use" (p. 85). When these federal officials learned the true nature of *Winters* after the government had already *won* in the trial court they were "horrified," became "positively hostile, even apoplectic," and "viewed with abhorrence" Rasch's riparian claims (pp. 85-86).

Rasch had not told his superiors that he would be arguing the dreaded riparian theory. He had gotten authority from Washington only to take action "to protect interests of Indians against interference by subsequent appropriators of waters of Milk River" (p. 68). He did

25. This was the position of the United States in *Kansas v. Colorado*, 206 U.S. 46 (1907), and the Department of Justice did not want to risk jeopardizing it by taking an inconsistent position in the *Winters* case. Pp. 89-102.

mention to the local Indian agent that he was arguing riparian law in another Montana Indian water rights case and that he would raise it in *Winters* as well, but said that "the principal proposition in the case is the use that was made of the waters for beneficial purposes upon the reservation," i.e., prior appropriation.[26] No wonder Washington was irate.

Shurts recounts the drama of Rasch's ensuing struggle to get the Justice Department to approve going forward with his theories on appeal to the Ninth Circuit Court of Appeals and the United States Supreme Court. Rasch confessed that he had relied on riparian law, but explained that, having discovered that the reservation actually began using water after the non-Indians, he deemed it the strongest ground in the case (pp. 87-88). Even with the inertia of a government victory in hand, it was difficult to get permission to defend it against the white homesteaders' appeal. Ultimately, the issue was reviewed by President Theodore Roosevelt. When the President solicited his views, the Secretary of the Interior resolved a bitter internal conflict among his own subordinates — Indian affairs officials who favored the appeal and Reclamation interests who opposed it — and concluded that the case was "exceptional" because it was the only way to protect Indian rights. The case went forward and when the Solicitor General took it over in the Supreme Court he continued to argue Rasch's riparian law ground (p. 100).

C. *Sua Sponte: A Trial Court's Invention of Indian Reserved Water Rights*

Curiously, the *Winters* decision from the Supreme Court and, as Shurts illustrates, the decisions in the lower courts, were not grounded in riparian law at all. The decisions were based squarely on a recent Indian law decision, *United States v. Winans*, that upheld the rights of Indians to cross private property to get to their old fishing areas along the Columbia River in Washington, because they had retained off-reservation fishing rights in a treaty.[27] The salient principles of that case were that, in a treaty with Indians, any rights or property not expressly ceded are retained and, where ambiguities exist in treaty interpretation, they are to be resolved in favor of Indians. The trial court and court of appeals stressed that the intention of the government and

26. P. 72. Shurts says that this was "an apparent reference to a *Rio Grande*-reserved treaty rights approach." *Id.* Although in *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690 (1899), the Supreme Court said state water law could not "destroy the right of the United States as owner of lands bordering on a stream to the continued flow — so far, at least, as might be necessary for the beneficial use of the government property," the language Rasch used and the scope of his authority suggests he was referring to a prior appropriation claim.

27. 198 U.S. 371 (1905).

the Indians when they entered into an agreement in 1888 was to settle the Indians on the Fort Belknap Reservation and that irrigation was necessary to accomplish that purpose.[28]

These were not Rasch's ideas. He did plead that allowing upstream use would be "violative of the treaties" but he did not stress *Winans* to the trial court, although it had emanated from the Supreme Court just before he filed the case. Nevertheless, the trial judge made *Winans* the foundation of his decision. Inexplicably, even after inadvertently winning on this theory, Rasch used the decision only cursorily in his brief to the court of appeals. He apparently did not believe in it and chose to continue emphasizing riparian rights (pp. 57-58). He might have muted or confused some of the opposition to his appeal in his battles with Washington had he framed the matter as a peculiar Indian law issue resolvable by reference to the *Winans* reserved rights theory rather than as one that implicated fundamental principles of western water law. Either he never grasped the significance of the reserved rights theory or he did not feel that it would hold up on appeal.

Given the clarity of the Montana trial judge's understanding and articulation of the reserved rights doctrine of Indian water rights, it is difficult not to see U.S. Attorney Rasch as rather hardheaded. He unrelentingly advocated riparian law; never mind that neither of the courts below bought the theory. If we are looking for the champion of Indian reserved water rights it is U.S. District Judge William H. Hunt because it was he who extended the reserved rights doctrine from the treaty fishing rights context of *Winans* to water rights (pp. 72-74). Rasch may have been too close to the matter to see it as anything but a water rights case. The lower courts understood that it was a matter of sustaining the foundations of Indian law, and so did the Supreme Court in an opinion by Justice McKenna, who was also the author of the *Winans* decision a few years before.

II. INDIAN LAW: A TRADITION OF JUDICIAL RESTRAINT

Water law is characterized, first, by judicial announcements of starched doctrines that appear to have Talmudic significance. But if doctrine — whether based on riparian concepts or notions of prior appropriation — fails to protect investments and settled expectations, or impedes social progress, then courts will heap on exceptions and qualifications to fit contemporary utilitarian demands. And if the courts fail to do this, legislatures will step in and modify the system. Water law's mission, then, has been to serve the forces of social change, without substantially interrupting vested interests.

28. Winters v. United States, 143 F. 740, 745-49 (9th Cir. 1906). The trial court's memorandum order is quoted in full in Shurts. Pp. 72-74.

Federal Indian law, by contrast, historically has been marked by judicial decisions resistant to the intrusion of social change into Indian country enclaves, at least until Congress has made clear an intention to alter the situation. Courts have honored two, occasionally conflicting, principles: Indian tribes have a right to maintain the integrity of their lands and autonomous societies; and Congress has almost unbridled power to manage, and change, Indian policy.

So the Supreme Court has made sure that treaties are honored, that states are excluded from imposing their laws in Indian country, and that tribes can pursue self-determination. But whenever Congress, in its presumed wisdom, wants to destroy tribal rights, the Court has deferred. The judicial role in Indian law, then, has been agnostic to pleas of social necessity for change. Neither the Court's perceptions of contemporary conditions, nor non-Indian pleas based on inequity or obsolescence of Indian rights, have prevailed.

A legal realist finds nothing exceptional in judicial adjustments of doctrine that conform it to changing conditions. Water law follows this mode, ballasted by property notions that tend to restrict the ambit of change. It is Indian law that is exceptional, with its often uncontextualized results, its relative timelessness.[29] It seems to me that *Winters* never would have emanated from the Supreme Court if it had been "merely" a water law case. It can be better explained, and understood, as an Indian law case.

A. *The Supreme Court as a Bulwark of Indian Rights*

Indian law historically has been distinguished by jurisprudence that seems to defy contemporary political winds. From the first Supreme Court until the Rehnquist Court, Indian rights have survived all but express congressional abrogation. The Court's landmark cases in Indian law have been bulwarks against the erosion of Indian rights by the forces of non-Indian economic and social interests.

Perhaps sensing that relations between aboriginally sovereign tribes and the United States are essentially a political matter, and that the relationship is constitutionally defined in the Commerce Clause, the Court has been largely unwilling to restrict Indian rights by interpretation. This trait has aroused loud conflicts over the rights of states and the impacts on non-Indians. While the Court has remained impervious to the resulting political pressures, however, it has also unquestioningly deferred to curtailing Indian rights once Congress has spoken.

29. Charles F. Wilkinson, in AMERICAN INDIANS, TIME, AND THE LAW 32 (1987), says, "The modern cases reflect the premise that tribes should be insulated against the passage of time."

In the *Cherokee Cases*,[30] Georgia tried to assert its laws over the territory of the Cherokees within the state.[31] Chief Justice John Marshall's opinion rebuked the State of Georgia for violating the Cherokee Nation's rights of self-government and conflicting with Congress's exclusive authority to regulate such matters.

Andrew Jackson, before running for president, vociferously supported Georgia's claim to sovereignty over Cherokee lands and advocated removal of the Indian tribes from the territory of the states. As President, he was unmoved by the Cherokees' pleas for protection against Georgia's encroachments on their lands and for enforcement of the guarantees of independence anchored in treaties. This touched off one of the nation's earliest and bitterest federalism conflicts.

The Cherokees' first attempt to get judicial relief was dismissed for lack of jurisdiction, but Chief Justice John Marshall's opinion was couched in sympathetic language that characterized the relationship of tribes to the United States as having constitutional dimensions. The Commerce Clause gave Congress power over Indian affairs, and put the federal government in the position of "guardian."[32] In a second case, Marshall found the Georgia laws regulating matters in Indian country "repugnant to the constitution, treaties, and laws of the United States."[33] Georgia effectively was told that its laws were invalid on the Cherokee Reservation, a vast area within its boundaries where gold had been discovered. Instead, supreme federal law secured the Cherokee Nation's power of self-government within its territory.

Georgia refused to obey the mandate of the Court and was supported by President Jackson. Legend holds that it is of this decision Jackson said "John Marshall has made his decision, now let him enforce it."[34]

The *Cherokee Cases* touched off a constitutional crisis. Former President John Quincy Adams declared that "[t]he Union is in the most imminent danger of dissolution.... The ship is about to founder."[35] The nation survived, however, and so did the decision with its sweeping, and persistently unpopular, preemption of state laws and recognition of tribal sovereignty in Indian country. The Cherokees did

30. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

31. On the history surrounding the *Cherokee Cases*, see generally 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE: 1815-35 (1988); and Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

32. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

33. *Worcester*, 31 U.S. (6 Pet.) at 562-63.

34. MARQUIS JAMES, THE LIFE OF ANDREW JACKSON 603 (1938).

35. 4 BEVERIDGE, *supra* note 31, at 544 (second alteration in original).

not fare so well; they were later removed in the Trail of Tears to what is now Oklahoma.[36]

Other Indian law cases have demanded heroic advocacy and judicial resistance to popular will and political trends. For instance, in the late nineteenth century, popular sentiment against tribalism was strong. There was pressure to open up already shrunken reservations to white settlement and the policy of moving tribes out of the way of settlement to their own enclaves and allowing them to manage their own affairs became nearly impossible to maintain.

The government turned its attention to controlling Indian life within the reservations in order to "civilize" the Indians. The goal, which resonated with both the well-intentioned, self-styled friends of the American Indian and those bent on settling the West, became assimilation.[37] Conveniently, this involved opening the reservations to land-hungry non-Indians who would come in to take up lands that were deemed surplus after tribal holdings were parceled out to individual Indians. The non-Indians gained land but would serve as examples of individual enterprise for the Indians. By giving each Indian a piece of what had belonged to the whole tribe, communalism would end and the Indians would be induced to shed their "old and injurious habits . . . [f]requent feasts, community in food, heathen ceremonies, and dances, constant visiting."[38] Traditional religious and cultural practices were reviled and forcibly repressed.[39] "Civilizing" the Indian, it was thought, depended on destruction of Indian culture and reservations. And Indian children were to be civilized by removing them from their families and putting them in boarding schools, where they were forced to give up their dress, language, religious practices, attitudes, and families.[40]

To supplant tribal government and end the influence of traditional leaders, Indian agents were put in charge of law and order on reservations.[41] The agents eventually ran their own police and courts under an

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36. *See* RENNARD STRICKLAND, FIRE AND THE SPIRITS — CHEROKEE LAW FROM CLAN TO COURT 65-67 (1975).

37. *See generally* HENRY E. FRITZ, THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890 (1963); 2 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 609-58 (1984).

38. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 9, at 430 (statement of Delos S. Otis, quoting agent for Yankton Sioux) (internal quotation marks omitted).

39. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 290-94 (1970); JENNINGS C. WISE, THE RED MAN IN THE NEW WORLD DRAMA 289-91 (Vine Deloria, Jr. ed., 1971).

40. *See* PETER FARB, MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE 257-61 (1968).

41. *See generally* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES (1966); Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police*

administratively promulgated federal code. This was part of the scheme to educate and tame Indians for their own good and the safety of their new neighbors.[42] The assimilation policy and the authority of the Indian agents were directly threatened by the continuation of traditional tribal justice.

So the Bureau of Indian Affairs pressed Congress for legislation that would extend federal jurisdiction over reservation crimes. A law was passed allowing prosecution of federal crimes in Indian country, but it excepted crimes involving only Indians.[43] Nevertheless, federal prosecutions in these matters proceeded. In one such case, *Ex Parte Crow Dog*,[44] the Supreme Court dealt a blow to the assimilation policy when it set aside the conviction and death sentence of a Sioux Indian who had murdered another Sioux on the reservation. The murderer had already been sanctioned by the tribal council and tribal peacemakers required payments and restitution to the victim's family. The government argued that a rather ambiguous treaty provision allowed federal prosecution, but the Court said that to depart from the "highest and best" promise of "self-government" in the treaty would require a "clear expression of the intention of Congress."[45] Only after the assimilation policy was embodied in quite specific legislation did the Court uphold its application.[46]

To be sure, the Court's decision in *Crow Dog* ran against popular opinion and federal policy of the time. But it comported with a tradition of tribal independence and of safeguarding the aboriginal autonomy and treaty rights of Indian tribes unless and until Congress plainly abrogated those prerogatives.

Through the years, the Supreme Court has gone against the tide of social change to prevent the deterioration of Indian rights in many other noteworthy cases. In *Winans* it found that a Northwest fishing tribe's retention of fishing rights on lands ceded to the government by treaty implicitly impressed the land with a perpetual easement across the ceded land to get to the river to fish, even after the land was pat-

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Idea in American Policy, *in* AMERICAN INDIANS AND THE LAW 25 (Lawrence Rosen ed., 1976).

42. *See* United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) (describing the courts imposed on reservations as "educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes.").

43. Act of Feb. 18, 1875, ch. 80, 18 stat. 316, 318 (codified as amended at 18 U.S.C. § 1152 (1994)).

44. 109 U.S. 556 (1883).

45. *Id.* at 568, 572.

46. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (sustaining the decision of Congress to allot tribal lands contrary to a treaty promise); United States v. Kagama, 118 U.S. 375 (1886) (upholding the enactment of the Major Crimes Act, now codified at 18 U.S.C. § 1153 (1994)).

ented to non-Indians.[47] At a time when society revered the hard work and grit of settlers, the decision cracked the non-Indians' thriving fishing monopoly on the river and gave tribal members an opportunity to use an old treaty promise as a means of economic and cultural survival.

Even where Congress has spoken and instituted policies curbing Indian rights, the Court has been conservative in construing the impact on tribal rights. In the 1960s, at the height of an eventually abandoned "termination" policy under which Congress had ordered several reservations dismantled and tribes disbanded, the Supreme Court surprisingly held that a terminated tribe retained its fishing rights.[48] The Court cited venerable authority that held that " 'the intention to abrogate or modify a treaty right is not to be lightly imputed to the Congress.' "[49]

Just as the Court has upheld the extensive power of Congress to take away tribal rights and powers, it has also sustained exercises of power that single out Indians for special benefits. In *Morton v. Mancari*,[50] the Court upheld an act of Congress giving an employment preference to Indians in the Indian service. It rejected non-Indian objections based on the Equal Employment Opportunity Act of 1972.[51] It said that the law made a political distinction and therefore did not result in racial discrimination because the Constitution specifically empowered Congress to deal with tribes as governments. It would have been easy in the 1970s to construe the civil rights laws as ultimately working more to the benefit of Indians than laws that perpetuated their special legal treatment. But the Court adhered to the judicial traditions of Indian law.

Through the 1970s and 1980s, an unprecedented number of Indian cases came before the Supreme Court. As growing non-Indian communities and economies closed in on Indian country, states tried to impose taxes and regulations on reservation activities. Tribes, too, exerted more of their governmental powers. Jurisdictional conflicts led to judicial challenges. The "modern era," as it was called by Charles Wilkinson, was marked by dozens of cases in which the Supreme Court vindicated tribal claims of immunity from state law, exempted non-Indians from taxes and regulatory laws on reservations if they would in any way interfere with federal purposes, and validated tribal authority to govern even non-Indians in Indian country.[52] Thus, tribes

47. *See* United States v. Winans, 198 U.S. 371 (1905).

48. Menominee Tribe v. United States, 391 U.S. 404 (1968).

49. *Id.* at 413 (quoting Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934)).

50. 417 U.S. 535 (1974).

51. Title VII, 42 U.S.C. § 2000e-2(a) (1994).

52. *See* WILKINSON, *supra* note 29, at 1-2.

were able to collect taxes from non-Indian energy companies producing oil and gas on reservations,[53] and non-Indian contractors were held exempt from state taxes when building a school on a reservation.[54] Indian treaties were also interpreted to allow large shares of commercial fisheries to be harvested by Indians in the Northwest to the detriment of established non-Indian fishers.[55]

All of these cases were contentious and implicated the sovereignty of states. Many of them resulted in serious economic impacts for the states and for non-Indian businesses. It is fair to surmise that there would have been no political outcry if the Indians had lost in these cases. There *was* an outcry when they won.

The significance of having a judiciary able to insulate tribes from the mood swings of politics and social attitudes has been brought home by the sharp change in the Supreme Court's approach to Indian cases since the mid-1980s. By getting actively involved in the cases and trying to do what is best for mainstream society, rather than continuing the tradition of upholding Indian rights and sovereignty unless Congress has clearly divested the tribes of them, the Rehnquist Court has begun to erode the foundations of Indian law.[56] The contrast with the prior century and one-half of Indian law is striking. It may be too early, however, to conclude that the Court's departures of the last fifteen or so years have permanently changed the course of Indian law. In any event, seeing the Supreme Court as an institution willing to elevate Indian cases above the broader social and economic context accurately portrays the legal milieu of *Winters*.

B. Winters: *In the Indian Law Tradition*

United States v. Winters is one of the bulwark cases of Indian law. It preserves tribal water rights that were not expressly ceded by the Indians or extinguished by the government. It applies ancient canons of construction that favor interpretations resolving ambiguities "from the standpoint of the Indians."[57] The agreement between the tribes of the Fort Belknap Reservation and the government was silent as to water rights. So the Indians' right to sufficient water to fulfill the intent of their agreement survived the cession of land.

The Supreme Court opinion was written by a westerner who understood the profound impact the decision would have on settlers who

53. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

54. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982).

55. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

56. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

57. 207 U.S. 564, 576 (1908).

had homesteaded former Indian lands.[58] He knew that the water rights perfected by the settlers under state law were already being used by them. He knew how disruptive it would be if the settlers' water rights were subordinated to future rights reserved for irrigating Indian reservations. He understood the equities. The non-Indian settlers had been drawn West by the promise of homesteads where they could farm and prosper, and their livelihoods and investments were at stake. Everyone knew that successful farming would take irrigation and the settlers had been told that they only needed to claim water rights for their homesteads under state law.

The government had created an impossible situation where its implied representations to the settlers could not be fulfilled if the intent of the agreement with the Indians was satisfied. Justice McKenna wrote: "We realize that there is a conflict of implications, but that which makes for the retention of the waters [by the Indians] is of greater force than that which makes for their cession."[59]

The Indian law principles used by McKenna to reach his decision were not revolutionary. Although *Winters* was the first case to apply these principles to water rights, they can be traced to some of the oldest cases in Indian law.[60] The concept that Indian rights predated the United States and that the United States is obliged to protect them against encroachment by those asserting state law, and the rule that these rights must be explicitly extinguished by the Congress, trace to the *Cherokee Cases*.[61] So does the instruction to read provisions in Indian treaties favorably to the Indians,[62] which had been reiterated by the Court in other cases by the time of *Winters*.[63]

Yet, there is no doubt that *Winters* stunned McKenna's fellow westerners. Shurts sees the opinion as "unremarkable" in the sense that the theories had been vented in the lower courts and were merely applications of McKenna's decision in *Winans* (p. 144). But observers found plenty about which to remark. Shurts says that after the court of appeals decision there were "stories and editorials of criticism and outrage" in nearby towns, although some newspapers treated it with a more neutral tone (pp. 104-05). If the reaction of communities along the Milk River was mixed, criticism across the West was generally vehement. For instance, a Wyoming Congressman called the decision

58. Shurts reports that Justice McKenna was solidly connected to the establishment of western economic interests and political influence. P. 163.

59. 207 U.S. at 576.

60. *See* Richard B. Collins, *The Future Course of the* Winters *Doctrine*, 56 U. COLO. L. REV. 481, 482-83 (1985).

61. Worcester v Georgia, 31 U.S. (6 Pet.) 515, 544-49, 551-54, 562 (1832).

62. *See id.* at 551-54; *id.* at 582 (McLean, J., concurring in the judgment).

63. *E.g.*, Jones v. Meehan, 175 U.S. 1, 11 (1899).

"monstrous," because it "may stay development until the crack of doom because there is somebody too indolent or too indifferent to develop or allow development" (p. 66). To this day, the legal literature seethes with commentary on the decision and its consequences.[64]

I cannot agree with Shurts's conclusion that "*Winters* fit right in" because at the time there was a "diversity of viewpoints" on water (pp. 163-64). First, I have questioned in the preceding section whether, by the time of *Winters*, the existence of a few vestiges of riparian law left open a viable debate over whether prior appropriation would predominate. Second, the decision was treated like a bombshell that did not fit in at all with the water rights trends of western water law. If *Winters* "fits" anywhere, it is within Indian law's historical tradition of sustaining tribal rights whether or not broader policy interests are served.

III. RESERVED RIGHTS IN PRACTICE

For all the fears it has evoked, and its purported potency, one would think that in ninety years *Winters* would have produced tangible results. Indian reservations would have blossomed and their economic advantages over neighboring non-Indian communities would be apparent. The opposite is true. At least for the past few decades, reserved rights claims have become a central, and complicating, factor in adjudications of water rights, yet the consequences in terms of Indian benefits or disruptions of non-Indian uses are sparse. This is partly owing to the paucity of capital for tribes to invest in the infrastructure to develop and use water. It is also because only a few dozen tribes have been able to achieve adjudications to make their reserved rights enforceable. The blame has generally been placed at the feet of the federal government for failing to assert reserved rights until recently. That failure, in turn, has allegedly lulled non-Indians into a false sense of security that would be unfairly disrupted by latter-day assertions of reserved rights.

Shurts's research belies claims that the sudden invocation of reserved water rights in the late twentieth century constitutes an unfair attempt to disinter an arcane and unripe principle. This answers arguments that, if the doctrine is to be applied at all, it should be modified to avoid disruption of non-Indian uses. Now, I never could subscribe to the unfair surprise ground for objecting to reserved rights claims. Since 1908, no one could read *Winters* and miss the fundamental point: all water rights on streams near Indian reservations are potentially subject to superior Indian claims. Whether or not the government actively pursued Indian water rights on reservations around the West af-

64. I have found at least forty-five law review articles focusing primarily on aspects of the reserved water rights doctrine that have been published in the last twenty years.

ter it won *Winters* should not matter. It is the job of investors and lawyers to inquire into the nature and security of property rights and to take account of the risks. A long delay in enforcement while tribes suffered an incapacity to develop their water rights should not evoke too much sympathy — especially for non-Indians who were beneficiaries of federally subsidized water development on many of the same streams where Indian claims lie.[65]

Whatever the merits of the argument might be, Shurts attempts to show that the government was, indeed, actively involved in advancing reserved water rights claims in the several years following the decision. He acknowledges that the government did not press reserved rights in water litigation in the first years following the decision and thus the doctrine "remained a misunderstood novelty" (p. 185). Shurts argues, however, that the doctrine was not entirely moribund. He cites a failed attempt by an Indian affairs official to get legislative recognition of reserved rights, a flurry of rhetoric in Congress on the same subject, matched by opposing rhetoric glorifying prior appropriation law, various examples of congressional and Indian agency awareness of the need to litigate Indian water claims, and discussions of extending reserved rights claims beyond Indian reservations to federal lands (pp. 184-222). This proves that members of Congress and Indian affairs officials were aware of the reserved rights doctrine and that eventually some water rights claims were, indeed, pursued.

Shurts concludes that the government did use the doctrine, "often, and to some effect" (p. 252). He illustrates with a case study of the government's litigation of claims for the Uintah Reservation of the Northern Utes in Utah. This case study is meant to exemplify that "contrary to conventional understanding of what happened to *Winters* in the first decades after the original decision, in this instance [federal] officials aggressively pursued a *Winters* claim" (p. 246). The Ute case shows, instead, how unaggressive the United States was, notwithstanding its potent victory in *Winters*. The story reveals that the government selectively advocated reserved rights to advance the welfare of non-Indians.

After agonizing over whether to assert rights for the reservation at all, the government attorney decided not to insist on all of the reservation's legal entitlement (p. 230). He felt that it would "not be just" to the settlers because they had come there "practically under an invitation from the Government" (p. 238). Of course, this was exactly the situation of the upstream settlers who lost out in *Winters*. Moreover, it appears that the reserved rights claims for the Uintah Reservation were made primarily for the benefit of non-Indians who had leased

65. *See* UNITED STATES NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE — FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 474-75 (1973).

most of the irrigated land on the reservation (pp. 233-34, 239). The government invoked the doctrine to give the non-Indians who occupied Indian lands the advantage of an earlier priority under the umbrella of Indians' reserved rights so they could use water to the detriment of other non-Indian farmers off the reservation whose water rights depended on state law.

The most shocking story of all in the aftermath of *Winters* seems to have occurred back on the Fort Belknap Reservation itself. Shurts explains that after the court entered a final decree giving the reservation 5000 inches of water (almost all the average flow during the irrigation season) the upstream non-Indian irrigators refused to obey the decree and took all or most of the water out upstream. Federal officials quickly compromised and settled for 2500 inches — half the amount of water the reservation was entitled to receive (pp. 107-08). It was a dry year and so perhaps the officials felt obliged to compromise. But there are enough other facts that, when pieced together, arouse concern about the good faith of the federal officials with respect to the Indians who should have benefited from their ostensible water-rights victory.

Shurts could find little evidence of an Indian stake or involvement in the litigation. He tells us that non-Indians farmed about half of the irrigated lands at Fort Belknap at the time. Indeed, the superintendent himself grazed cattle on the reservation. Most of the farmers were there under leases arranged by the reservation superintendent, and some were there because they had married Indian women. Indians objected to the superintendent's leasing program for the reservation (pp. 27-33).

While Shurts disputes the basis of another commentator's conclusion that the *Winters* litigation was motivated by a desire specifically to benefit the downstream and on-reservation non-Indians, he agrees that the outcome favored non-Indians. We know, too, from his research that some years after the decision an inspector reported that Indians had heard of the decision but had not seen its fruits. One Indian said: "This year all these ditches are dry, and we will not raise anything, and I think we will starve off this winter" (p. 187).

A project ripe for Shurts or another historian is an exploration of what went wrong after *Winters*. If Indians did not benefit, why? Who did benefit? Did officials at Fort Belknap continue to settle for half of the tribe's entitlement after the drought year? Did they settle for half because that was enough for the half of the reservation land that was then being cultivated by non-Indians? Did the flaccid federal support for Indian irrigation have anything to do with the fact that Congress was considering, at the behest of non-Indian neighbors, legislation to open up the irrigable lands of the reservation for non-Indian settlement and ownership?

The most vexing question of all is why, eighty years after they theoretically won the best water rights in the West, most tribes are on

Indian reservations that are parched and undeveloped? In the 1970s, the National Water Commission concluded that: "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights . . . is one of the sorrier chapters."[66] The Commission put much of the blame on the fact that the United States was focused on developing the very same waters that could be claimed by Indians to be used instead in big water projects for the benefit of non-Indians. The political dynamics that contributed to the failure to develop Indian water rights are thoroughly examined by Daniel McCool.[67] The problem has even darker causes; it is well documented that the United States has actually compromised its legal advocacy of tribal water rights when faced with conflicts of interest.[68] Whatever the causes, the reality is that a tiny percentage of irrigable acreage on reservations is actually irrigated — only seven percent as of 1984.[69] This includes acreage served by the meager irrigation systems that have been built on reservations, but even these are in such disrepair that they approach uselessness.[70]

Most observers would have to agree that in the last two decades of the twentieth century, Indian reserved rights were more frequently and vigorously applied than at any other time. One major case went to judgment in the Wyoming Supreme Court, which awarded a large share of the water from the Big Horn River to the Wind River Indian Reservation.[71] The decision was affirmed by the Supreme Court but nearly was reversed because the Justices were worried that the judgment portended dislocations for non-Indian irrigators. An opinion demanding "sensitivity" to the impact on non-Indian appropriators in the application of reserved rights was almost issued.[72] Today, there are some sixty Indian water-rights cases pending in courts around the West. Potentially at stake are claims to water totaling more than four times the annual flow of the Colorado River.[73]

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66. *Id.* at 475.

67. DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER (1987).

68. *See* SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 91ST CONG., A STUDY OF THE ADMINISTRATIVE CONFLICTS OF INTEREST IN THE PROTECTION OF INDIAN NATURAL RESOURCES 5-19 (Comm. Print 1971) (written by Reid Peyton Chambers).

69. MCCOOL, *supra* note 67, at 159

70. WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 3-48 (1998).

71. *In re* Gen. Adjudication of all Rights to Use Water in the Big Horn Sys., 753 P.2d 76, *aff'd mem. by an equally divided Court sub. nom.* Wyoming v. United States, 492 U.S. 406 (1989).

72.. *See* Getches, *supra* note 56, at 1640-41.

73. WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, *supra* note 70, at 2-28 (stating that claims could affect 60 million acre-feet of water).

But the saga of the *Big Horn* decision seems to have moved many Indian water rights cases out of the courts. Daunted by what the case shows about the potentially huge quantity of a tribe's reserved right, non-Indians may be more cautious about resolving these matters in the courts. The tribes, now aware that the Supreme Court came close to diluting the doctrine substantially, have been open to non-judicial resolutions as well. Lloyd Burton has studied many of these efforts in detail and analyzed their relationship to the law.[74]

Since the 1980s, more than a dozen settlements effecting major quantifications of Indian water rights have been reached by negotiation and typically followed by implementing federal legislation.[75] Each settlement is different and attuned to the local situation. Yet the most common feature of the settlement packages is a federal subsidy for development of water facilities or purchase of water rights so that non-Indians can continue using water unmolested by the development of Indian water rights. Generally, the settlements have "enlarged the pie," so that non-Indians gain in the process. It is fair to say that if a tribe wants to quantify, use, and enforce its water rights it must find a way to collaborate with non-Indian neighbors and make them whole, or even better off.

The most recent chapter in the *Winters* story mimics the first. Many reservations languish without water that could nourish their economic security and improve their lifestyle. Federal assistance to the tribes has been inadequate. In its 1998 Report, the Western Water Policy Review Advisory Commission described the continuing failure to resolve reserved rights claims as creating "an inequitable situation for Indians and considerable uncertainty among all other water users."[76] The commission called for the government "to fulfill its trust responsibilities to Indian nations and tribes to secure and protect tribal water rights and to assist the nations and tribes in putting those rights to use."[77] The fruition of the tribes' paper legal rights depends, as it always has, on federal assistance, which is not likely to be forthcoming unless it will result in tangible benefits to non-Indians.

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74. LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW (1991).

75. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 844-852 (4th ed. 1998); David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Policy Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 52 & nn.240-43 (2001).

76. WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, *supra* note 70, at 2-28.

77. *Id.* at xix.

CONCLUSION

John Shurts has advanced our understanding of the reserved rights doctrine by illuminating the milieu of its formulation and early days. He adds several new perspectives. By explaining that the prior appropriation doctrine was not the only brand of water law that could fit the West's conditions or, indeed, that had been considered, he deflates a popular western myth. Although other writers have mustered a wealth of contemporary criticisms of the *Winters* decision to show how eccentric it was, Shurts's research reveals that it was not, in fact, uniformly disdained in Montana in 1908; the most outraged observers were politicians from outside the state. A final project of Shurts's important study was to show how *Winters* was applied in the few decades after the Supreme Court decision.

Shurts is surely correct that the West's aridity did not make inevitable the universal adoption of prior appropriation. But that adoption was nearly complete in Montana, and I continue to be among the unreconstructed types who believe that by 1908, departures from the prior appropriation doctrine were truly aberrational in western water law. Yet I do think *Winters* logically followed the traditions and precedents of Indian law. My view of the government's deportment once the Court armed it with reserved water rights is more cynical than Shurts's; I am moved less by the fact that it was invoked at all and more by the way it was used primarily to benefit non-Indians.

Although some of my conclusions from the penetrating research presented by the book differ from the author's, I nevertheless find it to be a rich and well-presented source. The research provides an impressive and sound basis for drawing one's own conclusions.

Important lessons flow from learning about the local social and economic context. One is that *Winters* might not have been advanced by the federal officials and attorney but for the potential alignment of Indian and non-Indian self-interest. Another is that once federal litigation on behalf of Indians is unleashed, its unpopularity or potential for disrupting larger regional or national policies of social and economic importance may not hold it back. Federal litigators and, most significantly, the United States Supreme Court have often resisted political winds to hold the line on depreciation of Indian rights absent clear congressional instructions otherwise. This phenomenon and the legal principles invoked by the Court make *Winters* a coherent part of Indian law jurisprudence, if a water law aberration.

Another lesson from this new history is that, having won the case, the government applied it selectively where and when it would pro-

duce substantial benefits for non-Indians. That history seems to be repeating itself in the way the doctrine is applied today. This lesson is at once troubling in its crassness and instructive to Indian law tacticians who are seeking ways to give value to the tribes' potentially vast water rights estate.

TAKING AIM AT AN AMERICAN MYTH

*Paul Finkelman**

ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE. By *Michael A. Bellesiles.* New York: Alfred A. Knopf. 2000. Pp. 16, 603. Cloth, $30; paper, $16.

Every American had a musket hanging over his fireplace at night, and by his side during the day. Like Cincinnatus, time and again Americans dropped their plows to shoulder their arms, to fight the Indians, the French, the Indians, the British, the Indians, the Mexicans, the Indians yet again, and then, from 1861 to 1865, each other. American men were comfortable with guns; they needed them and wanted them. They felt at home in woods, in search of food, or in defense of their homesteads.

It is a story as old as our first pulp novels and earliest movies. It is larger than John Wayne and as real to us as Ronald Reagan narrating *Death Valley Days.* And, as Michael Bellesiles[1] persuasively demonstrates, it is largely untrue.

In *Arming America,* Michael Bellesiles challenges — indeed, demolishes — the pervasive notion that America was always a nation of gun owners, gun users, and most importantly, gun lovers. While vulnerable to some criticism,[2] this is one of the most important books in American history of the last decade. It has gathered great praise and at least one major award, the Bancroft Prize for the best book in American history. Bellesiles offers a full scale, and for the most part successful, attack on one of the most persistent myths of American culture: that throughout our early history Americans were a gun-toting people, skilled at shooting and hunting, often violent, using their guns to defend their honor or just to settle an argument, and

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1. Professor of History, Emory University; Director, Emory Center for the Study of Violence.

2. Most importantly, Professor James Lindgren of Northwestern University has challenged Bellesiles's use and analysis of probate records. *See* James Lindgren & Justin Lee Heather, *Counting Guns in Early America* (2001) (unpublished manuscript on file with author). It is also quite likely that some of Bellesiles's other counts may not hold up. For example, he notes studies of newspapers for states or cities in which no gunsmiths advertised. Pp. 228-29. It is possible that a study of other papers from the same city or state will find a gunsmith here or there, but such minor details will not alter the general picture Bellesiles has painted.

ready at a moment's notice to grab musket and powder horn to defend their homes and homeland.

The story Bellesiles tells is different, persuasive, and, most of all, logical. Bellesiles makes many contributions to our understanding of guns in early America, many of which run counter to our myths but logically dovetail with what else we know about society. For example, Bellesiles demonstrates that:

1) Guns, at least until the mid-nineteenth century, were expensive, costing the equivalent of two months' wages (p. 106). Before the 1750s, few outside of the upper class could afford them. From the first settlement until the eve of the Civil War, guns were scarce and largely unavailable. Indeed, there was a persistent shortage of guns, even for military purposes, from the earliest English settlements until the middle of the Civil War.

2) Hunting was a time consuming, inefficient way of finding food or making a living. While some men on the frontier hunted for a living, they were rare and relatively unsuccessful. Most Americans on the frontier were farmers, raising corn, hogs, and cattle. As scholars of the European invasion of the Americas have long known, domesticated animals and the ability to grow crops, especially wheat, were keys to the success of Europeans on the frontier.[3] Thus, as Bellesiles notes:

> If a settler wanted meat, he did not pull his trusty and rusty musket, inaccurate beyond twenty yards, off the hook above the door and spend the day cleaning and preparing it.... To head off into the woods for two days in order to drag the carcass of a deer back to his family — assuming he was lucky enough to find one, not to mention to kill it — would have struck any American of the Colonial period as supreme lunacy. Far easier to sharpen the ax and chop off the head of a chicken or, as they all did in regular communal get-togethers, slaughter one of their enormous hogs, salting down the meat to last months. [p. 103]

Even on the overland trail, hunting was time consuming and potentially dangerous. People who spent time hunting might not make it across the great plains in time to miss winter (pp. 341-42).

3) Americans had notoriously poor skills with weapons, and most did not know how to handle guns. Guns were complicated and difficult to maintain. Many fell into disrepair, became rusty, and were mostly useless. Almost every account of military recruiting and militia musters — from the earliest colonial records through the beginning of the Civil War — describes vast numbers of American men who never held a gun, had no idea how to shoot one, and most importantly, had no interest in learning.

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3. *See, e.g.*, AL CROSBY, GERMS, SEEDS AND ANIMALS: STUDIES IN ECOLOGICAL HISTORY (1994); AL CROSBY, THE COLUMBIAN EXCHANGE: BIOLOGICAL AND CULTURAL CONSEQUENCES OF 1492 (1977).

4) The American militia was almost universally incompetent, and with a few notable exceptions, in all of America's wars the militia was rarely successful in battle. During the colonial wars, the Revolution, and the Civil War, Americans had to be trained not only to march and dig fortifications, but also to load and fire guns. Contrary to our popular myths, the American Revolution was not won by the militias, although clearly in a few important battles the militias were heroic, competent, and successful. Rather, the war was won by the national army, trained for the most part by professional soldiers from Europe, like Baron von Steuben, Tadeusz Koscuiszko, and the Marquis de Lafayette.[4]

5) Before the Civil War, guns were extremely complicated tools, requiring practice and skill to load and fire. A small miscalculation in the amount of powder placed in a gun could turn it into a harmless noisemaker or, just as easily, into a dangerous exploding device more likely to injure the one holding the gun than anyone else.

6) Bellesiles demonstrates that gun ownership did not become common until after the Civil War. The reason is largely economic and technological. During the war the United States rapidly and successfully expanded its production of weapons, developing new manufacturing technologies and new kinds of weapons. The end of the war left the nation with a surplus of guns and, just as significantly, a number of companies that faced bankruptcy if they did not find a new market for their product. Thus, advertising, entrepreneurship, and economies of scale led to the arming of America after the Civil War (p. 431). Tied to this development was the existence of millions of veterans now skilled in the use of guns, and thus able safely to handle them (pp. 428-29).

These are just some of the basics Bellesiles teaches as he forces us to unlearn our myth and to relearn American history.

For legal scholars, Bellesiles teaches a vital story that helps explain both our modern gun culture and the origin of the Second Amendment. The story shows that the personal ownership of weapons was not a central aspect of early American society and that, for the most part, guns were regulated. In addition, Bellesiles shows that while the militias of early America were for the most part underarmed, undertrained, and relatively incompetent, the image of the militia was a central myth in the development of the nation. At the end of the Revolution, Americans knew that "Republican ideology had not won the Revolution. The militia, Jefferson's repository of courage and virtue had not come through in times of ultimate crisis; the Continental army, the professional soldiers, had" (p. 207). But Americans desper-

4. Thus, at Valley Forge, Washington worked with von Steuben to train the American soldiers to be more like European professionals, and to drill them so they would look less and less like militiamen. JOHN SHY, A PEOPLE NUMEROUS AND ARMED: REFLECTIONS ON THE MILITARY STRUGGLE FOR AMERICAN INDEPENDENCE 155 (1976).

ately wanted to believe in the myth of the citizen-soldier. Thus, they enshrined the myth of the militia into their ideology. As historian Charles Royster notes, "Americans reclaimed the war from the army to whom they had tried to entrust it" and thus "[t]he future security of American independence would rest not on a military establishment but on public virtue. To believe that public virtue had the strength to sustain independence, Americans wanted to believe that public virtue had won it."[5]

Thus, after the Revolution, America wanted to assign the national defense to the militia. This was necessary because Americans had invested so much of their ideological energy in attacking the very idea of a standing army or a professional army that it was antithetical to the Revolution now to admit that Independence had been won by professional soldiers. But of course, many Americans who lived through the war, including such delegates to the Constitutional Convention as George Washington, James Madison, Alexander Hamilton, and General Charles Cotesworth, Pinckney knew better. They knew that a well-armed standing army, not an incompetent and underarmed militia, was necessary to the security of a free state. In framing the Constitution they provided for the development of such an army. The military provisions of Article I of the U.S. Constitution bear this out.[6] To satisfy the mythmakers and the need for the myth, however, the First Congress agreed to enshrine the militia, promising not to disarm it, as long as it was "well regulated" and under the authority of national government, as set out in Article I, Section 8 of the Constitution. In fact, as Bellesiles shows, the Second Amendment's promise not to disarm the well-regulated militias was meaningless, because for the most part the militias had no arms to begin with. As Bellesiles demonstrates, the people, both collectively and as individuals, were basically unarmed at the time the Bill of Rights was written.

I. HOW BELLESILES CLARIFIES WHAT WE ALREADY KNEW

One of the central contributions of this book is that it helps make sense of American history and, by extension, American constitutional law. Since almost all scholars have labored under the myths about guns and the militia, there has always been a disconnect between what we knew about history and what we "knew" about guns and the militia.[7] A few examples of what almost all educated Americans "know"

5. P. 207 (quoting CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775-1783, at 351 (1979)).

6. *See generally* Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000).

7. Pp. 10-12 (citing WESLEY FRANK CRAVEN, THE COLONIES IN TRANSITION, 1660-1713, at 30-31 (1968); WILLIAM C. DAVIS, A WAY THROUGH THE WILDERNESS: THE NATCHEZ TRACE AND THE CIVILIZATION OF THE SOUTHERN FRONTIER (1995); JOHN M.

about our history underscore how Bellesiles's findings help us make sense of things. Essentially, by demythologizing our understanding of arms, gun ownership, and the militia, Bellesiles allows for a more coherent understanding of our past.

A. *Myth and Reality: Gun-Toting Americans and the Revolution*

We "know" that all Americans had guns at the beginning of the Revolution. They are over the fireplace in every colonial house that we have seen in the movies and on television.[8] But we also know from historical research that at the beginning of the war Americans were desperate for guns.

Consider one of the early victories of the war, which demonstrated both the scarcity of guns among the revolutionaries and the importance to the Continental Army commanders of obtaining guns. On May 10, 1775, less than a month after the war began, Ethan Allen and his Green Mountain Boys seized Fort Ticonderoga and its arsenal. This was a rare victory for civilians acting as soldiers during the Revolution. These were not even trained militia men, but rather, a collection of local frontiersmen who swarmed into the Fort. Significantly, this victory was not won by guns, in part because only twenty of the eighty-five men with Allen even owned a musket. Allen and his men seized the fort by surprise, not firepower. His men rushed the fort, "seized the neatly stacked muskets of the [British] regulars, and demanded the surrender of the shocked and confused commander," who if fact did not even know that "there was a war on" (p. 184). The Green Mountain Boys were now armed. As Bellesiles notes, others in the colonies soon followed "Allen's example, seizing whatever British arms and ammunition they could" (p. 185).

Similarly, when we think about Lexington and Concord, we imagine the Massachusetts farmers (who were probably the best armed in America) (pp. 150, 181) rushing out of their homes with muskets in hand. But the very reason the British were marching to Concord in the first place was to seize the militia's guns, powder, and shot stored in the local armory. In other words, the main cache of weapons was not

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DEDERER, WAR IN AMERICA TO 1775: BEFORE YANKEE DOODLE 116, 251 (1990); LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 108 (1995); WARREN MOORE, WEAPONS OF THE AMERICAN REVOLUTION, at vi (1967); JAMES B. WHISKER, THE AMERICAN COLONIAL MILITIA 87, 171 (1997); JAMES B. WHISKER, THE GUNSMITH'S TRADE 71, 91 (1992); HAROLD F. WILLIAMSON, WINCHESTER, THE GUN THAT WON THE WEST 5 (1952); Jenkins, *Old Reliable*, AM. RIFLEMAN, Dec. 1931; Harold R. Peterson, *The Military Equipment of the Plymouth and Bay Colonies, 1620-1697*, NEW ENG. Q., 1947, at 197).

8. It is hard to fathom why these guns are invariably over the fireplace, unless they were always unloaded and the powder horns hanging with them were empty. It certainly makes no sense to store a weapon or powder near a fire, which might heat the powder to the point of combustion, or send a spark that would cause the gun to fire or the powder horn to explode.

in the farmhouses, but in the central storage house of the local militia. Many of the farmers that day were armed with edged weapons, particularly axes and hatchets (p. 174).

Similarly, throughout the Revolution the Americans faced constant shortages of guns, powder, and bullets. Captured British weapons kept the Revolution going until an infusion of French and Dutch weapons, first sold and then given to the Americans, armed the Continental line.

B. *Myth and Reality: The Militia and the American Revolution*

The myth of the militia was that the armed citizens rushed to the defense of their lands and families to fight for the patriot cause in the Revolution. The hardy farmers and frontiersmen were crack shots, ready to shoot the eyes out of the British. We "know" this was true because we read it over and over again. Thus, as one historian writing about Lexington and Concord noted, "[e]very narrative of the fighting speaks of the superior shooting of the provincials, with the easy assumption that as a body they were marksmen" (p. 174). Moreover, as Bellesiles shows, before the American Revolution many patriot leaders bragged about the martial skills of Americans. Richard Henry Lee claimed that the farmers of western Virginia "could hit an orange at two hundred yards" and that "[e]very shot is Fatal" (p. 178). Even James Madison bought into this propaganda effort, asserting that "[t]he strength of this Colony" was "chiefly in the rifle-men of the Upland Counties" who could hit "a man's face at the distance of 100 Yards" (p. 178). In fact, neither Madison nor Lee had spent much time with these western marksmen. Had either man visited the frontier he would have learned that such men did not exist, and that many of the western men were actually unarmed. A more accurate appraisal of the situation is made clear by the petition Madison and other members of Virginia's council received from westerners pleading for aid for their "raw Militia," which was "ill armed, half Clad, ignorant of Discipline, & of every thing requisite" to the military tasks assigned to them (pp. 178-79).

Bellesiles argues that before, during, and after the Revolution, Americans had a need to believe in the strength of the militia. It dovetailed with Republican ideology and with the common hostility to a standing army. Illustrative of this ideology was the argument of the anti-Federalist John DeWitt, that "a militia and a standing body of troops never yet flourished in the same soil," and that "Tyrants have uniformly depended upon the latter, at the expence of the former."[9] Similar statements can be found from most of the Founders, although

9. John DeWitt, *V: To the Free Citizens of the Commonwealth of Massachusetts* (1787), *in* 4 THE COMPLETE ANTI-FEDERALIST 37 (Herbert Storing ed., 1981).

significantly not from those, like Washington, who had actually seen the militia in action and realized how ineffective it was in either winning independence or defending the nation. Americans *wanted* to believe that the militia had won the Revolution and could win other wars. The history we know, and the history Bellesiles now clarifies, shows how wrong this was.

Consider what we know about the battle of Bunker Hill, which is usually remembered as an American victory (even though it was not). In that battle the British suffered about a thousand casualties[10] before the Americans fled from the field because their ammunition ran out. We "know" that the Americans were so successful at Bunker Hill because they were such great shots. But we also remember the command of the day: "Don't shoot until you see the whites of their eyes."

Why did they hold their fire until the British were about to overrun them? In part because they were lousy shots! Americans could hit neither an orange at 200 yards nor the face of an enemy at 100 yards. In fact, they could only hit the enemy if he was so close they could see his "the whites of his eyes." Only at point-blank range could these militiamen hit a Redcoat, despite the brilliant target his uniform made.

Even if they had been better shots, however, it would have mattered little, because the Americans were so short of ammunition. This shortage of ammunition and guns helps explain why Americans were such terrible shots. Marksmanship requires practice and more practice. "In shooting, as in other sports and most other activities, practice wins out over an imagined innate genius every time. Contrary to one of the most cherished fictions of American culture, simply living on the frontier did not make one an excellent shot" (p. 260). Such practice required an abundance of guns, powder, and shot, which Americans did not have during the colonial period. Because the Americans had a shortage of shot and powder, they could not afford to fire volley after volley as the British charged up the hill (p. 180).

The battle at Lexington and Concord also illustrates the deficiencies of American martial skill and the paucity of American gun ownership. It is true that at the Lexington Green the militia turned out, and while chased from the field of battle, these farmers and tradesmen harassed the British from behind trees and stone walls, sending the Redcoats fleeing back to Boston. The myth tells us that these American marksmen, skilled at shooting deer, now did the same to the hated British lobsterbacks.

If that was so, though, why were so few British troops actually killed or wounded at Lexington and Concord? At least 3,763 Americans "are known to have participated in this long day of battle" (p. 174). At most the British had about 900 men in the field. Hopelessly

10. SHY, *supra* note 4, at 103.

outnumbered, the British ultimately ran back to Boston, suffering seventy-three dead, 174 wounded, and twenty-six missing.[11] This means that the more than 3,700 American militiamen managed to hit their targets — British soldiers — no more than 273 times.[12] But even this figure is too high, because we know that some of the British soldiers were killed or wounded by axes, hatchets, knives, and swords — weapons that were more common than guns, and tools that Americans *did* know how to wield.

So how could it be that so many Americans failed to do more damage to the fleeing British troops? How could these American marksmen, skilled at killing deer and Indians, at home in the woods, almost born with musket in their hands, miss so often?

The answer, as Bellesiles demonstrates, is twofold. First, many of these militiamen showed up at Lexington with axes, knives, and swords because they did not own guns. And those who did own guns brought for the most part rusty muskets, not more accurate rifles. And even if they had access to state-of-the-art weapons, they had little skill in using them. They were not hunters, Indian fighters, or marksmen. They were farmers, tradesmen, blacksmiths, teachers, and ministers roused to action by a silversmith. As one of the first historians to chip away at the myth of the American militia noted: "Every narrative of the fighting . . . speaks of the superior shooting of the provincials, with the easy assumption that as a body they were marksmen," but in reality, "marksmen they were not."[13]

Nor, as the war continued, was it clear that they were "superior" to the British as soldiers. In the second year of the war the great pamphleteer Tom Paine complained that these were "the times that try men's souls," because the "summer patriots" had all gone home.[14] Indeed, throughout the War, the militia had a terribly annoying habit of simply disappearing, often before a battle or in the middle of the battle. As John Shy, who is sympathetic to the militia, noted some years ago, "militiamen would not automatically spring to arms in time of danger. They were afraid. They lacked the confidence that comes with training and experience."[15] Bellesiles now shows us that they also lacked arms and ammunition. Indeed, throughout the war, the militia was unreliable and often useless. More than a few patriot soldiers needlessly lost their lives because the militia abandoned the battlefield and left the Continental line unprotected and undermanned. General

11. ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 130 (1976).

12. This assumes the "missing" were wounded or killed by gunfire.

13. ALLEN FRENCH, THE DAY OF CONCORD AND LEXINGTON: THE NINETEENTH OF APRIL, 1775, at 27 (1925).

14. TOM PAINE, THE AMERICAN CRISIS 1 (1776), *reprinted in* COMMON SENSE AND RELATED WRITINGS 126 (Thomas P. Slaughter ed., 2001).

15. SHY, *supra* note 4, at 151.

Nathaniel Greene complained that the militia "have refused to turn out when there has been the greatest want of their Assistance" (p. 195). At the battle of Camden the militia fled in terror, leading to the death of General DeKalb and a major American defeat.[16] Thus, Richard Henry Lee's assurances to his brother that western Virginia would send 6000 "Rifle Men that for their number make [the] most formidable light Infantry in the World" were unfounded (p. 178). As Bellesiles wryly notes, "[f]or some reason these six thousand marksmen did not materialize during the war" (p. 178).

Propaganda is always important in war, and at times both the Americans and British believed the patriot bravado. For most of the war, however, the cognoscente knew perfectly well that the militia was often useless. Washington's disdain for the militia is notorious. As early as 1757 he complained that in the Virginia militia, "[m]any of them [were] unarmed, and *all* [were] without ammunition or provision."[17] He considered the militia "incapacitated to defend themselves, must less to annoy the enemy."[18] In 1776 he "damned the militia and called on Congress for a professional army of long-service volunteers."[19] In that year he privately complained "that no Dependence can be put on the Militia for a continuance in Camp, or Regularity and Discipline during the short time they may stay."[20] By 1780 he had abandoned all hope of "carrying on a War with Militia."[21] He condemned those who "extolled" the militia as "visionary Men whose credulity easily swallowed every vague story in support of a favorite Hypothesis," and declared he had never seen an example of the Militia "being fit for the real business of fighting" (p. 194). In one Maryland brigade, twenty-six percent of the men lacked weapons, while in a New York unit sixty-three percent were unarmed (p. 200). As a general and as President, he wanted a standing Army to defend the young nation (p. 218).

Much of this history is well known to military historians. But, with the addition of Bellesiles's work, we can now better understand why the received story of an armed people has never fit well with the real-

16. P. 196. ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, at 456-57 (1982).

17. P. 159 (quoting Letter from George Washington to Robert Dinwiddie (June 27, 1757), *in* 2 THE WRITINGS OF GEORGE WASHINGTON 77, 78-79 (C. Fitzpatrick ed., 1931)).

18. P. 159 (quoting Letter from George Washington to Robert Dinwiddie (June 27, 1757), *in* 2 THE WRITINGS OF GEORGE WASHINGTON 77, 79 (C. Fitzpatrick ed., 1931)).

19. SHY, *supra* note 4, at 151.

20. P. 194 (quoting Letter from George Washington to John Hancock (July 10, 1775), *in* 2 THE PAPERS OF GEORGE WASHINGTON 327 (W.W. Abbot ed., 1983)).

21. *Id.*; p. 194 (quoting George Washington, *Circular to the States* (October 18, 1780), *reprinted in* 2 THE WRITINGS OF GEORGE WASHINGTON 77, 78-79 (C. Fitzpatrick ed., 1931)).

ity of an incompetent and unarmed militia. The people simply were never armed or skilled with firearms.

C. *Myth and Reality: Guns in the Early Republic*

After the Revolution, Americans were no more skilled with firearms than before, and they were just as unlikely to own any. Gunmakers were rarer than gunsmiths. Bellesiles' studies of newspapers show no gunmakers or gunsmiths advertising in the newspapers in Maryland, South Carolina, or Philadelphia between 1786 and 1800 (p. 229). Between 1777 and 1799 only nine gunsmiths advertised in New York City's newspapers (p. 228). It may be that the studies on which Bellesiles relies are off by a gunsmith here and there. But the conclusion seems overwhelming: guns were simply not very important to most Americans. Expensive, complicated, and difficult to maintain, they were the playthings of the rich and well born, just as hunting was usually the sport of the elite, who had the time to waste tramping through the forest looking for game.

A quick look at the various early federal statutes on militias, most of which Bellesiles discusses, reveals again how his insights are confirmed by other forms of evidence. What we "know" about the federal militia acts now makes sense, because Bellesiles has filled in the information on the shortage of guns in America.

Under the Militia Act of 1792[22] the federal government expected militia men to arm themselves. As Bellesiles notes, however, "nothing of this sort happened" (p. 262). Thus, a few years later, Congress responded with the Militia Acts of 1794[23] and 1797,[24] which required the state governors to "arm and equip according to law" the state militias. It is not clear if the "according to law" referred back to the 1792 statute, or if this now meant that the states were to arm the militias. Any confusion was cleared in 1798, when Congress passed "An Act providing Arms for the Militia throughout the United States."[25] As the title suggests, Congress had given up on the people providing their own arms. Thus, Congress declared that the United States would provide "thirty thousand stand of arms" to "be sold to the governments of the respective States, or the militia thereof."[26]

With a possible war against France looming on the horizon, the United States could no longer live with the mythology of an armed

22. "An Act more effectually to provide for the National Defence . . . ." Act of May 8, 1792, 1 Stat. 271.

23. Act of May 9, 1794, 1 Stat. 367.

24. Act of June 24, 1797, 1 Stat. 522.

25. Act of July 6, 1798, 1 Stat. 576.

26. *Id.*

populace. The reality was that the people owned few guns, and many of them were old, rusted, and in disrepair. No war with France took place, but when the Jeffersonians came to power they discovered the nation's defenses were weak. In 1803, Secretary of War Henry Dearborn authorized a national census of arms and weapons. "Dearborn discovered that [only] 45 percent of the militia bore arms," and that less than a quarter of the nation's white male population (less than five percent of the total population) owned a gun (pp. 262-63). Such figures illustrated the need for the Militia Act of 1803, which declared that "every citizen duly enrolled in the militia shall be constantly provided with arms, accoutrements, and ammunition."[27]

This Act, as well as the earlier Act of 1798, was consistent with the obligations of Congress to "provide for organizing, arming, and disciplining the Militia."[28] But, until this time Congress had failed to fulfill the Constitution's command. There seem to be three complementary explanations for the failure of Congress to act up until this time. First, there may have been an economic concern — lack of funds to supply the militias. This was tied to the second reason — lack of guns in the country. Guns were scarce, and therefore expensive. Congress could not supply the militia, because there were few guns to distribute. Indeed, during this period Congress was buying guns, as well as gun locks and steel for the domestic production of weapons, from England (p. 232). Finally, in 1792, the leaders of Congress may have been suffering from the effects of the revolutionary-era propaganda that the American people were well armed. In any event, by 1798 Congress realized that if the militia was to be armed, the national government would have to supply the arms.

The question, of course, was where the government would find these arms. Imports supplied some of the requirements, but a domestic arms industry was the real answer. In his famous *Report on the*

27. "An Act in addition to an act entitled, 'An act more effectually to provide for the National defence . . . .' " Act of Mar. 2, 1803, 2 Stat. 207. At page 230 Bellesiles mistakenly asserts that this provision of the 1803 act was part of the 1792 act. My guess is that his confusion resulted from either looking at a compilation of statutes which combined the two, or by looking at various reenactments of the militia law in 1813 and 1814, *see* p. 521 n.85. He may have also carelessly used an early compilation, THE MILITIA LAWS OF THE UNITED STATES AND MASSACHUSETTS (1836), which was anonymously published in Boston, rather than looking at the *United States Statutes at Large*. This suggests the complexity of doing legal research from this period — or simply some sloppy note-taking — but does not indicate any attempt by Bellesiles to misrepresent the facts to support his thesis. In fact, as I argue in this section of the Review, the correct story provides even greater support for Bellesiles's overall argument: that the Congress bought the myth of an armed populace in 1792, and starting in 1798 began to abandon that idea. By 1803, only eleven years after the first Militia Act, Congress had completely rejected the foolish notion of relying on the members of the militia to bring their own arms with them. They had no arms to bring, and Congress finally admitted this.

28. U.S. CONST. art. I, § 8, cl. 15.

Subject of Manufactures[29] Alexander Hamilton had urged support for gun manufacturing and gunpowder as a national necessity.[30] Despite his support for private enterprise, Hamilton suggested that "necessary weapons of war" might be manufactured by the government itself.[31] He similarly urged the stimulation of lead manufacturing,[32] and he was ready to exempt both saltpeter and sulfur from import duties because they were necessary for the creation of a domestic gunpowder industry, and the United States had no domestic supply.[33]

Beginning in 1795, the national government followed Hamilton's advice and tried to stimulate gun production in America. But this attempted stimulation failed. For instance, after the Revolution, Congress armed soldiers by purchasing seven thousand muskets from England (p. 232). This practice of buying guns and, more importantly, gunlocks from Great Britain continued until the War of 1812 interrupted the flow. Attempts by American entrepreneurs did nothing to stimulate a domestic supply of weapons. In 1795, Eli Whitney won a contract to produce weapons for the country. Despite the myth of Whitney inventing interchangeable parts, Bellesiles demonstrates that the inventor of the cotton gin produced almost no usable weapons for his country (pp. 233-35). The United States government did manage to develop a few factories of its own that produced weapons at national armories in Springfield, Massachusetts, and Harpers Ferry, Virginia (now West Virginia), but the numbers were small. Between 1795 and 1799, Springfield produced only 7,750 muskets — about a third of what was needed (p. 238). In the Civil War this armory would be essential to the national defense, but in the War of 1812 it was only marginally valuable.

The conclusion from statutes, production records, various gun censuses, government reports, and newspaper records is overwhelming: After the Revolution, Americans had few guns and could produce few guns. The people, with some exceptions, were relatively unarmed.

D. *Myth and Reality: The Militia and the War of 1812, or Who Really Saved New Orleans?*

During the War of 1812, the militias were for the most part useless, and often unarmed. Fewer than 4,500 British soldiers captured and burned Washington, D.C., despite the presence of "some fifty thou-

29. ALEXANDER HAMILTON, *Report on the Subject of Manufactures* (Dec. 5, 1791), *in* 10 THE PAPERS OF ALEXANDER HAMILTON 230 (Harold C. Syrett et al. eds., 1966).

30. *Id.* at 317, 334.

31. *Id.* at 317.

32. *Id.* at 319.

33. *Id.* at 334.

sand militia within a day's march of the capital" (p. 254). Those few that did show up to defend the nation's capital lacked guns, flints, and leadership. One militia regiment came to Washington "wholly unarmed," and thus was of little use in defending the city (p. 255). This shortage was not unique to the region around the national capital. Counting all guns in private hands and in public armories, regardless of their age or condition, New York had only enough weapons for half of its militiamen, and Virginia could only arm twenty-three percent of its militia (p. 255). The same situation arose in the West. Over 2,300 Kentucky militiamen showed up at New Orleans to serve under Andrew Jackson, but only 700 of them had guns, and Jackson complained that "the arms they have are not fit for use" (p. 259).

After the Battle of New Orleans, Americans created myths and songs about the "Hunters of Kentucky" who won the battle with their marksmanship. In reality, however, these mostly unarmed frontiersmen were farmers who had few skills with a musket. Cannon "manned by members of the U.S. Navy and Army," as well as by Jean Lafite's pirates, won the battle, along with some regular soldiers armed by the national government (p. 259). But as Bellesiles notes, "the myth of the Kentucky riflemen picking which eye of British officers to shoot out fulfilled some deep national yearning. An imagined American equality seemed to demand that every man could be the equal of the best trained troops in the world — at least in popular songs and tall tales" (p. 259).

E. *Myth and Reality: Bleeding Kansas and Guns in Antebellum America*

Bellesiles argues, correctly I believe, that the "arming of America" began to take shape after the Mexican-American War (1846-47) and that it continued to accelerate until the Civil War. This appears to be true, but the evidence from Kansas shows that this process of arming America was incomplete, and rather slow, as late as the 1850s. Bellesiles only briefly mentions the events in Kansas — the scene of America's warm up for the Civil War — in the mid-1850s. He notes, for example, that members of the Connecticut Kansas Colony, setting out for what was already "Bleeding Kansas" in 1856, were given fifty rifles by their supporters and friends in state (p. 370). Bellesiles uses this information to illustrate the acceleration of the arming of America immediately before the Civil War. The fact that these settlers had to be given weapons en route to a hostile environment, however, suggests that many people in America as late as the 1850s did not own guns. Moreover, Kansas was not as well armed as even Bellesiles assumes. Furthermore, if the settlers did have any guns, few in Kansas actually knew how to use them. Bellesiles notes that two free-state men were captured by proslavery forces because, while they had four

guns with them, they had no firing caps, and thus the guns were useless (p. 370). The free-state military leader James Montgomery urged that volunteers be trained in the use and care of weapons before they arrived in the territory (p. 370).

What little Bellesiles says about Kansas dovetails with the larger story in the territory. Moreover, Bellesiles's overall thesis helps explain the nature of the early struggle in Kansas.

After the passage of the Kansas-Nebraska Act in 1854, free-state settlers swarmed into the territory and quickly became involved in a mini-Civil War, fighting settlers from the slave states. Many — perhaps most — of the settlers came not for politics, but for fresh, inexpensive land. Even the most famous family to move to Kansas, the Browns of Ohio, came for land and a fresh start in life. Like so many other Northerners, the Browns thought keeping Kansas a free state could be done with the ballot box, or with moral suasion. They did not come to fight. But, very quickly, they found themselves in an armed conflict.[34]

The patriarch of the family, John Brown, remained in Ohio while his sons went to the new territory. In May 1855, a fearful Salmon Brown wrote his father: "There is a great lack of arms here . . . ."[35] Similarly, John Brown, Jr., wrote his father that the antislavery men were "desperately short of guns."[36] John Jr. begged his father to find some wealthy supporters of the cause to buy guns. "Give us the arms, and we are ready for the contest."[37] At the moment they had only a few Sharps rifles sent by some eastern abolitionists. Thus it was that in the summer of 1855 John Brown toured the East and Midwest, raising money to buy Colt revolvers, Sharps rifles, powder, caps, and swords.[38] In October 1855, John Brown arrived in Kansas with "revolvers, rifles, dirk knives, and those menacing broadswords."[39] Meanwhile other boxes of rifles, sometimes known as a "Beecher's Bibles,"[40] arrived in the free-state settlements of Kansas. The industrialist Amos Lawrence helped pay for about 325 Sharps rifles that were sent to free-state settlers in Kansas.[41]

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34. STEPHEN B. OATES, TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN 90-93 (2d ed. 1984).

35. *Id.* at 88.

36. *Id.* at 90.

37. *Id.* at 92.

38. *Id.* at 92-93.

39. *Id.* at 98.

40. Named after the fervent abolitionist the Rev. Henry Ward Beecher.

41. DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 206-07 (Don E. Fehnrenbacher ed., 1976).

Why did John Brown have to bring guns to his sons in Kansas? Why didn't they bring their own? Why were the Connecticut Kansas settlers Bellesiles writes about have to be given guns when they left (pp. 370-71)? Although I have long taught and even written about Brown,[42] only after reading Bellesiles do I understand the answers to these questions. As Bellesiles repeatedly demonstrates, most American men in the mid-nineteenth century did not own a gun and could not afford the luxury of buying one. Thus, the settlers who went to Kansas to make it a free state did so without guns, or, if they took guns, like the Connecticut Kansas Colony settlers, they took them because "without any agency of our own, we were presented with fifty Rifles, which we gladly accepted" (p. 370).

F. *Myth and Reality: Where Were All Those Guns When the Civil War Began?*

A final example of how Bellesiles's book helps explain American history concerns the American Civil War. The myth of America is that all white men, especially in the South, were heavily armed. We all "know" this. But we also well know that, with just under 160,000 guns, the Confederacy was desperately short of arms when the war began. The Confederacy did everything it could to import them from Europe, but Lincoln's blockade effectually stopped these imports by 1863. The would-be nation failed to produce many guns of its own, and throughout the war the Confederacy survived with weapons captured from the enemy, taken from dead United States soldiers, or sneaked past the blockade (p. 419). A few European guns made it to the Confederacy through Mexico.

If the myth of a gun-owning America had been true, these shortages would not have been so great. Moreover, with over four million slaves in 1860, the region was a tinderbox waiting to explode, and only the vigilance of the master class prevented this. The South should have been well armed because of the apparent need of the master class for arms, the presumption that rural men were all gun owners, and the cultural presupposition that the South was more gun happy than the North. But the South was not well armed because, as Bellesiles teaches us, guns were expensive, complicated, and, until the Civil War, manufactured in small numbers in the nation.

42. HIS SOUL GOES MARCHING ON: RESPONSES TO JOHN BROWN AND THE HARPERS FERRY RAID (Paul Finkelman ed., 1976).

II. THE MILITIA, THE MYTH OF AN ARMED POPULACE, AND THE SECOND AMENDMENT

Throughout much of our history, the militia has been held in contempt, despite the fact that we have simultaneously created a myth about the success of the militia in battle and its role in both creating the nation in 1776-83 and defending it afterwards. The contradiction was of course a function of the ideology of the Revolution which condemned the professional, or "standing" Army, which became a proxy for everything that was wrong with the British Empire, and thus forced the revolutionaries to praise the militia. Thus, on the eve of the Revolution John Hancock noted that "[f]rom a well regulated militia we have nothing to fear," but he asked rhetorically, from a standing army "what has not a state to fear?"[43] Of course, during the Revolution Americans learned just how ineffective the militia was, but the ideological commitment *against* a standing army forced Americans to enshrine the militia in popular myth.

This cultural admiration for the militia also led to the adoption of what became the Second Amendment. Anti-Federalists, fearful of a strong national government, were particularly concerned about the reality of a professional army, which Congress was clearly empowered to create under Article I, Section 8 of the Constitution. In writing the Bill of Rights, Madison did nothing to undermine national power,[44] but he was willing to offer up a promise that each state would be able to maintain a "well regulated militia," subject, of course to federal call up, as set out in Article I, Section 8.

While the myth of the militia seemed important to Americans after the Revolution, the reality of the militia, both during and after the Revolution was another matter. And so, from the end of the Revolution to the Civil War the militia was generally held in contempt. We know (or at least we have long thought we knew)[45] that the militia would parade annually or even twice a year, have its musters, and that usually the most important aspect of the muster was the keg of hard cider, or some other strong beverage. The militia was something of a joke from the colonial period to the Revolution to the Civil War. In

43. JOHN PHILLIP REID, IN DEFIANCE OF LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION 104 (1981).

44. Paul Finkelman, *James Madison and the Adoption of the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301-47 (1991).

45. One of the many things this book teaches us is that some states actually abolished their militias in the early and mid-nineteenth centuries, and that no states actually required people to serve. In 1811, for example, Delaware "essentially eliminated its militia." P. 387. When Lincoln asked the loyal state governors to call out their militias, "Governor William Burton of Delaware, informed Lincoln that their militia did not actually exist." P. 410. Similarly, in Lincoln's home county of Sangamon, Illinois, people "were rudely reminded that they did not have a militia, and had not for the previous fifteen years." Pp. 409-10.

the eighteenth century, most militias "bec[a]me more social than military organizations."[46] The growth of private militias in the nineteenth century continued this process. The more social they became, the less likely the militias were to be serious military organizations. In the nineteenth century, the private militias were better dressed, often in snappy, brightly colored uniforms. They were social clubs, often, but not always, for the elite. When the Civil War began, the militias on both sides were barely competent and not much good in battle. Slowly, painfully, and at great expense of human life, American boys on both sides of the Mason-Dixon line learned to be soldiers.

Indeed, the whole notion of the citizen-soldier from the colonial period to the Revolution appears largely to have been a myth. In colonial New York, commercial connections, not the militia, kept the peace with the Iroquois. And as the University of Michigan's great military historian John Shy noted, "in time of trouble," New York "had to call for help."[47] In Virginia, the militia "virtually ceased to exist" in the half century after Bacon's Rebellion of 1676,[48] and the colony relied for defense on Rangers — "a few dozen paid, mounted soldiers who 'ranged' " along the frontier from fort to fort.[49] In 1713, "[w]hen the Tuscarora momentarily menaced Virginia,"[50] the governor tried to call out the militia, but no one turned out. Thus, the governor, "convinced that he could not make war, made peace."[51] The same story could be told, as Bellesiles does, for most of the colonial militias. As we have seen, during the Revolution General Washington and others had nothing but contempt for the militia. Washington felt the same way when he was a colonel during the Seven Years War. In the War of 1812, the militias were almost nowhere to be seen and not terribly useful when they were around.[52]

As Bellesiles notes, the militia was critical to the nation's psyche as a symbol of republican virtue. Americans at the time of the Revolution believed a standing army was dangerous, even though it was the professional army that, battling for eight years, fought the British to a standstill and forced the strongest nation in the world to the peace table.

The Constitution of 1787 reflected the reality of the recent past. Article I provided for the establishment of a military by the national government. The militia would exist but would be always subject to

46. SHY, *supra* note 4, at 29.

47. *Id.* at 27.

48. *Id.*

49. *Id.* at 25.

50. *Id.*

51. *Id.* at 27.

52. Pp. 159-60, 254-55; *supra* text accompanying note 5.

federal regulation and control. This frightened some Americans, who feared a professional standing army and believed that the strength of the nation was in the militia.[53]

Men like Washington, Charles Cotesworth Pinckney, Henry Knox, and even James Madison understood how absurd this was. They knew that the professional army, trained by Washington and a host of European officers, had won the war. Furthermore, former generals like Washington, Pinckney, and Knox also understood that the nation had nothing to fear from the military. Good republicans all, they trusted the officers and men under their command to support the Constitution.

When he introduced what became the Bill of Rights, Madison did not accept the fears of the Anti-Federalists or others who asked for amendments. He thought a bill of rights was utterly unnecessary,[54] but Madison was willing to concede "that in a certain form and to a certain extent," a bill of rights "was neither improper nor altogether useless."[55] While proposing amendments that were neither "improper" nor "useless," Madison was careful, as he noted in a private letter to Edmund Randolph, to make sure that "[t]he structure & stamina of the Govt. are as little touched as possible."[56] It is this goal of Madison — to protect the "structure & stamina" of the new government — that most illuminates the meaning of the Second Amendment. Bellesiles's important book, however, adds significant social, economic, and military history background to how we understand the Founding in general, and the Second Amendment in particular.

Madison generally saw the Bill of Rights as clarifying the meaning of the Constitution, not fundamentally changing it. He had no problem expressly protecting freedom of religion, for example, because he did not think that the purpose of the Constitution was to allow Congress to regulate religion, even where Congress had plenary jurisdiction. Similarly, he was willing explicitly to protect the right of a jury trial in federal prosecutions, since he believed the Constitution already protected that right. He probably had not thought much about the right to counsel, but he saw no impediment to protecting it.

He was not, however, ready to undermine the "structure & stamina" of the new government. Thus, he did not dismantle the provision allowing Congress to create an army or to regulate the state militias.

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53. Letter of Edmund Randolph, *in* 2 THE COMPLETE ANTI-FEDERALIST 88 (Herbert Storing ed., 1981); Essays of Brutus, *in* 2 THE COMPLETE ANTI-FEDERALIST 375 (Herbert Storing ed., 1981).

54. Paul Finkelman, *supra* note 44, at 302-03.

55. 1 ANNALS OF CONG. 453 (1st Cong., 1st Sess.) (Joseph Gales & William Seaton eds., 1789).

56. Letter from James Madison to Edmund Randolph (June 15, 1789), *in* 12 THE PAPERS OF JAMES MADISON 219 (Charles F. Hobson et. al. eds., 1979).

He certainly had no interest in protecting a personal right to own guns, because, as Bellesiles demonstrates, few people had guns anyway, and those who did included malcontents, such as the farmers who gathered in Shay's Rebellion. Madison probably did not believe in the myth of the militia, either. He knew better. But he was happy to promise that the new national government would not dismantle or disarm the state militias, as long as they remained "well regulated," which meant under federal supervision as Article I required. Since some people feared the new national government might dismantle the state militias,[57] Madison was willing to put a provision in the Bill of Rights explicitly stating that Congress would not disarm the state militias. At the same time, he had no interest in preventing Congress from regulating weapons in the places where Congress had clear legislative power.[58] Madison had worked for a strong government — with a national army and the power to federalize state militias — at the Philadelphia Convention. He had no interest in undermining this in the Bill of Rights by prohibiting a standing army, removing the power of the national government to control the state militias, or permitting citizens to have unfettered access to weapons.

Arming America gives us a context for understanding what the First Congress did when it wrote what became the Second Amendment. Bellesiles demonstrates, over and over again, decade by decade, that until the Civil War era most Americans had little interest in guns or gun ownership. Even in the debates over the Constitution, the fears of the Anti-Federalists were not about losing their guns — because they mostly did not have any — but about creating a standing army. The Anti-Federalists[59] worried that the standing army would take over. Madison answered that the best defense against this was a well-regulated state militia, armed by the national government. That was the plan set out in Article I, Section 8 of the Constitution. The Second Amendment merely reaffirmed this plan, and at the same time guaranteed that if the national government did not arm the militias (as the Constitution obligated it to do), the states could do so themselves.

Arming America is clearly controversial. Supporters of an individual rights interpretation of the Second Amendment — what some

57. Washington was willing to do this, as was Secretary of War Henry Knox. Senator Rufus King of Massachusetts opposed arming the militia on the frontier, "least they should Use them against the United States." THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 246 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

58. For a greater discussion of this, see Finkelman, *supra* note 6.

59. *See generally* Paul Finkelman, *Turning Losers into Winners: What Can We Learn, If Anything, from the Antifederalists?*, 79 TEX. L. REV. 849 (2001) (reviewing SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA 1788-1828 (1999)).

proponents arrogantly call "the standard model" interpretation[60] — are clearly threatened by this book. If it is true that gun ownership was irrelevant to most Americans, then it is hard to believe they would have fought to amend the Constitution to protect the right to own something they could not own and did not want to own. And as Don Higginbotham, a leading military historian, has noted, "[i]n all the discussions and debates from the Revolution to the eve of the Civil War, there is precious little evidence that advocates of local control of the militia showed an equal or even secondary concern for gun ownership as a personal right."[61]

Some activists have taken it upon themselves to check every footnote and source in the book. They flood various listservs with errors they have found. Doubtless they will find some in a book if over 600 pages, almost 150 of which are densely packed footnotes. Serious scholars have questioned some of Bellesiles's use of probate records and his statistical analysis of them in determining gun ownership. It is likely that those numbers will change as other scholars examine the evidence.

On the other hand, the simple statistics on weapons production and importation, and the various gun censuses taken by state and federal officials, support the conclusion that gun ownership was not all that common in this period. Moreover, the thesis presented here seems overwhelmingly solid. The nonstatistical evidence from letters, diaries, official reports, and statutes all point in the same direction: from the colonial period to the Civil War guns were expensive, complicated, and not widely owned, and most Americans were not particularly skilled at using them. When we fought Britain, and when we wrote the Constitution and the Bill of Rights — including the Second Amendment — we were not a gun culture. These conclusions must inform us today as we debate public policy and constitutional law surrounding an America that is now fully armed.

60. For a discussion of this "model," see Saul Cornell, *Commonplace of Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221 (1999), and *Symposium on the Second Amendment: Fresh Looks*, 76 CHI.-KENT L. REV. 1 (2000).

61. P. 215 (quoting Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. (3rd ser.) 39, 40 (1998)).