ARMED CITIZENS, CITIZEN ARMIES: TOWARD A JURISPRUDENCE OF THE SECOND AMENDMENT

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Few political issues have been as hotly debated as firearm regulation, and yet few constitutional guarantees have been treated with as much judicial indifference as the Second Amendment's recognition of a "right of the people to keep and bear arms." The sole Supreme Court decision construing the right dates from forty years ago,[1] and the principal ruling on its applicability to the States is a century old.[2] In the absence of authoritative judicial interpretation, Second Amendment controversies tend to be inspired by actual or potential activities of the legislative branch. The recent dearth of such activities—until the enactment this year of a major reform of federal firearms laws[3] —has led to a similar dearth of legal commentary.[4] (pg.560) But recently, under the combined impact of original historical research,[5] a study of federal archives by the Senate

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1 United States v. Miller, 307 U.S. 174 (1939). The *Miller* decision is hardly a model of clarity, possibly because of the appellee's failure to file a brief, argue the case, obtain an attorney on appeal, or appear for trial on remand. *See* Hardy & Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 52, 65 (1974).

2 *See* Presser v. Illinois, 116 U.S. 252 (1886).

3 *See* Firearm Owner's Protection Act, Pub. L. No. 99-308. The preamble to this legislation begins: "[T]he Congress finds that—(1) the rights of citizens—(A) to keep and bear arms under the second amendment to the United States Constitution ... require additional legislation to correct existing firearms statutes ...." The legislative history shows frequent references to an individual right to keep and bear arms as a factor underlying the statute's purposes. *See*, *e.g.*, 131 CONG. REC. S9105-9111, S9164, S9168 (daily ed., July 9, 1985); H1659, H1670, H1695 (daily ed., April 9, 1986).

Before the reform legislation of 1986, the last firearm legislation to be enacted at the federal level was the Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921-928 & 26 U.S.C. §§ 5801, 5802, 5811, 5821, 5840-5849, 5871, 6806, & 7273 (1982)). The last proposal to obtain committee approval before 1986 in either house of Congress was H.R. 11193, 94th Cong., 1st Sess. (1975), which was reported out of the House Judiciary Committee but died in the Rules Committee in 1976.

4 Before 1980, all commentators relied upon secondary sources. The best of the second-source commentaries are: Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789; Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Hardy & Stompoly, *supra* note 1; Hays, *The Right to Bear Arms: A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUS. L. REV. 1 (1969).

5 *See generally* Hardy, *Historical Bases of the Second Amendment*, in SUBCOMM. ON THE CONSTITUTION OF THE SEN. JUDICIARY COMM., , 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS 45 (Comm. Print 1982); Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Shalhope, *The Ideological Origins of the*

Subcommittee on the Constitution,[6] and a judicial challenge to a local handgun ban,[7] the Second Amendment has returned to its status as the most controversial unsettled area of the Bill of Rights.

The Second Amendment to the Constitution of the United States provides: "A well-regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."[8] The controversy over the meaning and ramifications of this one-sentence declaration involves a clash between two and perhaps three schools of thought. One school, which may be considered the "individual rights" approach, holds that the Second Amendment recognizes a right protecting individual citizens in the peaceful ownership of private firearms for their private purposes.[9] The second approach, broadly described as a "collective rights" approach, argues that the right embodied in the Second Amendment runs only in favor of state governments and seeks to protect their maintenance of formal, organized militia units (pg.561) such as the National Guard.[10] In addition, there appears to be a hybrid interpretation, which argues that the right protected is indeed one of individual citizens, but applies only to the ownership and use of firearms suitable for militia or military purposes.[11]

This Article will demonstrate that in light of the historical evidence, documentation of the intent of the drafters of the Second Amendment and their contemporaries, and the need to maintain a consistent standard of constitutional interpretation, the individual rights approach is the only approach that has any validity. It will then formulate a proposed test intended to accommodate the purposes of the Framers to developments in weapons technology that have produced infantry weapons qualitatively more deadly than existed when the Bill of Rights was drafted.

Second Amendment, 69 J. AMER. HISTORY 599 (1982).

6 SUBCOMM. ON THE CONSTITUTION OF THE SEN. JUDICIARY COMM., 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982).

7 *See* Quilici v. Village of Morton Grove, 685 F.2d 261 (7th Cir. 1982) (challenging the enactment of a ban on possession of handguns in Morton Grove, Illinois). In *Quilici*, the challenge was rejected, but other recent challenges to weapons laws have met with more success and ended in the invalidation of the laws on right to keep and bear arms grounds. *See* Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980); State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981); State v. Kessler, 298 Or. 359, 614 P.2d 94 (1980).

8 The precise punctuation of the Second Amendment is subject to no clear rule. One version has but one comma, following the word "state." The other has three commas, after "Militia," "State," and "Arms." The former version is accepted by the Statutes at Large, while the second is found in the ratification enactments returned by many states and in at least one of the original copies sent to the states for their vote. Capitalization is likewise varied, a not unusual occurrence in the days when documents were copied by hand. Letter from Marlene McGuirl, Chief, British-American Law Division, Library of Congress (Oct. 29, 1976).

9 *See*, *e.g.*, Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URBAN L.J. 31 (1976); Hays, *supra* note 4, at 381; Hardy & Stompoly, *supra* note 1, at 62; Levine & Saxe, *supra* note 4, at 1.

10 *See*, *e.g.*, G. NEWTON & F. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 1138 (1969); Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971); Note, *The Right to Bear Arms*, 19 S.C. L. REV. 402 (1967).

11 This appears to be the view taken by the United States Supreme Court in United States v. Miller, 307 U.S. 174 (1939). In that case, the Supreme Court reversed a dismissal of an indictment for possession of an unregistered sawed-off shotgun, noting that the moving party had failed to introduce evidence that such an arm had any suitability for militia purposes and that the trial court was not in a position to take judicial notice of such suitability. *Id.* at 178. Most commentators have treated *Miller* as a simple collective rights ruling, which it clearly was not: The Supreme Court specifically states that "the Militia comprised all males physically capable of acting in concert for the common defense," who "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179. Nowhere in the opinion does the Court even mention the term "National Guard," and it remanded for evidence, not that Miller was taking part in an immediately militia related *activity*, but that he was carrying a *weapon* that was "part of the ordinary military equipment or that its use could contribute to the common defense." *Id.* at 178.

I. THE RIGHT TO KEEP AND BEAR ARMS: A HISTORICAL PERSPECTIVE

The development of the right to keep and bear arms in English and American law may best be analyzed by examining six periods. The first can broadly be classified as the earliest history of the right, in which the concept of individual armament gradually became an accepted part of the English experience and part of the "rights of Englishmen." The second is the crucial half century from 1639 to 1689, which forged the English and American concept of "rights" and (coming as it did less than a century before the American Revolution) was familiar (pg.562) history to the framers of the American Constitution and Bill of Rights. The third is the specifically American experience in keeping and bearing arms before and during our War of Independence. The fourth is the period during which our Constitution was drafted, debated and verified; the fifth is that of the drafting and passage of the Bill of Rights. The final period of relevance consists of treatment of the right to keep and bear arms in early case law. Each of these periods will be examined in turn.

A. *Early Common Law*

The concept that there is a relationship between individual ownership of weaponry and a unique status as "free Englishmen" antedates not only the invention of firearms but also the Norman-English legal system. The great English legal scholar, William Blackstone, attributed the development to Alfred the Great, asserting: "It seems universally agreed by all historians, that King Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers ...."[12] Recent historical research has suggested that this is an understatement. The early militia, or Fyrd, can now be traced at least to A.D. 690; indeed, it is likely that "the obligation of Englishmen to serve in the Fyrd of people's army is older than our oldest records."[13] It is in any event clear that, centuries before the Norman conquest, the Saxons had evolved a military and political system in which every free man was obligated by law to possess the weapons of an infantryman and to serve in the Fyrd.[14] Under these laws, "every land holder was obligated to keep armour and weapons according to his rank and possessions; these he might neither sell, lend nor pledge, nor even alienate from his heirs."[15] This concept (pg.563) was radically different from the Continental feudal system, which revolved around mounted and armoured men at arms and limited the right of armament, and the duty of fighting in defense, to a relatively small and wealthy class.[16]

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[12] 1 W. BLACKSTONE, COMMENTARIES *409.

[13] 1 J. BAGLEY & P. ROWLY, A DOCUMENTARY HISTORY OF ENGLAND 1066-1540, at 152 (1965). The reference is to a Seventh-Century Wessex law. Others have sought to place the origins in Germanic customs, which required that a freed slave be presented with arms as a symbol of his new status as freeman. *See* C. HOLLISTER, ANGLO-SAXON MILITARY INSTITUTIONS 27 (1962).

[14] *See generally* C. HOLLISTER, note 13 *supra*. The Anglo-Saxon system was infinitely more open than the feudal system of the Continent. A commoner could, for example, enter the lesser nobility (as a "thegn") by owning about 600 acres (five "hides") of land. In times of national danger, he could become a "thegn" just by providing himself with appropriate armor and sword! *See* F. MAITLAND, DOMESDAY BOOK AND BEYOND 158 (1921).

[15] 1 F. GROSE, MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE BRITISH ARMY 1-2 (London 1812). *See generally* Brooke, *The Development of Military Obligations in Eighth and Ninth Century England*, in ENGLAND BEFORE THE CONQUEST 69 (P. Clemoes & K. Hughes eds. 1971); C. HOLLISTER, *supra* note 13.

[16] *See generally* J. BEELER, WARFARE IN FEUDAL EUROPE (1971); B. TUCHMAN, A DISTANT MIRROR (1978).

The Norman conquest of 1066 saw the most efficient form of military feudalism imported into England.[17] But the new Norman rulers added some improvements intended to avoid the central flaw of the feudal system. That flaw had lain in the concept that the duty of military service was owed, not necessarily to the national sovereign or government, but immediately to the individual who had granted land to the person rendering service. Because the military duty ran with the land, determining who owed service and how many men he was obligated to provide soon became as complicated and easily disputed as a title question in the period before recording statutes. Further, it was possible that the same individual might owe military service to two individuals in conflict with each other, or that a major landholder would be able to call upon his subordinate tenants to fight with him against the king.[18] In 1086, William the Conqueror required every land holder to swear directly to him "loyalty against all men."[19] Maitland considered that the combination of this oath and Fyrd duty was the crucial distinction between English and the Continental political ideals.[20]

The Angevin monarchs continued the tradition of individual armament. The Assize of Arms of 1181 strengthened the principle that every able bodied freeman was required to provide weapons according to the worth of his chattels and to serve the king at his own expense when summoned by the sheriff of his (pg.564) county.[21] In 1253, another Assize of Arms expanded the duties still farther to encompass not only free men, but also villeins, or serfs, who were bound to the land and most certainly not free.[22] Even the poorest and least free Englishman was required to have at least a halberd (an eight-foot pole weapon mounting an ax-head and a sharpened spike) and a dagger. Forcing serfs to obtain weapons was hardly in accord with feudal ideals![23]

The ascendency of the longbow as a characteristically English weapon reinforced this trend. The longbow was an inexpensive weapon, suitable for mass armament of the commoners, but had sufficient power to pierce the armour of a feudal knight.[24] In the Thirteenth and Fourteenth

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[17] *See* D. DOUGLAS, THE NORMAN ACHIEVEMENT 174-75 (1969).

[18] *See* BROOKE, *supra* note 15, at 97. One example: Not infrequently, a vassal found that he owed fealty to both of two lords presently at war with each other. Medieval jurists at length determined that, in this situation, he must personally fight for the one to whom he had first sworn fealty, while hiring a mercenary of equal skill to fight as his proxy for the other! Both lords were then barred from forfeiting his lands for default or treason. *See* B. TUCHMAN, *supra* note 16, at 260-61.

[19] R. ADAM, A CONQUEST OF ENGLAND 214-15 (1965).

[20] F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 162 (1908). Jolliffe argues that the importance of the 1086 oath is overstated. To him, it must have been a nonenforceable oath of fealty, not the enforceable oath of homage. *See* J.E.A. JOLLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 162 n.2 (4th ed. 1961).

[21] *See* 1 F. GROSE, *supra* note 15, at 9-11; B. LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 273 (2d ed. 1973). "Assize" has conveyed a multitude of meanings in English law. At this time, it generally indicated an act meant to settle the fine points of customary law, or to expand its letter to fulfil its spirit. *See* J.E.A. JOLLIFFE, *supra* note 20, at 239-40; W. WARREN, HENRY II 281 (1973).

[22] *See* J. BAGLEY & P. ROWLEY, *supra* note 13, at 155-56.

[23] The serf was barely above the slave; indeed, the term derives from the Latin term for slavery. Serfs were bound to the land, subject to oppressive demands for their labor and produce, and had no right to appeal to the royal courts for any injury inflicted by their overlord. *See* 1 M. BLOCH, FEUDAL SOCIETY 272-75 (1961); F. HERR, THE MEDIEVAL WORLD 22-34 (1962).

[24] Surviving Sixteenth-Century bows are estimated to have had a "pull," or force necessary to draw them, of about 100 pounds; a modern hunting bow pulls 40 to 60 pounds. *See* R. HARDY, THE LONGBOW 53-55 (1977). Contemporary accounts indicate a longbow could penetrate both sides of a suit of armor, or a hand's breadth of oak. *See* J. MORRIS, THE WELSH WARS OF EDWARD I 16 (1969). A modern test of a 75-pound longbow and a replica medieval arrow, directed against both sides of a suit of mail armor laid over pine planks, found that the arrow "struck with such force that a shower of sparks flew from it, and the arrow drove through the center of the back, penetrating eight inches...." C. TRENCH, A HISTORY OF MARKSMANSHIP 65-66 (1969). Nor was the longbow's range limited: A Sixteenth-Century doctor reports a man hit by accident "some six or seven score [yards] off": The arrow deeply penetrated his thigh, becoming "firmly fixed in the bone." W. CLOWES, PROFITABLE AND NECESSARIE BOOKE OF OBSERVATIONS 65

Centuries, English armies, composed largely of commoners equipped with longbows, inflicted stunning defeats upon traditional French feudal forces.[25] The outcome was an English emphasis upon ownership of individual weapons that appears incredible today. In 1285, Edward I reaffirmed the earlier assizes and added the requirement that "anyone else who can afford them shall keep bows and arrows."[26] In the following century, Edward III ordered the sheriffs of London to *force* "every one of said city (pg.565) stronge in body, at leisure time on holidays" to "use in their recreation bowes and arrows."[27] His successor, Richard II, established a national policy of universal armament with projectile weapons, commanding that "every Englishman or Irishman dwelling in England shall have a bow of his own height," that each town maintain an archery range, that games of dice, horseshoes, and tennis be banned in order to force citizens to use the bow for sport, and that prices of bows be controlled in order to make them available to even the poorest citizen.[28]

This right and indeed duty to keep and bear arms was subject at common law to only a few limitations. Several early enactments prohibited appearing before Parliament or the royal courts with force and arms.[29] The Statute of Northampton prohibited Englishmen from using their arms "in affray of the peace, nor to go or ride armed by day or night in fairs, markets, nor in the presence of the justices or other ministers."[30] The enactment might on its face be read to indicate a prohibition on carrying arms in most public assemblies. In fact, consistent with the common law acceptance of widespread private armament, the royal courts construed the ban to apply only to the wearing of arms "accompanied with such circumstances as are apt to terrify the people," holding that on the other hand, "persons of quality are in no danger of offending against the statute by wearing common weapons."[31]

The Tudor dynasty of the Sixteenth Century found itself faced with new problems. First, the increasing prevalence of firearms led to neglect of longbow shooting, and, at least for the first half of the century, the longbow was still considered the more useful military weapon. Second, the invention of the wheelock, which did not require a burning match for firing, (pg.566) made firearms truly portable and rendered possible extensive use of pistols. On the Continent, the second consideration had already led to a wave of weapon regulation. The Emperor Maximillian I attempted to ban wheelock manufacture throughout the Holy Roman Empire in 1518; the French monarchy likewise imposed strict control upon manufacture and sale of firearms and ammunition.[32] In a nation

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(1568, reprinted 1945).

[25] *See generally* 1 J.F.C. FULLER, A MILITARY HISTORY OF THE WESTERN WORLD 444-68 (1954).

[26] Statute of Winchester, 13 Edw., ch. 6 (1285).

[27] E. HEATH, THE GREY GOOSE WING 109 (1971).

[28] *See* R. HARDY, THE LONGBOW: A SOCIAL AND MILITARY HISTORY 128-29 (1977).

[29] 7 Edw., ch. 2 (1279); 7 Edw. 2 (1313) (no enumerated chapter).

[30] 2 Edw. 3, ch. 3 (1328).

[31] 1 W. HAWKINS, PLEAS OF THE CROWN 267 (6th ed. 1788). *See* Rex v. Knight, 87 Eng. Rep. 75 (K. B. 1686):

> The information sets forth, that the defendant did walk about the Street armed with guns, and that he went into the church of S. Micheal, in Bristol, in the time of divine service, with a gun .... The case was tried at bar and the defendant was acquitted. The Chief Justice said that the meaning of the statute of 2 Edw. 3 c. 3 was to punish people who go armed to terrify the King's subjects.

See also Rex v. Dewhurst, 1 State Trials (New Series) 529 (1820). *See generally* Caplan, *supra* note 4, at 791, 794-97.

[32] *See* L. KENNETT & J. ANDERSON, THE GUN IN AMERICA 12, 15 (1975); N. PERRIN, GIVING UP THE GUN 58 (1975). Maximilian I's decrees are among the earliest records of the existence of wheelock mechanisms. *See* Blair, *Further Notes on the Origins of the Wheelock*, in ARMS AND ARMOR ANNUAL 29, 35-36 (1973).

like England, where every peasant was already required by law to own a longbow and a supply of armour-piercing arrows, banning firearms to protect the nobility against peasant revolt would have been an exercise in futility. On the other hand, at least while firearms were perceived as less deadly than the longbow, a case could be made for restricting their use on the same basis as other sporting activities that distracted from archery training. That is, firearm shooting might be restricted because firearms were not yet deadly enough. In 1503, Henry VII had already limited shooting (but not ownership) of crossbows to those who held lands worth 200 marks annual rental, but provided an exception for those who shot out of the house in lawful defense of their dwelling.[33] Eight years later, Henry VIII increased the property requirement to 300 marks, but disavowed any objective of general disarmament by repeating the command that citizens "use and exercyse shootyng in longbowes, and also have a bowe and arrowes contynually" in their houses.[34] The same statute required fathers to purchase bows and arrows for their sons who reached the age of seven years and to train their sons in their use.[35] In 1514, firearms were included within the ban on crossbows, so that only the relatively wealthy (who would rarely fight as archers anyway) could possess them.[36] This measure was a total failure.

In 1533, the "Acte for Shotyng in Crosbowes and Handgonnes" noted that notwithstanding the earlier laws "many wylfull and lyght disposed persons from tyme to tyme have attempted the breche or vyolacion of the same statutes."[37] Rather than (pg.567) trying to make Englishmen comply with the law, this 1533 enactment sought to make the law comply with the activities of Englishmen, by dramatically reducing the property requirement for firearm ownership to 100 pounds worth of lands per year. Eight years later, a second enactment by the same name complained that "divers malicious and evil disposed persons" had not only violated the earlier laws but committed "shamefull murther, roberies, felonyes, ryotts, and routs with crosbowes, little short handguns, and little hagbutts."[38] Once again, the statute was liberalized rather than tightened: Now it would apply only to possession of small firearms, below one yard overall length for some and three-quarters of a yard for others, and even this ban was subject to exemptions for residents of towns shooting at target ranges and in self-defense.[39] Eventually, with increasing acceptance of the firearm as a military tool, Henry VIII was driven to repeal the entire set of firearm statutes by royal proclamation; subsequent attempts at revival were unavailing.[40]

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[33] 19 Hen. 7, ch. 4 (1503).

[34] 3 Hen. 8, ch. 13 (1511).

[35] *Id.*

[36] 6 Hen. 8, ch. 13 (1514).

[37] 25 Hen. 8, ch. 17 (1533).

[38] 33 Hen. 8, ch. 6 § 1(1541). "Hagbutts" was one of many anglicizations of the Spanish "Arquebus," an early matchlock musket. Other terms used in England for this firearm were hackbutt, harquebus, and harquebusie.

[39] *Id.* at §§ II & VI.

[40] N. PERRIN, *supra* note 32, at 59. In 1546, Henry issued a proclamation:

> Where the King our most dread sovereign lord, considering how expedient it was to have his subjects practiced and exercised in the feat of shooting of handguns and hackbuts ... did, by his Highnesses' proclamation set forth ... give license and liberty to all his Majesty's subjects, born within his Grace's dominions, being of the age of 16 years and upwards, that they and every of them, from and after the said proclamation made, might lawfully shoot in handguns and hackbuts without incurring any forfeiture, loss, or danger for the same; and statute thereof made before the contrary notwithstanding....
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> Forasmuch as it hath pleased God to remove from us the plague of war and to send unto us a right honorable peace.... His most Royal Majesty therefore, by this his Highness' present proclamation, but also strainghly

The early Tudor militia emphasized individual marksmanship, (pg.568) not organization. The bulk of England's Sixteenth-Century wars had been carried on without the militia, using largely vagabonds, beggars, and other persons "pressed" into service by local officials.[41] But the increasing complexity of Sixteenth- and Seventeenth-Century warfare, which emphasized coordination of infantry units armed with long spears ("pikes"), muskets or field artillery, and cavalry, made improved organization essential.[42] The Spanish Armada scare of 1588, moreover, illustrated the threat of invasion by a large, well-organized force. The reign of Elizabeth I saw an increased organization of the armed citizen army, complete with mandatory annual drills and target practice.[43] In her reign, the term "militia" first came into use, to designate the entire body of armed citizenry;[44] this was in distinction from the "train bands" or "trained bands," which were a small part of the entire militia chosen for special training with government-supplied arms.[45]

Thus, by the end of the Tudor period, extensive armament of individual Englishmen and a general obligation to serve in the militia had become an accepted part of English law and tradition. The private armament of Englishmen was striking to foreign visitors. In 1539, the French ambassador reported that "in Canturbury, and the other towns upon the road, I found every English subject in arms who was capable of serving. Boys of 17 or 18 have been called out, without exemption of place or person ...."; a few years later, the English government was able to keep a body of 120,000 men available throughout the summer.[46] This universal armament was subject only to the most narrow of exceptions. When Parliament in 1585 passed a bill to seize and store the armour of "papist recusants" (pg.569) (Catholics, who were unable to take the Oath of Supremacy, which proclaimed the Queen's religious supremacy), Elizabeth vetoed the legislation; only in the following year did she permit it to become law, in a form that permitted the armour to be seized and held for "safekeeping" rather than forfeited to the government.[47]

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chargeth and commandeth all and singular his Majesty's subjects, that they or any of them, from the last day of August next coming, shall not shoot in any handguns, hackbuts, or other guns, nor use or have the same contrary to the tenor, form and effect of his gracious law and statute made in the Parliament begun at Westminster ...." [33 Hen. VIII c. 6.]

1 P. HUGHES & J. LARKIN, TUDOR ROYAL PROCLAMATIONS 372-73 (1969). A few years later, Henry repealed the gun statutes once again. *See* N. PERRIN, *supra*. How quickly the statutes fell behind the times is illustrated by the necessity of Elizabeth I's prohibiting, fifteen years later, the shooting of handguns "within the cathedral church of St. Paul, or the churchyard adjoining thereunto ... or within any other church or churchyard," and by the fact that in 1575 she left unfinished and unsigned a proclamation "prohibiting the carriage of dags and pistols," which would have expressly revived the statute of 33 Hen. 8, ch. 6, with an amnesty period during which "all noblemen and such known gentlemen which be without spot or doubt of evil behavior" could carry handguns. 2 P. HUGHES & J. LARKIN, *supra*, at 177, 399.

41 *See* C. CRUIKSHANK, ELIZABETH'S ARMY 28-29 (1966); C. FIRTH, CROMWELL'S ARMY 2-3 (1962).

42 *See generally* 2 J.F.C. FULLER, A MILITARY HISTORY OF THE WESTERN WORLD 49-51 (1955).

43 *See generally* L. BOYNTON, THE ELIZABETHAN MILITIA (1967); C. CRUIKSHANK, *supra* note 41. The major reforms instituted at this time included special "musters" for training as well as inspection of arms (hence the modern phrase, "passing muster"); appointment of instructors in arms and military tactics; awards of money prizes for the best marksmanship; and transitions from bows and arrows to the early firearms (arquebuses and then calivers) and from those firearms to the later, more powerful musket. *See*, *e.g.*, L. BOYNTON, *supra*, at 65-69 (describing the decline of archery skills among the English populace because of the prevalence of firearms).

44 *See* J. HILL, THE MINUTEMAN IN PEACE AND WAR: A HISTORY OF THE NATIONAL GUARD 26-27 (1968).

45 *See id.*; L. BOYNTON, *supra* note 43, at 148.

46 *See* L. BOYNTON, *supra* note 43, at 8-9.

47 *See id.* at 149.

Some, to be sure, were disturbed at the widespread popularity of firearms and feared illegal or rebellious use. But when the Privy Council in 1569 proposed government storage of militia firearms, almost unanimous opposition was encountered on the part of local militia officials.[48] Officials in Kent made a counterproposal: disavow all intent of restricting gun ownership, allow unlimited hunting with guns, and all shortages of militia firearms would solve themselves very quickly.[49] The Privy Council dropped its proposal.

The English citizen army was not without imitators. When the French attempted a similar experiment, seeking to organize 42,000 citizen soldiers, the result was a failure. A contemporary noted of them that "they were brought up in slavery, with no experience in handling weapons, and since they have passed suddenly from total servitude to freedom, sometimes they no longer want to obey their masters."[50] Throughout the Tudor period, the English came to see widespread ownership of weapons as the essence of being English, and free English at that. In his work, "The Governance of England," written sometime between 1471 and 1476, Sir John Fortescue expounded at length on the difference between the lot of the French peasant (which he considered the result of absolute monarchy or *jus regale*) as opposed to that of the English commoner (which he considered the fruit of a constitutional monarchy). The French peasants, he noted, have grown feeble, "not able to fight, nor to defend the realme; nor thai haue wepen, nor money to bie thaim wepen withall.... Werthurgh, the French kynge, hath not men of his own reaume able to defend it, except as nobles.... Lo, this is the frute of his *jus regale*."[51] Sir Walter Raleigh, the later (pg.570) patriot, corsair, explorer, and historian, took a similar view. In his *Maxims of State*, he assigned to the "barbarous and professed tyranny" the plan "to unarm his people of weapons," while the "sophistical or subtle tyrant" would seek "to unarm his people and store up their weapons, under pretence of keeping them safe."[52] Other historians have joined with Fortescue and Raleigh in considering extensive private ownership of "wepens" to be a factor in the moderation of monarchical rule and development of the concept of individual liberties in Britain, at the same time that royal absolutism was expanding on the Continent. Thomas Macaulay, the Nineteenth-Century "new Whig" historian, counseled his readers that while past generations of Englishmen held their king to the line of the constitution:

> they also claimed the privilege of overstepping that line themselves, whenever his encroachments were so serious as to excite alarm. If, not content with occasionally oppressing individuals, he dared to oppress great masses, his subjects promptly appealed to the laws and, that appeal failing, appealed promptly to the God of battles.
>
> They might indeed safely tolerate a king in a few excesses; for they had in reserve a check which soon brought the fiercest and proudest king to reason, the check of physical

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48 *See* C. CRUIKSHANK, *supra* note 41, at 110-12.

49 *See id.* at 116.

50 1 R. LAFFONT, THE ANCIENT ART OF WARFARE 485 (1966). The claim of a French clergyman that the archer corps was abandoned because the king came to see "that English archery was a peculiar gift of God," seems less probable. R. PAYNE-GALLWEY, THE CROSSBOW 36 (1958).

51 J. FORTESCUE, THE GOVERNANCE OF ENGLAND 114-15 (rev. ed. 1885, reprinted 1979). Sir John Fortescue (1390(?)-1476(?)) was a Judge of Assize and later Chief Justice of King's Bench and sided with the Lancastrians during the Wars of the Roses. His work was the first English political study based on observations of governmental realities rather than extrapolation from theory or theology. "Wepen" is, incidentally, confirmed by the Oxford English Dictionary as an obsolete form of "weapon." 7 THE OXFORD ENGLISH DICTIONARY 317 (1933).

52 W. RALEIGH, *Maxims of State*, in 8 THE WORKS OF SIR WALTER RALEIGH, KNT., NOW FIRST COLLECTED 22 (Oxford Univ. 1812).

> force ... resistance was an ordinary remedy for political distempers .... If a popular chief raised his standard in a popular cause, an irregular army could be assembled in a day.[53]

British military historian Sir Charles Oman provides a case in point—that of Henry VIII:

> More than once he had to restrain himself, when he discovered that the general feeling of his subjects was against him. As the Pilgrimage of Grace showed, great bodies of malcontents might flare up in arms, and he had no sufficient military force to oppose them. His "gentlemen pensioners" and his yeomen of the guard were but a handful, and bows and bills were in every farm and cottage.[54] (pg.571)

The militia system thus achieved a reasonable balance between order and liberty, a balance rare today, and even rarer in the Sixteenth Century.

B. *1639-1689: The Crucial Half-Century*

A careful study of the half-century from 1639 to 1689 is crucial to a proper understanding of the views of the framers of our own Constitution and Bill of Rights. The Tudor and Stuart monarchs had increased the power of the monarchy until many accepted that a king ruled by divine right, subject (at most) to a few traditional rights of his subjects. But the period from 1639 to 1689 saw a civil war between Parliament and crown, one king executed for "crimes against the people," a second deposed, a military dictatorship created and ended, a Declaration of Rights enacted, and a new king and queen, chosen by Parliament, required to accept the Declaration before coronation. In that violent half-century, the concept of rights that would dominate English (and thus American) thought of the next century took form. The political party whose thought would so greatly shape American views before the Revolution, the Whigs,[55] was born in the conflicts of this period. When Jefferson, Madison, and their contemporaries called for a bill of rights, they had to hearken back barely a century for an English precedent.

During the reign of the Stuart monarchs, opposition to the royal prerogatives mounted. As John Dalrymple wrote barely a century after this period: "Various causes contributed to this, besides the first great cause, the high spirit of the people, indignant of their servitude." As he saw it, the main cause of the spirit was the rise of the militia, "composed not of military tenants and their vassals only, but in which every freeman grasped a sword who had strength to wield it ...."[56] The approaching conflict was not long delayed. Early in the Seventeenth Century, increasing conflicts between the financial desires of the Crown and the growing reluctance of Parliament to approve higher taxation passively led Charles I simply to refuse to call Parliaments for eleven long years. In 1640, however, the demands (pg.572) of a victorious Scottish army for a massive indemnity payment made additional taxes, and thus a Parliament, inevitable. The new Parliament (called the "Long Parliament" because it sat for nine years) played its hand to the limit. Charles I's ministers were

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[53] 1 T. MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 26-27 (Boston 1849).

[54] C. OMAN, A HISTORY OF THE ART OF WAR IN THE SIXTEENTH CENTURY 288 (1937).

[55] *See* C. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 55 (1963) (quoting John Adams's remark that during the American revolutionary period, "nine tenths of the people" were "high whigs").

[56] 1 J. DALRYMPLE, MEMOIRS OF GREAT BRITAIN AND IRELAND FROM THE DISSOLUTION OF THE LAST PARLIAMENT OF CHARLES II 10 (2d ed. London 1771).

attainted, and one executed; acts were passed that forbade the dissolution of Parliament without its own consent, required the calling of a Parliament every three years, expelled the Lords Spiritual (the bishops, who were strongly royalist) from the House of Lords, and destroyed the crown's "prerogative courts."[57] Charles acquiesced in these revolutionary measures; the pill that could not be swallowed came when Parliament demanded control of the militia.[58] Charles's reply took the form of an unsuccessful attempt to arrest five members of Parliament for high treason. Virtually driven out of London in August 1642, Charles raised the royal standard, the traditional call for the mustering of an army.

The forces arrayed on both sides were indifferently armed. One force that gave a good account of itself boasted but 30 musketeers and 1,000 "clubmen," carrying the only weapon they could obtain, a wooden club.[59] To make up the deficiency—and to minimize the possibilities of the populace turning against him—Charles confiscated the arms of many "trained bands."[60] The results were hardly unexpected:

> Wails of despair were heard from city after city as the royal army confiscated public magazines and disarmed local residents. "The best of it is," a distraught and disarmed townsman of Nantwich wrote, "if we stay at home, we are now their slaves. Being naked, they will have of us what they list, and do with us what they list." Forewarned and forearmed, and from 1642 Englishmen learned to hide their firearms and stockpile weapons.[61]

As he disarmed his opponents, Charles cajoled potential supporters (pg.573) into purchasing arms. He even wrote Catholic magnates, disarmed by his lieutenants in earlier years, to explain that he had not really meant for their firearms to be taken permanently, but only held in temporary custody; if they would arm now, he would guarantee their later possession, or reimburse them should they be disarmed at any later date.[62] Charles's efforts were to no avail; the Civil War ended in a total Parliamentary victory. Charles's attempts to revive the conflict ended with his trial and execution.

Parliament soon learned the perils of attempting to dismount from a tiger. Attempts to dissolve the army (conveniently ignoring that many of its regiments had been unpaid for months) and to prosecute religious independents led to a military takeover of the government. The precipitating event was an attempt by Parliament to enact a Militia Ordinance; one of the first acts

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57 *See* C. HILL, THE CENTURY OF REVOLUTION 1603-1714, at 111-12 (1961).

58 Blackstone, like more modern students of the period, concluded that the militia question "became at length the immediate cause of the fatal rupture between the King and his Parliament." 2 W. BLACKSTONE, COMMENTARIES *412. The gravity of the issue is illustrated by the atypically firm response of Charles: "By God, not for an hour. You have asked that of me in this, which was never asked of a King." R. OLLARD, THIS WAR WITHOUT AN ENEMY 53 (1976).

59 *See* J. BARNABY, PURITAN AND CAVALIER 48 (1977).

60 *See* C. FIRTH, *supra* note 41, at 16.

61 J. MALCOLM, THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS: THE ORIGINS OF THE SECOND AMENDMENT 8-9 (1981). Dr. Malcolm's work on the Seventeenth-Century concept of the right to bear arms is clearly the most pivotal original research yet undertaken into the history of that right.

62 *See* AN EXACT COLLECTION OF ALL REMONSTRANCES, DECLARATIONS, VOTES, ORDERS ... AND OTHER REMARKABLE PASSAGES BETWEEN THE KING'S MOST EXCELLENT MAJESTY AND HIS HIGH COURT OF PARLIAMENT 661-62 (London 1643). The author was amazed to find, in the course of his research, two original copies of this 343-year-old work in the stacks of the Library of Congress.

of the new "Rump" Parliament, put into power by the army, was to rescind the ordinance.[63] In 1654, yet another Parliament was dissolved after it tried to enact a similar law.[64] The new Parliament was nominated by the officers of the army. Within the year, Oliver Cromwell had pressured it into dissolution and replaced it with yet another Parliament, which named him "Lord Protector" of England. But, in 1655, even this Parliament began to press for a reduction of the standing army and a revitalization of the militia.[65] Cromwell made the final step, dissolving Parliament and creating a military government that divided the nation into eleven districts, each headed by a major general whose duties included political surveillance, censorship, and influencing elections.[66] These were assigned a special militia, limited to slightly over 6,000 men in number, who were paid by the government on a yearly basis.[67]

Following Cromwell's death, the remnants of the Rump Parliament were recalled in May 1659, and within a few months (pg.574) enacted laws requiring each householder in London and its suburbs to report to the government all persons residing in his house, together with a list of all arms or ammunition of each, and empowering government officials to confiscate arms and ammunition upon a finding of "just cause of suspicion and danger to the commonwealth."[68] A week later, it passed "An Act for settling the Militia in England and Wales."[69] The title was misleading. The officials administering that statute were to muster only "well-affected persons," and were on the other hand empowered to

> search for and seize all arms, in the custody and possession of any popish recusant, or other person that hath been in arms against the Parliament, or that have adhered to the enemies thereof, or any other person whom the Commissioners shall judge dangerous to the peace of this Commonwealth.

The new Rump Parliament did not last long. The commander-in-chief of its army advanced on London with his own troops, overthrew the New Model Army without a fight, and called a new Parliament. This Parliament invited Charles II, son of the executed king, to return. The rule by military junta was over, but this rule, which ended barely a century before the American Revolution, left a bitter taste for all concerned: "The soldier is no longer an injured citizen; he is a danger to the state."[70]

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63 *See* J.R. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY 6 (1965).

64 *Id.*

65 *See id.*

66 *See* C. BARNETT, BRITAIN'S ARMY 1503-1970, at 79 (1970); M. GRUBER, THE ENGLISH REVOLUTION 125 (1967).

67 *See* J.R. WESTERN, *supra* note 63, at 8-9.

68 ORDINANCES AND ACTS OF THE COMMONWEALTH AND PROTECTORATE 1317 (London 1911).

69 *Id.*

70 J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 225 (1928). At the same time, it is possible that the role of the New Model Army in the standing army controversy is overstated. Pocock points out that allusions to it are rare in the late Seventeenth- and early Eighteenth-Century pamphlets on the subject and regards fears of a standing army as derived more from fears that the power to appoint its officers (and suppliers) would be used to corrupt Parliament and the people. These fears were seen as inapplicable to the institution of the militia, where "the public defense is exercised directly by the independent proprietors appearing in arms at their own charge ... and the proprietor's liberty is guaranteed as much by his right to be the sole fighter in his own defense as by his ultimate right to cast a vote ...." Pocock, *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. 549, 566 (1965).

The new king swiftly pensioned off the New Model Army, keeping only troops that he felt would be loyal to the new regime.[71] For civilians, the reign began with repression of dissent. (pg.575) A vengeful Parliament enacted statutes liberalizing the definition of treason and imposing censorship on the press—books on politics or history now required a license from the Secretary of State. Other enactments imposed religious conformity and required the demolition of the protective walls of many towns that had sided with Parliament during the civil war.[72] None of these measures, however, addressed the most obvious barrier to centralized royal control: By 1660, Englishmen were, in the words of one historian, "armed to the teeth."[73]

Twenty years of political strife had left individuals and towns heavily armed and the few guns remaining in government hands were promptly stolen. Although the main English army alone had numbered 60,000 men, Charles II found only 3,000 guns in public arsenals.[74] Using his own prerogative, in the absence of statute, Charles reconstituted a very limited organized force and began trying to disarm his opponents. He issued instructions commanding the Lords Lieutenant of the militia to exercise their troops: "well-affected officers chosen, the volunteers who offer assistance formed in troops apart and trained; the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized ...."[75] Five months later, he caused a militia bill to be introduced in the Commons, but it encountered opposition based more on the harassments and excessive gun searches by the organized militia than on the terms of the bill.[76] Only in 1662 did Charles get (pg.576) his militia statute, after trumping up reports of various plots against the government and stacking the committee considering the bill with his father's former officers.[77] Like the militia establishments under the Protectorate, Charles's militia would be composed only of a small part of the population—many fewer, indeed, than had been enrolled in the militia in the less populous times of Elizabeth I.[78]

Under the militia statute, those "charged" with providing a militiaman were exempted from service if they hired a substitute in their place, and were required to swear "that it is not lawful upon any pretense whatsoever to take arms against the king". Other provisions of the 1662 Militia Act empowered Lieutenants of the militia to confiscate all arms owned by any person they "judge[d]

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71 *See* J. CHILDS, THE ARMY OF CHARLES II 9 (1976). Charles II's demobilization of the army was strikingly effective. The troops were promised payment of all pay arrearages; because some were over a year in arrears, this would be enough to sustain them for a time. Charles and his supporters financed public works projects and removed the traditional restrictions on apprenticeships in many trades, to ensure their speedy passage back into civilian life. *Id.* at 9-11.

72 J. MALCOLM, *supra* note 61, at 11; J.R. TANNER, *supra* note 70, at 227-29. These enactments, known as the "Clarendon Code," required all municipal officers to renounce the Covenant (thus excluding Presbyterians) and resistance to the king under any circumstance, revised official prayer books, expelled from their office and clergy not accepting the Anglican Book of Common Prayer, and punished anyone who thereafter listened to their preaching. Although named for Charles II's Lord Chancellor, the Earl of Clarendon, he in fact bears little responsibility for their provisions. The Code was primarily the work of the vengeful members of the Restoration Parliament; Charles and Clarendon generally sought less repressive measures. 2 G. TREVELYAN, HISTORY OF ENGLAND 241 (1952).

73 Malcolm, *supra* note 5, at 296.

74 *Id.*

75 8 CALENDAR OF STATE PAPERS (DOMESTIC), CHARLES II, No. 188, at 150 (July 1660).

76 J.R. WESTERN, *supra* note 63, at 10. Charles's parliaments were favorable to royalism—but quite inclined toward protecting legislative power and the prerogatives of the gentry. *See generally* D. WITCOMBE, CHARLES II AND THE CAVALIER HOUSE OF COMMONS 1663-1674 (1966).

77 *See* J. R. WESTERN, *supra* note 63, at 10-15.

78 *See* C. BARNETT, *supra* note 66, at 112.

dangerous to the peace of the kingdom."[79] To buttress these measures, Charles ordered gunsmiths to produce a record of all weapons manufactured over the previous six months together with a list of purchasers, and to file weekly reports on firearms sold; carriers were forbidden to transport guns without a royal license, and importation was limited.[80]

In 1671, Parliament imposed measures aimed at general disarmament of the non-landowning population. Hunting had long been a privilege of the upper class, and poaching was discouraged by game laws that prohibited not only the act of poaching but also the possession of hunting implements such as nets or traps.[81] In 1671, however, the Hunting Acts were amended to limit hunting to persons with lands worth 100 pounds sterling per year (two and a half times the figure required at the beginning of Charles II's reign and no less than *fifty* times the electoral franchise requirement) to eliminate the exception for those with four hundred pounds worth of personal property (that is, the city merchants and professionals), and to expand the list of items whose possession was prohibited to non-hunters to include "any guns, [or] bows ...."[82] (pg.577) The Calendars of State Papers for the period are filled with examples of enforcement of the various firearm laws: "Think Fauntleroy an untoward fellow; arms for thirty or forty were found in his house last year...."; a report of an arrest "for dangerous designs, he having been taken on the guard, with a pistol upon him," and a report of an arrest of seven Quakers of whom "one, a gunsmith, confesses to fixing arms lately," were typical.[83]

Charles was followed by his brother, James II, who had built a reputation during their Continental exile as an honest and forthright soldier. His major drawback was that, while officially head of the Anglican Church and king of a nation that barred Catholics from appointive office, James was himself a Catholic and practiced his faith openly. Within a few months, he was faced by a rebellion led by the Duke of Monmouth, Charles II's charismatic illegitimate son, who portrayed himself as the savior of Anglicanism. The local militia proved incapable of stopping the rebellion, which was finally put down by regular troops.[84] In response, James greatly increased the regular army. Because no act existed that authorized him to impose martial law, discipline was weak and clashes with civilians were frequent.[85] The arms confiscations were expanded. One Londoner noted

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79 14 Car. 2, ch. 3 (1662). The act was somewhat expanded the following year. 15 Car. 2, ch. 4 (1663).

80 *See* Malcolm, *supra* note 5, at 285, 299.

81 *See*, *e.g.*, 13 Rich. 2, ch. 13; 22 Edw. 4, ch. 6; 1 Jac., ch. 27.

82 22 & 23 Car. 2, ch. 25 (1671). *See generally* P. MUNSCHE, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671-1831, at 11-14 (1981). Malcolm makes it clear that in 1671 the initiative was Parliament's, not Charles's. *See* Malcolm, *supra* note 5, at 302. For an interesting study of the draconian enforcement of hunting acts in the next century, see E. THOMPSON, WHIGS AND HUNTERS: ORIGIN OF THE BLACK ACT (1975). Also of interest is Chitty, *Observations on the Game Laws*, in 9 THE PAMPHLETEER 172 (1817). Chitty argues that "it will scarcely be denied, that the liberty of killing game, if given universally to the people, would encourage habits of dissipation ...." *Id.* at 184.

83 68 CALENDAR OF STATE PAPERS (DOMESTIC), CHARLES II, No. 35, at 44 (Feb. 1662); 70 CALENDAR OF STATE PAPERS (DOMESTIC), CHARLES II, No. 13, at 83 (Mar. 1662); 83 CALENDAR OF STATE PAPERS (DOMESTIC), CHARLES II, No. 60, at 333 (Nov. 1663).

84 2 T. MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 4 (11th ed. London 1856).

85 *See* C. BARNETT, *supra* note 66, at 119; G. TREVELYAN, THE ENGLISH REVOLUTION 57 (1939). In Devon, for instance, a civilian who criticized the army was attacked by an officer and four enlisted men, who nearly killed him with clubs and bayonets: "He got into a house near adjoining, or else he believes they would have murdered him." 2 CALENDAR OF STATE PAPERS (DOMESTIC), JAMES II, No. 157, at 38.

that James's officers "went from house to house to search for arms, and 'tis said at some places quantities were seized."[86]

The kings of England had traditionally held a "dispensing power" by which they could make an occasional exception to (pg.578) statutory law.[87] James II used this wholesale to permit Catholic officers to enter his army despite the "Test Acts."[88] James then requested authorization of a large standing army but was rejected even by his normally compliant Parliament.[89] These requests and his use of the dispensing power had fueled popular suspicion of his intentions. James, it was rumored, intended to impose his religion and royal absolutism by military force.

James also continued the arms confiscations that had been begun by his brother, directing them increasingly against the new Whig party, which opposed him. In December 1686, orders were sent to six of the Lords Lieutenant of the Militia, informing them that the King had heard "that a great many persons not qualified by law under pretence of shooting matches keep muskets or other guns in their houses," and that the King therefore desired "that you should send orders to your Deputy Lieutenants to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order."[90] Records of the period show many searches, executed under authority either of the Militia Acts or of the Hunting Act.[91] The political motivation was obvious: "There are signs that the disarming of the people for good was an integral part of the Crown's measures for destroying Whig [anti-royalist] powers of resistance."[92] These searches and confiscations caused a great deal of bitterness among their victims.[93] (pg.579) James further issued an order "for disarming the population of Ireland," which local authorities enforced heavily against the English colonists.[94] This disarmament was likewise resented: Lord Tyrconnel, Military Commandant of Ireland, only a month later reported "informations seeming to impute much of the unruliness of the Tories [local bandits—the term came to have a political meaning later] to the English being

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[86] 1 N. LUTTERELL, A BRIEF HISTORICAL RELATION OF STATE AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714, at 263 (Oxford 1857).

[87] The dispensing power was limited to *mala prohibita* or regulatory offenses. *See* J.R. WESTERN, MONARCHY AND REVOLUTION: THE ENGLISH STATE IN THE 1680'S, at 15-16 (1972). In a day when prosecutions could be brought by private individuals, so that prosecutorial discretion as it is known today did not exist, few objected to the dispensing power. James II's alleged misuse was its use on a mass, rather than individual, basis.

[88] The Test Acts barred employment of non-Anglicans in most government positions. One of James's dispensations from these Acts exempted no fewer than 2 generals, 6 colonels, 9 majors, 24 captains and 30 lieutenants from the Test Acts. 2 CALENDAR OF STATE PAPERS (DOMESTIC), JAMES II, No. 101, at 22.

[89] *See* G. TREVELYAN, THE ENGLISH REVOLUTION 1688-1689, at 57-58 (1939). James II told Parliament that "I hope everybody will be convinced that the militia, which hath hitherto been so much depended on, is not sufficient for such occasions, and that there is nothing but a good force of well-disciplined troops in constant pay that can defend us." A. BROWNING, ENGLISH HISTORICAL DOCUMENTS 1660-1714, at 81 (1953). Privately, he complained that during the rebellion there had been more militiamen in the rebel army than in the royal camp. *See* 2 T. MACAULAY, *supra* note 84, at 4.

[90] 2 CALENDAR OF STATE PAPERS (DOMESTIC), JAMES II, No. 1212, at 314 (Dec. 6, 1686).

[91] *See id.*, No. 1588, at 392 (Mar. 10, 1687); 3 *id.*, No. 477 at 95 (Nov. 2, 1687).

[92] J.R. WESTERN, *supra* note 63, at 143-44. *See also* J. JONES, COUNTRY AND COURT 54, 224 (1979).

[93] One deputy lieutenant of the period attended church one day to find that his "cussin" (cushion) had been taken by Sir John Brook, "a person I had thought fitt, with other deputy lieutenants, to disarm in our last search for arms. This gentleman rising at the Psalms, I took up the cussin and replaced it in my seat. Service being ended, Sir John asked me if I had the same commission to take his cussion that I had to take his arms." The encounter ended with a challenge to duel, which was declined. *See* B. BLAKELEY & J. COLLINS, DOCUMENTS IN ENGLISH HISTORY 216.

[94] 2 T. MACAULAY, *supra* note 84, at 136-37.

disarmed," but he agreed that "It is a thing of great consequence what persons should be trusted with arms and ought to be very well considered ...."[95]

James's civil policies alienated the Whigs, and his religious policies alienated the Anglican establishment, the normal bulwark of the throne. With both of these forces against him, he was a marked man. In November 1688, England was nominally "invaded" by his son-in-law, William of Orange, and daughter, Mary, and James fled to the Continent. The bloodless coup came to be known as the "Glorious Revolution" ("revolution" at that time having almost the opposite of its current meaning, being used to describe a reversal of a radical change and a return to traditional norms rather than the institution of such a change).[96]

The flight of James II posed two major constitutional questions. The first was a problem for the "establishment," now becoming known as the Tories: Given that they adhered largely to the notion of kingship as a divine or at least hereditary right, how could they justify recognizing William or any other person as monarch at a time when James, who unquestionably had been the King of England, was alive and asserting his hereditary right? The second was a problem for the "country party," the Whigs: How could they insure that the rights they felt James had infringed would be guaranteed against future infringements by the new monarchs or their descendants?

These problems were handled in a practical, if not necessarily consistent, manner. A "convention" Parliament formulated a Declaration of Rights, proclaimed that James had abdicated (pg.580) by (in Whig theory) violating those rights and (in Tory theory) by leaving England. William and Mary accepted the Declaration of Rights as definitive of the rights of their subjects, agreed to govern in accord with the Declaration, and thereupon assumed the role of sovereigns. They then formally called a parliament, which enacted the Declaration of Rights as the Bill of Rights.[97]

The Declaration was not intended as a radical statement of the rights of individuals. Because constitutional government was being held in limbo pending its drafting and acceptance by the intended sovereigns, speed was essential, and its principles had to be ones acceptable to virtually all members of the legislature, from the most conservative Tory to the most radical Whig. It was accordingly drafted, not to introduce new principles of law, but merely as a "recital of the existing rights of Parliament and the subject, which James had outraged, and which William must promise to observe."[98] This essentially conservative consensus would become the basis of the English and American theory of rights that predominated during the American Revolution eighty-six years later. For constitutionalists of that period such as Edmund Burke and William Blackstone, "1689 seemed the last year of creation, when God looked down upon England and saw that it was good."[99]

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[95] 2 CALENDAR OF STATE PAPERS (DOMESTIC), JAMES II, No. 50, at 11 (Jan. 19, 1686).

[96] *See* J.R. WESTERN, *supra* note 63, at 1.

[97] 1 W. & M., ch. 2 (1689). The inconsistency of this solution lay in the fact that, if James II had in fact abdicated, the Crown should have gone to his son, James (III), an infant then with him on the Continent, and not to Mary, his daughter, much less William, his son-in-law. Additionally, there was only one precedent for treating William and Mary as co-sovereigns—the ill-remembered reign when Mary I and her husband, Philip II of Spain, ruled jointly (Philip *was* king regnant of England; *cf.* 1 Phil. & 2 M., ch. 10 (1554)). Thus, either William should have been king and Mary queen consort, or she should have been queen regnant and he prince consort. But there was little reason to believe that James III, when grown to adulthood, would be any better than his father; the English would not support a foreigner as king in his own right; and William would not accept the role of prince consort. As is usual in politics, pragmatic needs triumphed over theoretical consistency.

[98] G. TREVELYAN, THE ENGLISH REVOLUTION 179-80 (1979).

[99] *Id.* at 8. Burke described the Declaration as "the cornerstone of our Constitution." L. BREVOLD & R. ROSS, THE PHILOSOPHY OF EDMUND BURKE 192 (1970).

Significant among the rights recognized in the Declaration was an individual right to ownership of arms. In the form finally adopted by both Houses, the Declaration complained that James "did endeavor to subvert and extirpate ... the laws and liberties of the kingdom" by, *inter alia*, causing his Protestant subjects "to be disarmed at the same time when Papists were both armed and employed contrary to law," and resolved "for vindicating and asserting their ancient rights and liberties," (pg.581) that "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[100] The Parliament went on to re-enact the Hunting Act, with one significant change: Firearms were pointedly omitted from the list of hunting equipment that could not be possessed except by the wealthy.[101] "The provision in the Declaration of Rights that Protestant subjects had a right to have arms suitable to their conditions and as allowed by law was interpreted to mean that all Protestants, whatever their condition, were permitted to have arms."[102]

A few modern writers have claimed that the Declaration of Rights was not directed so much at any disarmament of Protestants as at the fact that Catholics were permitted to be armed while the Protestants had been disarmed: "The imposition lay more in the discrimination than in the disarming."[103] No authority is cited for this conclusion, except personal surmise. Historical data, such as the private arms confiscations that led to the deposition of James and the subsequent repeal of the Hunting Act's ban on firearms ownership, indicate that this is (pg.582) an incorrect interpretation. Additionally, the legislative history of this section of the Declaration of Rights in the House of Commons strongly suggests that an individual right was intended. Lord Somers, a Whig leader who headed the committee charged with drafting the Declaration,[104] penciled notes of the Commons debates.[105] Somers's notes reveal Parliament's great concern with the confiscation of private arms collections, in particular under the 1662 Militia Act. Somers condensed a speech by Sir Richard Temple to "Militia Bill—power to disarm all England—now done in Ireland."[106] Another member, a Mr. Boscawen, added a personal complaint: "arbitrary power exercised by the Ministry....

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[100] 1 W. & M., ch. 2 (1689).

[101] 4 & 5 W. & M., ch. 23 (1692). The amendment left the possibility that guns could be seized as "engines" suitable for poaching. Any such construction was ruled out in 1739 when the Court of King's Bench struck down such a seizure, holding that while other items such as nets and hunting dogs had no use but poaching, firearms had legitimate uses as well. Forfeiture of a firearm as an "engine" thus required proof of actual use in poaching. Rex v. Gardner, 93 Eng. Rep. 1056 (K.B. 1739).

[102] J. Malcolm, Disarmed: The Loss of the Right to Bear Arms in Restoration England 16 (working paper, Mary Ingraham Bunting Institute, Radcliffe College, 1980). *See also* P. MUNSCHE, *supra* note 82, at 81 (1981) (noting that fears of disarmament "are belied by the large proportion of game cases heard by the quarter sessions in this period which involved the use of firearms. They are belied as well by the known popularity of shooting matches at this time and by the openness with which unqualified men acknowledged their possession of firearms.") A century later, even legal commentators had forgotten the uses of the 1671 Act. In 1817, Joseph Chitty, probably then the foremost expert on the game laws, contested Blackstone's claim that Hunting Acts had been used for disarming the people: "[E]ver since the modern practice of killing game with a gun has prevailed, everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game." Chitty, *supra* note 82, at 189 n.1.

[103] *See* Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53, 59 (1975); Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975). It is interesting to note that while the Declaration would have allowed disarmament of Catholics, even the most anti-Catholic members of Parliament considered it oppressive to do more than reduce their armaments. A 1689 act, passed when there was still risk of James's return, allowed Catholics to retain all arms needed for self-defense. Malcolm, *supra* note 5, at 309. The act's zealous sponsor, who complained during the debate that "we are so mealy-mouthed and soft-handed to the Papists," nonetheless explained that Parliament should not seize arms "necessary [for the] defense of their houses." 5 PARLIAMENTARY HISTORY OF ENGLAND 183-84 (London 1809).

[104] *See generally* 4 LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS 484-86 (1878).

[105] *See* 2 PHILLIP, EARL OF HARDWICKE, MISCELLANEOUS STATE PAPERS FROM 1501 TO 1726, at 339 (London 1778).

[106] *Id.* at 416.

Militia—imprisoning without reason; disarming—himself disarmed ...."[107] Sergeant Maynard then blasted the previous parliaments that had enacted this legislation: "Some gross grievances for which we are beholden to a Parliament, who cared not what was done, so their pensions were paid— Militia Act—an abominable thing to disarm the nation ...."[108] Members of the Commons, it can be seen, were primarily afraid of the disarmament of individual Englishmen under the powers granted by the Militia and Hunting Acts.

The attitude of the House of Lords is even more clear. As passed by the Commons, the Declaration of Rights would simply have noted that "The acts concerning the Militia are grievous to the subject," and that therefore, "It is necessary for the public safety that the subjects, which are Protestants, should provide and keep arms for their common defense; and that the arms which have been seized and taken from them be restored."[109] While this wording did call for the return of arms confiscated from individuals, it still placed emphasis on the keeping of arms "for the common defense." The House of Lords changed this provision to: "The subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law," and so omitted any notion of (pg.583) "common defense."[110] The Declaration's introductory clause that condemned the arming of Catholics was added during conference late in the drafting process after both Houses had passed versions of the Declaration. The Lords who proposed considered it only an aggravation of the real violation: personal disarmament. "This is a further aggravation fit to be added to the clause," is their entire explanation of the conference amendment.[111]

The actions of both Houses are thus consistent only with the view that an individual right was intended. Indeed, modern British military historian J. R. Western, who views the proceedings from the standpoint of the militia movement rather than individual rights to own arms, has complained of the final version: "The original wording implied that everyone had a duty to be ready to appear in arms whenever the state was threatened. The revised wording suggested only that it was lawful to keep a blunderbus to repel burglars."[112] This is, of course, consistent with the later actions of Parliament in repealing the arms ban contained in the Hunting Act.[113] This individual rights interpretation of the Declaration is also consistent with colonial views of the right to bear arms. When Maryland in 1692 enacted a militia statute based on the 1662 Act, it added a provision that no "persons whatsoever shall presume at any time to seize, press or carry away from the inhabitant

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[107] *Id.*

[108] *Id.* at 417. "Pensions" then referred, not to retirement benefits, but to royal grants or salaries for nominal posts, a favored tool for influencing votes.

[109] JOURNAL OF THE HOUSE OF COMMONS FROM DEC. 26, 1688 TO OCT. 26, 1693, at 5-6, 21-22 (London 1742).

[110] J.R. WESTERN, *supra* note 63, at 339.

[111] JOURNAL OF THE HOUSE OF COMMONS, *supra* note 109, at 25.

[112] J.R. WESTERN, *supra* note 63, at 339.

[113] *See supra* note 102 and accompanying text. One may contend that "as allowed by law" was meant to preclude royal, not parliamentary, efforts at disarmament. The distinction is questionable. No one had denied that the arms seizures condemned in the Declaration were in fact duly authorized by statutes enacted by Parliament. In fact, the Commons in 1688 directed their complaints at the 1662 and 1671 statutes themselves, not at any alleged royal misinterpretation. *See supra* notes 92-95 and accompanying text. The members also complained of other statutes: "In the year 1660, there were many hard laws made, grievous to the people." 2 PHILLIP, EARL OF HARDWICKE, *supra* note 105, at 415. The "law" referred to in the Declaration was the common law body of rights, not recent statutes.

resident in this province any arms or ammunition of any kind whatsoever ... any law, statute or usage to the contrary notwithstanding."[114]

A second important political legacy of the Glorious Revolution is the eventual emergence of the Whigs as a major political (pg.584) party and Whiggism as the dominant ideology of freedom.[115] This had no small impact on the New World; John Adams estimated that nine-tenths of Americans were Whigs by the outbreak of our Revolution, and even the British general John Burgoyne admitted that "I look with reverence, almost amounting to idolatry, upon those immortal Whigs" responsible for the Declaration of Rights.[116]

The early Whig theorists unanimously stressed individual ownership of arms, the formation of a citizen army, and the limitation of standing armies as the basis of political freedom. They drew upon Sir Walter Raleigh, who wrote that among the "sophisms of a barbarous and professed tyranny" would be plans "to unarm his people of weapons, money and all means whereby they may resist his power," while the "sophistical or subtle tyrant" would plan "to unarm his people, and store up their weapons, under pretence of keeping them safe, and having them ready when service requireth."[117] Algernon Sydney, a leading Whig thinker and politician executed by Charles II, counseled that "No state can be said to stand upon a steady foundation, except those whose whole strength is in their own soldiery, and the body of their own people," and more concisely, that in a proper commonwealth, "the body of the people is the public defense, and every man is armed."[118]

The post-1688 Whigs maintained the same principles. Roger Molesworth summed it well in his famous foreword to Hotman's *Franco-Gallia*: "[T]he arming and training of all the (pg.585) freeholders of England, as it is our undoubted ancient constitution, and consequently our right; so it is the opinion of most Whigs, that it ought to be put into practice."[119] Molesworth praised the Swiss as examples of this wisdom and rejected the Game Laws as a reason for disarming the poor: "The preservation of the game is but a very slender pretence for omitting it. I hope no wise man will put a hare or a partridge in balance with the safety and liberties of Englishmen." James Harrington expanded upon these principles in his *Oceana*, a Whig *Utopia*. To Harrington, it was "the possession of land that gave a man independence, this independence being in the last analysis measured by his

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[114] 13 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, APRIL 1684-JUNE 1692, at 557 (W. Browne ed. 1894).

[115] *See generally* B. WILLIAMS, THE WHIG SUPREMACY (5th ed. 1962); J. REES, THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISIS 1678-1683 (1961). Several historians have challenged the previously accepted connection between the Glorious Revolution and the triumph of the Whigs. *See*, *e.g.*, J.P. KENYON, OBLIGATION AND AUTHORITY (1977). Indeed, in light of the Sacheverell trial, many historians now accept that Toryism was the dominant ideology through 1714, and that the decline of the Tories is attributable to the succession of the Hanoverian monarchs. In any case, it is clear that Whiggism was predominant in the American colonies for at least the half-century preceeding the American Revolution. Toryism in Britain, on the other hand, was revived in the second half of the Eighteenth Century (when the country was almost constantly at war). *See infra* note 171. American Whig sentiment deepened in reaction to that revival. In the succinct words of Benjamin Franklin, the colonists were "Whigs in a Reign when Whiggism is out of Fashion." H. COLBOURN, *infra* note 116, at 193.

[116] C. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 55 (1963). *See also* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); H. COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION (1965).

[117] W. RALEIGH, *Maxims of State*, in 8 THE WORKS OF SIR WALTER RALEIGH, KNT., NOW FIRST COLLECTED 22, 25 (Oxford Univ. 1829).

[118] ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 156-57 (3d ed. London 1751) (Library of Congress Rare Books Collection).

[119] F. HOTMAN, FRANCO-GALLIA at iv (R. Molesworth trans., London 1711).

ability to bear arms and use them in his own quarrels ...."[120] In his *Prerogative of Popular Government*, Harrington added that a republic is virtually unconquerable because its citizens, "being all soldiers or trained up unto their arms, which they use not for the defense of slavery but of liberty" cannot be subdued: "Men accustomed to their arms and their liberties will never endure the yoke."[121] Harrington's follower, Henry Neville, added that "democracy is much more powerful than aristocracy, because the latter cannot arm the people for fear they should seize upon the government."[122]

In the early Eighteenth Century, Andrew Fletcher added his *Discourse of Government with Relation to Militias*. Like Harrington, Fletcher shared Machiavelli's admiration for the ancient armed republics of Rome and Sparta.[123] Fletcher also noted the contemporary example of the Swiss: "the freest, happiest, and the people of all Europe who can best defend themselves, because they have the best Militia."[124] He saw his proposal "that the whole people of any Nation ought to be exercised to Arms" as supported by both the common law and by history; "and I cannot see, why Arms should be denied to any man who is not a (pg.586) Slave, since they are the only true Badges of Liberty ...."[125] His successor, James Burgh, was still more popular in the colonies. Burgh devoted an entire chapter of his *Political Disquisitions* to the Militia-Army issue. "No kingdom can be secured otherwise than by arming the people," Burgh wrote, adding, "The possession of arms is the distinction between a freeman and a slave."[126] Writing on the eve of the American Revolution, Burgh argued that the emerging conflict was itself a product of ignoring these principles:

> The confidence which a standing army gives a minister, puts him upon carrying things with a higher hand than he would attempt to do if the people were armed and the court [royal officials] unarmed, that is, if there were no land force in the nation, but a militia. Had we at this time no standing army, we should not think of forcing money out of the pockets of three millions of our subjects. We should not think of punishing with military execution, unconvicted and unheard, our brave American children, our surest friends and best customers.... We should not—but there is no end to observations on the difference between the measures likely to be pursued by a minister backed by a standing army, and those of a court awed by the fear of an armed people.[127]

The Whig writings have more than purely historical interest. John Adam's estimate that ninety percent of Americans were Whig sympathizers at the time of the American Revolution has been mentioned, and many of these American Whigs were deeply familiar with the writings of their

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[120] Pocock, *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. 549, 553-54 (1965).

[121] THE POLITICAL WORKS OF JAMES HARRINGTON 442 (J.G.A. Pocock ed. 1977).

[122] C. HILL, SOME INTELLECTUAL CONSEQUENCES OF THE ENGLISH REVOLUTION 27 (1980).

[123] "Rome remained free four hundred years and Sparta eight hundred, although their citizens were armed all that time; but many other states that have been disarmed have lost their liberties in less than forty years." N. MACHIAVELLI, THE ART OF WAR 30 (E. Farneworth trans., rev. ed. 1965). *See also* F. RABB, THE ENGLISH FACE OF MACHIAVELLI: A CHANGING INTERPRETATION 1500-1700 (1964).

[124] A. FLETCHER, A DISCOURSE OF GOVERNMENT WITH RELATION TO MILITIAS 45 (London n.d.) (probably before 1737).

[125] *Id.* at 47.

[126] 2 JAMES BURGH, POLITICAL DISQUISITIONS: AN ENQUIREY INTO PUBLIC ERRORS, DEFECTS AND ABUSES 345, 390, 476 (London 1774, reprinted 1971).

[127] *Id.* at 475-76.

English predecessors.[128] John Adams held special regard for Harrington, although he probably did not endorse the 1779 proposal to change Massachusetts's name to Oceana.[129] Adams and Madison both studied Molesworth in detail; Jefferson's library (pg.587) boasted copies of Sydney, Molesworth and Harrington.[130] These works, and those of Fletcher, were also owned by the likes of Benjamin Franklin, John Hancock, and George Mason.[131] When Burgh's *Political Disquisitions* were printed in the colonies, Benjamin Franklin served as editor, and the subscription list for the first edition included George Washington, Thomas Jefferson, John Adams, John Hancock, and John Dickinson.[132]

The Harringtonian view retained its vitality in England as well. Only a few years before the drafting of our own Constitution, the Recorder of London, a legal official roughly equivalent to the chief justice and general counsel of the City, issued a legal opinion.[133] This opinion accepted an individual right "of his Majesty's Protestant subjects, to have arms for their own defense, and to use them for lawful purposes," established "by the ancient laws of this kingdom." Such a right to own arms was necessary for "the suppression of violent and felonious breaches of the peace, the assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders."[134]

Thus, by the Eighteenth Century, the English tradition of individual armament had crystallized into a conception of individual ownership of arms as a specific political right supported by the entirety of Whig political thought. This concept would exert even greater impact upon the emerging American colonies than it had upon the Britain of the time.

C. *The Right to Bear Arms in Colonial America: "A People ... Discontented and Armed"*

The colonists in the New World needed private armament to a degree unknown in their motherland. The early colonies were short on fighting manpower, faced with external danger in the form both of Indians and of rival Dutch, French, and Spanish colonists, and heavily dependent upon hunting for their meat (pg.588) supply. It is thus not surprising all forms of firearms were soon present in quantity. In September 1622, for instance, the Virginia colony received a shipment of 300 muskets, "300 short pistols with fire locks," plus bows, arrows, and spears.[135] In 1623, the Virginia legislature forbade anyone to "go or send abroad without a sufficient partie will armed," ordered that

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[128] In the late Eighteenth Century, a firm background in history was considered indispensible to any legal or political thinker. It was an age when Patrick Henry might, although admittedly lacking in legal knowledge, gain admission to the bar by his grasp of history and logic; when a solid knowledge of Latin and Greek, and of such authors as Homer, Demosthenes, and Xenophon, was an entrance requirement for many colleges; and when Jefferson might spend his spare time accumulating one of the best historical libraries in the colonies and Madison his correcting footnotes in Latin translations. *See* M.C. TYLER, PATRICK HENRY 24 (1887, reprinted 1980); H. COLBOURNE, *supra* note 116, at 158-59.

[129] *See* C. HILL, PURITANISM AND REVOLUTION 311 (1958).

[130] *See* C. ROBBINS, THE EIGHTEENTH CENTURY COMMONWEALTHMAN 100-102 (1959); *see generally* H. COLBOURNE, *supra* note 116.

[131] *See* L. CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 35 (1982).

[132] *See id.*

[133] *See* JOWITT'S DICTIONARY OF ENGLISH LAW 1510 (2d ed. 1977).

[134] W. BLIZZARD, DESULTORY REFLECTIONS ON POLICE, at 59-68 (London 1785) (Baker Lib., Harv. Bus. School, Reel 1310).

[135] H. GILL, THE GUNSMITH IN COLONIAL VIRGINIA 3 (1974).

"The commander of every plantation take care that there be sufficient of powder and ammunition within the plantation" and required that every dwelling house be palisaded for defense.[136] Eight years later, it required that "All men that are fittinge to beare armes, shall bring their pieces to church ...." for drill and target practice,[137] and by 1658, it required that every "man able to bear arms have in-house a fixt gun ...." (apparently meaning a repaired and functioning one).[138] The American colonists quickly became the "greatest weapons-using people of the epoch in the world."[139] The breadth of armament was subject to few restrictions: In North Carolina, for instance, blacks who had obtained their freedom from slavery were also free to own as many arms as they desired; not until 1840 were they first required to obtain a license.[140]

The colonists had no use for regular troops, and instead concentrated upon refining the militia system. In the early Seventeenth Century, four northeastern colonies formed a military confederation that required thirty men out of every company to be maintained so as to be ready upon half an hour's notice; supporting these was a formidable general militia, one that in Massachusetts in 1675 was capable of turning out 1200 militiamen within an hour.[141]

The colonists often used their firearms against their own governors. After Bacon's Rebellion in 1676, Virginia Governor William Berkeley had cause to describe his misery at governing (pg.589) "a people where six parts of seven at least are poore, indebted, discontented and armed."[142] The Glorious Revolution in the mother country was met by a simultaneous rebellions of the northeastern colonies against the Royal Governor, Sir Edmund Andros, which rebellion saw Boston "generally in arms"[143] and the Governor besieged by several thousand armed colonists. By the second half of the Eighteenth Century, "scarcely a decade passed that did not see the people in arms to redress official grievances."[144] The end of the Seven Years War (known in the Americas as the French and Indian War) left Britain with a sizable empire and large frontiers to defend. Now the objective became the management of the empire: Expansion into the interior was to be discouraged, in order to maximize the lucrative fur trade with the Indians, revenue-producing taxes were to be enforced, and a large standing army stationed about the empire. These measures, the permanent stationing of large army units in particular, stirred controversy. The colonists, who saw the danger of Indian interference as diminished rather than increased now that the French stronghold of Canada had fallen, observed that the ranger units most useful against Indians were being dissolved even as the regulars were being increased, and were highly suspicious of British motives.[145] Conflicts between

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[136] 1 W. HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 127 (1823, reprinted 1969).

[137] *Id.* at 173-74.

[138] Malcolm, *supra* note 5, at 3.

[139] W. MILLIS, ARMS AND MEN 20 (1956).

[140] *See* J. FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA 76, 78 (1971). Paradoxically, free blacks had been totally denied the right to vote in 1835, five years before the legislature brought itself to require them to obtain permits for firearms, and 26 years before it attempted to disarm them entirely. *Id.* at 82, 102-03, 115.

[141] *See* D. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 356 (1958); J. GALVIN, THE MINUTEMEN 22 (1967).

[142] D. BOORSTIN, *supra* note 141, at 353.

[143] THE GLORIOUS REVOLUTION IN AMERICA 47 (M. Hall, L. Leder & M. Kammer eds. 1972).

[144] P. MAIER, FROM RESISTANCE TO REVOLUTION 5 (1972).

[145] *See generally* 3 M. ROTHGARD, CONCEIVED IN LIBERTY 27-31 (1976); J. SHY, TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION 142, 165 (1965).

soldiers and citizens rapidly increased and the newspapers of the time were filled with reports of insults, fights, robberies, and rapes attributed (correctly or not) to the British troops.[146]

Against such regular forces, the colonists asserted a right of individual armament and self-defense they believed guaranteed by the Declaration of Rights. The *Boston Evening Post*, for 3 April 1769, announced that colonial authorities had urged the citizenry to take up arms, and, in reply to the claim that this request was unlawful, observed that:

> It is certainly beyond human art and sophistry, to prove the British subjects, to whom the *privilege* of possessing arms is expressly recognized by the Bill of Rights, and who live in a province where the law requires them to be equipped with (pg.590) *arms*, etc., are guilty of an *illegal act*, in calling upon one another to be provided with them, as the *law directs*.[147]

A few weeks later, the *New York Journal Supplement* referred to the same measure, observing that:

> It is a natural right which the people have reserved for themselves, confirmed by their Bill of Rights, to keep arms for their own defense; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.[148]

The outbreak of the Revolution itself was largely the result of British attempts to disarm the colonies. British enactment of the "Coercive Acts" in retaliation for the "Boston Tea Party" led to so vigorous a reaction that one British commander wrote to warn that "the opposite party are arming and exercising all over the country."[149] Britain responded by banning all export of muskets and ammunition to the colonies[150] and by ordering General Gage to consider measures to disarm residents of rebellious areas.[151] In September 1774, a party of British regulars quietly emptied a militia powder magazine in Massachusetts. Some colonists complained that this was "part of a well-designed plan to disarm the people"; others spread an incorrect report that six colonials had been killed during the raid.[152] The effect was electric: Approximately 60,000 armed men turned out from western Massachusetts alone, a force seven times the size of the entire regular army stationed in the colonies.[153]

The effect of the British efforts was to harden American resistance. The colonists began to form the "minutemen," a nationwide select militia organization. Radicals called for new elections for militia officers, and the resulting elections effectively purged pro-British officers from militia ranks and gave the radicals a firm hold on the militia.[154] Movements to upgrade (pg.591) militia arms

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146 *See* O. DICKERSON, BOSTON UNDER MILITARY RULE xi, 17, (1936).

147 *Id.* at 61.

148 *Id.* at 79.

149 L. NEWCOMER, THE EMBATTLED FARMERS 52.

150 *See* J. ALDEN, GENERAL GAGE IN AMERICA 224 (1948).

151 Gage responded, logically: "Though their idea of disarming certain counties was a right one ... it requires me to be master of the country, in order to enable me to execute it." 1 THE POLITICAL WRITINGS OF THOMAS PAINE 111 (Boston 1856).

152 *See* S. PATTERSON, POLITICAL PARTIES IN REVOLUTIONARY MASSACHUSETTS 103 (1973).

153 *See id.*

154 *See id.* at 104-05; J. GALVIN, *supra* note 141, at 68-69. The pre-revolutionary militia also served as a rallying point for the poorer artisans and mechanics in the northern states, where the more wealthy classes tended to favor the British. One study of the Philadelphia militia, for instance, found that about half its members owned no real estate and only negligible personal property.

and organization spread rapidly. Patrick Henry's famed "give me liberty or give me death" speech, for instance, was in fact directed to his resolution "that a well-regulated militia, composed of gentlemen and freemen, is the natural strength and only security of a free government."[155]

The British efforts continued, however. In February 1775, a column of regular troops was dispatched to seize firearms stored in Salem, Massachusetts. A confrontation with local minutemen forced the column to back off to avoid bloodshed.[156] Two months later, Gage ordered a similar attempt against militia arms stored at Concord. Again, the minutemen mustered, and this time shots were fired. The British column was forced to withdraw into Boston with heavy casualties; only the arrival of a rescue force with light artillery enabled the column to escape swarms of unorganized but heavily armed colonists.[157] The British force was soon hemmed into Boston itself; an attempt to storm Breed's Hill on the outskirts of the city was met by murderous aimed fire[158] that left nearly forty percent of the attacking force casualties.[159] Any lingering doubts about the colonial love of firearms were resolved when Gage offered to permit Bostonians to transact business across his lines only if they first surrendered all firearms. The predominantly urban population turned in no fewer than 1,800 muskets and 634 handguns.[160] Nor did the British woes end here. Only a few (pg.592) days before, Governor Dunmore of Virginia had successfully raided the Williamsburg powder magazine—and promptly found his mansion surrounded by armed militiamen.[161] Virginians now made common cause with New Englanders: Dunmore's mansion was soon sacked and 200 government muskets taken.[162] A war was on—and colonists would not forget that a major cause was the government's attempts at disarmament.

The role of the unorganized militia in the Revolution has been, until recently, largely unrecognized. The militia generally acquitted themselves poorly during the major organized battles of the war,[163] and were the subject of constant and bitter criticism.[164] Recent scholarship has

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See E. FONER, TOM PAINE AND REVOLUTIONARY AMERICA 63-64 (1976).

155 H. MILES, REPUBLICATION OF THE PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 278 (1876).

156 L. NEWCOMER, *supra* note 149, at 55; J. ALDEN, *supra* note 150, at 225.

157 *See generally* W. WILLARD, APPEAL TO ARMS 17-24 (1951).

158 Israel Putnam's famed "Don't shoot 'till you see the whites of their eyes" order was prefaced with the note, "Men, you are all marksmen"; one participant later stated "I discharged my gun three times at the British, taking deliberate aim, as at a squirrel, and saw a number of men fall." W. WILLARD, APPEAL TO ARMS 41 (1951); 1 C. FLOOD, RISE AND FIGHT AGAIN 61 (1976).

159 2 J.F.C. FULLER, A MILITARY HISTORY OF THE WESTERN WORLD 275 (1955). A British officer observed one American sniper at work and estimated he shot down no fewer than 20 officers in 10 minutes; 14% of the total British officer casualties during the 13-year-long Revolution occurred on that one day on the slopes of Breed's Hill. *See* J. HUDDLESTON, COLONIAL RIFLEMEN IN THE AMERICAN REVOLUTION 25 (1978).

160 *See* J. ALDEN, *supra* note 150, at 255; W. MOORE, WEAPONS OF THE AMERICAN REVOLUTION vii (1967). Gage's demand was later cited by Congress as a cause of the war, although their protest seems more directed to an accusation that Gage broke his word and did not permit the promised trade after the confiscation. *See* DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess., at 14-15 (1927).

161 I. NOEL HUME, 1775: ANOTHER PART OF THE FIELD 135-37 (1966).

162 *Id.* at 239.

163 At Guilford Courthouse, for instance, Virginia and North Carolina militia broke and ran before sustaining a single casualty. The American commander noted: "They had the most advantageous position I ever saw, and left it without making scarcely the shadow of opposition." B. DAVIS, THE COWPENS-GUILFORD COURTHOUSE CAMPAIGN 155-56 (1962).

164 Washington complained of the militia that they "come in you cannot tell how, go you cannot tell when, and act you cannot tell where, consume your provisions, exhaust your stores, and leave you at last at a critical moment." J. PALMER, WASHINGTON, LINCOLN, WILSON: THREE WAR STATESMEN 26 (1930).

demonstrated, however, that the militia played no small role in determining the Revolution's outcome. The militia's functions included seizing immediate control of local political machinery, harrassing isolated British units and thus diverting manpower from their overstretched and undermanned armies, suppressing Tory units and Indian raiding parties that would otherwise have required responses from Washington's equally undermanned regular units;[165] and, by cutting off foraging parties, causing a supply problem that would have forced the British to negotiate within a few years even absent defeats in the field.[166] (pg.593)

The widespread American ownership of arms did not go unnoticed in the mother country, where it was often cited by English Whigs as a reason to negotiate rather than use force. Pitt had early warned the House of Lords: "Three millions of Whigs, with arms in their hands, are a very formidable body.... The [Coercive] Acts must be repealed; they will be repealed; you cannot enforce them."[167] Thomas Paine, the colonial propagandist *par excellance*, taunted the British commander Lord Howe with a theme that would still be appropriate two centuries later: Faced with a well-armed guerilla force, regular troops control only the ground under their feet.[168]

The experience of the Revolution thus strengthened the colonial perception of a link between individual armament and individual freedom. The colonists, who perceived themselves as staunch Whigs,[169] continued to see free individual armament as Whig dogma.[170] The British government and

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[165] One historian has noted that the militia's activities in the early days of the war "were absolutely essential to the launching and continuation of the revolution as war ... from a military point of view, these months were quite likely the most important period of the revolution. If one result of this militia-backed takeover was that the loyalists were to remain permanently on the defensive, surely another consequence was that virtually everywhere British armies landed they encountered a hostile environment." Higginbotham, *The American Militia: A Traditional Institution with Revolutionary Responsibilities*, in RECONSIDERATIONS ON THE REVOLUTIONARY WAR 95 (1978). *See also* J. SHY, A PEOPLE NUMEROUS AND ARMED 23-33 (1976); Shy, *A New Look at the Colonial Militia*, 20 WM & MARY Q. 175-85 (1963).

[166] "Failure to control a large enough area from which food and other essential requirements could be obtained meant that enormous effort had to be diverted into supplying the British forces ... and by 1782 the war must have ground to a halt in any event, for the country's shipping resources were stretched beyond the limit." I. CHRISTIE, CRISIS OF EMPIRE 106 (1966). *See also* E. DUPUY, G. HAMMERMAN & G. HAYES, THE AMERICAN REVOLUTION: A GLOBAL WAR (1977).

[167] 1 GORDON, THE HISTORY OF THE RISE, PROGRESS AND ESTABLISHMENT OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA 443 (London 1788). In similar fashion, Matthew Robinson-Morris, Baron Rokeby, argued in a 1774 pamphlet that the colonies could boast 300,000-400,000 men capable of bearing arms: "But can they arm so many? In any country greatly taxed ... it is not possible ... to arm the whole people.... But these are all democratical governments, ... where there is not the least difficulty, or jealousy about putting arms into the hands of every man in the country." ENGLISH DEFENDERS OF AMERICAN LIBERTIES 69-70 (1972) (P. Smith ed.). The pamphlet went through three English and seven American editions. *Id.* at 46.

[168]
> Suppose our armies in every part of this continent were immediately to disperse every man to his home, or where else he might be safe; it is clear that you would then have no army to contend with, yet you would be as much at a loss in that case as you are now; you would be afraid to send your troops in parties over the continent, either to disarm or prevent us from assembling, lest they should not return; and while you kept them together, having no army of ours to dispute with, you could not call it a conquest ....

1 THE POLITICAL WRITINGS OF THOMAS PAINE 94 (1837).

[169] *See supra* notes 116, 128-30 and accompanying text.

[170] *See supra* notes 118-20 and accompanying text.

the Tories who supported it[171] were seen as sponsors of arms confiscations and bans on the purchase of firearms.[172] (pg.594)

D. *Rights and Duties of Arms Ownership Under the American Constitution*

At the close of the Revolution, the former colonies' national government operated under the Articles of Confederation. These provided for only narrow powers at the national level, and reserved broad powers and duties to the individual states. The pre-1787 American guarantees of rights are, accordingly, to be found in the state bills of rights drafted during this period.

To be sure, not all of the States then adopted constitutions, let alone bills of rights; many were content to rely upon colonial charters.[173] But the prominence given the right to arms in those popularly ratified bills illustrates the importance attached to this right. The recognition of this right in state bills of rights has a second importance. It has been claimed that the Second Amendment's choice of words (for example, a right "of the people" and a reference to the importance of the militia) indicates a desire to protect the States against federal infringement of their right to possess an organized militia, not individuals in their rights to own arms.[174] The inclusion of parallel guarantees in state bills of rights entirely refutes this view. There was at this period no federal government; these state bills of rights were intended, not to *grant power* to the state governments, but to *reserve individual rights* from among the grants of state powers. The sole non-state political unit then existing, in whose favor such a reservation could run, was the individual. A careful examination of developments in the early state declarations of rights is thus vital.

The first of the state declarations of rights came in Virginia, in June 1776. The Virginia declaration was, however, hurriedly drafted and considered, and the records of the deliberations are all but nonexistent.[175] Thomas Jefferson had proposed elaborate guarantees of freedom, including a provision that no person thereafter entering the state might be held in slavery, and a guarantee that "No freeman shall ever be debarred the (pg.595) use of arms."[176] The Virginia convention opted, however, for a simpler document written by George Mason. Unlike subsequent declarations, this instrument was phrased in exhortations and not commands. Suspension of laws was "injurious to their rights, and ought not to be exercised"; general warrants were "grievous and oppressive, and ought not to be granted"; jury trial "is preferable to any other, and ought to be held sacred"; freedom of the press "can never be restrained but by despotic governments."[177] In the same style, it simply recognized that "a well-regulated Militia, composed of the body of the people, trained to arms, is the

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[171] To no small extent, the slide toward revolution was attributable ultimately to the Tory party's ascendancy in British politics in the year following 1760. *See generally* 3 M. ROTHBARD, CONCEIVED IN LIBERTY (1976); B. WILLIAMS, THE WHIG SUPREMACY (5th ed. 1962).

[172] George Mason, for instance, described his view of the British strategy to the Virginia convention on ratification of the proposed Constitution as having been "to disarm the people; that was the best and most effectual way to enslave them." 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 380 (2d ed. 1836).

[173] *See generally* J.T. MAIN, THE SOVEREIGN STATES 1775-1783 (1973).

[174] *See* Comment, *Constitutional Limitations on Firearms Regulation*, 1969 DUKE L.J. 773, 796-97. *Cf.* Hardy & Stompoly, *supra* note 1, at 68-69.

[175] Less than a month passed between the appointment of a committee to draft the Declaration and its final passage; during this time, both committee and convention were also preparing a constitution, which was finalized two weeks later. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 231 (1971).

[176] 1 PAPERS OF THOMAS JEFFERSON 344 (J. Boyd ed. 1950).

[177] 7 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS 3814 (1909).

proper, natural and safe defence of a free State ...."[178] Convention member James Madison would later use this exhortation as half, and only half, of what became the Second Amendment to the United States Constitution.

The Pennsylvania convention met in July 1776, and produced a more specific series of guarantees. Three noteworthy recognitions, missing in the Virginia declaration, were freedom of speech, the right to assemble peaceably, and the right to bear arms.[179] That the last was seen as an individual right is clear from the text. The first article of the Pennsylvania declaration recognizes "certain natural, inherent and inalienable rights," including that of "defending life and liberty." The thirteenth article recognizes that "the people have a right to bear arms for the defense of themselves and the State."[180] The intention to protect the individual is further illuminated by the Pennsylvania Constitution of 1776 itself, which recognized that "the inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other (pg.596) lands therein not inclosed ...."[181] When some, not surprisingly, observed, that this was not appropriate for a constitution, the *Pennsylvania Evening Post* replied that, under the British hunting acts:

> [T]he possession of hunting dogs, snares, nets and other engines by unprivileged persons has been forbidden and, under pretence of the last words, guns have been seized. And though this is not legal, as guns are not engines appropriate to kill game, yet if a witness can be found to attest before a Justice that a gun has thus been used, the penalty is five pounds or three months' imprisonment ....

"Thus," the *Evening Post* article explained, are "freeholders of moderate estates deprived of a natural right. Nor is this all; the body of the people kept from the use of guns are utterly ignorant of the arms of modern war, and the kingdom effectually disarmed.... Is anything like this desired in Pennsylvania?"[182] The Pennsylvania format was adopted by Vermont's convention the following year.[183] As an explanation of these rights, Vermont's convention introduced its declaration with the observation that "all men ... have certain natural, inherent, and unalienable rights, amongst which

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178 *Id.*

179 *Id.* at 262.

180 5 F. THORPE, *supra* note 177, at 3082-83. A 1790 revision of the Pennsylvania Constitution stressed still further the individual nature of the right. As initially drafted, the right to bear arms was separated from provisions on standing armies and instead grouped with rights of petition and assembly: "[T]he right of the citizens to bear arms in defense of themselves and the State, and to assemble peaceably together, and apply, in a decent manner, to those invested with the powers of government, for redress of grievances or other proper purposes, shall not be questioned." *Minutes of the Convention of the commonwealth of Pennsylvania, which Commenced at Philadelphia, on Tuesday the twenty-fourth Day of November, in the Year of Our Lord One Thousand Seven Hundred and Eighty-Nine*, at 46 (1789). The final version separated the right to arms into its own section (21), retaining the provision that it "shall not be questioned." 5 F. THORPE, *supra* note 177, at 3101.

181 5 F. THORPE, *supra* note 177, at 3091.

182 Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont and Massachusetts*, 10 VERMONT L. REV. 255, 270 (1985) (citing Pa. Evening Post, November 5, 1776). The anonymous author of the *Evening Post* article certainly had a detailed knowledge of the game laws. *See supra* notes 81-83, 90-91 and accompanying text. Although the game laws had long required proof that a gun had been used in poaching before it could be seized or the owner punished, similar complaints were voiced in England at the time. When landowners formed an "Association" to crack down on poaching, one response was that "The inhibition of bearing Arms has ever been deemed, through all the Nations of the World, the most flagitous Characteristic of abject Slavery!"; Lord Malmesbury complained that "You could not go into the city but you heard the lord mayor pronounce a condemnation of the game laws." P. MUNCSCHE, *supra* note 82, at 113-14.

183 *See* Halbrook, *supra* note 182, at 290-91.

are the enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining happiness and safety."[184]

In apparent contrast to the Pennsylvania and Vermont approaches, North Carolina recognized a right to bear arms "for the defense of the State," and Massachusetts recognized a right to keep and bear arms "for the common defense."[185] The contrast may not have been intentional; Massachusetts also recognized, among the "natural, essential and unalienable rights" of (pg.597) all free men "the right of enjoying and defending their lives and liberties."[186] One Massachusetts town meeting did go on record that "we deem it an essential privilege to keep Arms in Our House for Our Own Defense" and to complain that the "common defense" qualifier might someday be read to allow the government to "Confine all the fire Arms to some publick Magazine and thereby deprive the people of the benefit of the use of them."[187] Concerns such as these may have contributed to the rejection of the "common defense" and "defense of the state" qualifiers in subsequent state bills of rights—and ultimately, in the federal second amendment.[188]

As the foundations of the States were being fixed, those of the national government were being questioned. In early 1787, the Congress called a convention to propose amendments to the Articles of Confederation. The resulting convocation chose to draft an entirely new constitution. The incomplete notes of Constitutional Convention debates show little disagreement over the right to keep and bear arms. The primary concerns were establishment of a national government and the delineation of its powers vis-a-vis the States. Accordingly, debates over individual armament focused upon the need for federal versus state control over the militia.[189]

The final product of this militia-army dispute was a trade-off between Federalist and Anti-Federalist positions. The Federalists prevailed on the issue of regular army forces. These troops could not be kept by states and could be raised by the national government subject to a two-year limitation of appropriations.[190] Anti-Federalists prevailed on militia issues. Congress could not raise a militia. Rather it could only "provide for organizing, arming and disciplining" this force. It could only "govern" those in federal service, "reserving to the states respectively the appointment of officers, and the authority of (pg.598) training the militia according to the discipline prescribed by Congress."[191]

The drafting of the United States Constitution only began the process. For months, the nation engaged in a heated dispute over the terms of the proposed Constitution. A major area of contention was the absence of a bill of rights. Such bills—although originating in English law[192] —had become an American obsession. Early forms of such bills were adopted in Massachusetts in 1636, New

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184 6 F. THORPE, *supra* note 177, at 3739.

185 5 *id.* at 2788; 3 *id.* at 1892.

186 3 *id.* at 1889.

187 THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONVENTION OF 1780, at 624 (O. & M. Handlin eds. 1966).

188 A right to bear, or to keep and bear, arms for defense of self or the state was recognized in Kentucky in 1792, in Indiana in 1816, in Connecticut in 1818, and in Missouri in 1820. *See* F. THORPE, *supra* note 177, at 538, 1059, 1275, 2163. The Senate rejected a proposal to add "for the common defense" to what became the Second Amendment. *See infra* note 253 and accompanying text.

189 *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 330-31 (7th ed. 1963).

190 *See* U.S. CONST. art. I, § 8.

191 *Id.* at § 10.

192 *See supra* notes 85-87 and accompanying text.

Jersey in 1677, and New York in 1683.[193] By 1787, Americans regarded such measures as normal inventions of prudence. Theophilus Parson emphasized that: "[A] bill of rights, clearly ascertaining and defining the rights ... which every member of a state hath a right to expect ... ought to be settled and established, previous to the ratification of any constitution for the state ...."[194]

Federalists sought to excuse the omission of a bill of rights in the proposed Constitution on the ground that because the national government was to be a government of limited powers, the failure to delegate expressly to it the authority to do such things as restrict freedom of the press or establish a religion left it without any color of authority to do such.[195] Spokesmen such as Thomas Jefferson replied to this argument that "[a] positive declaration of some essential rights could not be obtained in requisite latitude" without a bill of rights.[196] (Privately, Jefferson was less temperate on the subject, describing a constitution in which the Executive could take away the rights secured by such a bill as "a degeneracy in the principles of liberty to which I had given four centuries instead of four years.")[197] The lack of a bill of rights led Richard Henry Lee (who years before had first moved for the Declaration of Independence) and George Mason (drafter of the Virginia Declaration of Rights) to refuse to sign the convention's final (pg.599) product.[198]

The ratification debates and concurrent newspaper and pamphlet wars give much insight into the contemporary understanding of the right to keep and bear arms. The relevant portions of these center upon four interrelated concerns—the power to raise armies, the question of the status of the militia, and the individual keeping and bearing of arms as a check on the standing army and new government, and the natural right of self-defense. Each concern merits detailed examination, as do the resulting demands by ratifying conventions for a bill of rights.

1. *Individual Ownership of Arms as a Check on Standing Armies*

The Anti-Federalists were quick to seize upon the obvious argument that, while standing armies were anathema to Americans, Section 8 of Article I of the proposed Constitution gave Congress carte blanche to "raise and support armies." Federalists were hard put to deny or to justify this provision. Instead, they sidestepped the issue by arguing that the universal armament of individual Americans removed the basis for concern: Standing armies were only dangerous to liberty where the people were disarmed and unable to resist. As Noah Webster contended in the first major Federalist pamphlet, aimed at the people of Pennsylvania:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by

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193 *See* B. BAILYN, *supra* note 116, at 194-6 (1967).

194 C. ROSSITER, *supra* note 55, at 185.

195 *See* J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION 640 (E. Koch ed. 1966); F. MCDONALD & E. MCDONALD, CONFEDERATION AND CONSTITUTION 190 (1968).

196 1 A.E. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 40-41 (1974).

197 12 PAPERS OF THOMAS JEFFERSON 558 (J. Boyd ed. 1950).

198 *See* A.E. HOWARD, *supra* note 196, at 40.

> the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretence, raised in the United States.[199]

On a similar theme, Segewick rejected the "chimerical idea ... that a country like this could ever be enslaved" and asked the Massachusetts convention to imagine whether an army bent upon enslaving the nation "could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?"[200] Madison, in *Federalist* No. 46, invoked "the advantage of being armed, which the Americans possess over the (pg.600) people of almost every other nation" and avowed that if European civilians were comparably equipped "it may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."[201] The Federalists thus sought to make universal citizen armament an assumption underlying the popular decision to ratify.

2. *The Militia as Dependent upon Universal Armament*

Federalists also advanced the existence of the militia as a counterpoise to the risks of a federal standing army authorized by the proposed Constitution. Hamilton, in *Federalist* No. 26, suggested that "[i]t is not easy to conceive a possibility that dangers so formidable can assail the whole union as to demand a force considerable enough to place our liberties in the least jeopardy, especially if we take into our view the aid to be derived from the militia, which ought always to be counted upon as a valuable and powerful auxiliary."[202] Madison, in *Federalist* No. 46, argued that a standing army of 25,000 to 30,000 men would be offset by "a militia amounting to near a half million of citizens with arms in their hands, officered by men chosen from among themselves ...."[203]

The Anti-Federalists were not persuaded. Their fears centered upon possible phasing out of the militia in favor of a smaller, more readily corrupted select militia. Proposals for such a select militia had already been advanced by individuals such as Baron Von Steuben, Washington's Inspector General, who proposed supplementing the general militia with a force of 21,000 men given government-issued arms and special training.[204]

An article in the *Connecticut Journal* expressed the fear that the proposed Constitution might allow Congress to create select militias: "this looks too much like Baron Steuben's militia, by which a standing army was meant and intended."[205] In Pennsylvania, John Smiley told the ratifying convention that "Congress (pg.601) may give us a select militia which will in fact be a standing army," and worried that, with this force in hand, "the people in general may be disarmed."[206] Richard Henry

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[199] N. WEBSTER, *An Examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention Held At Philadelphia* 43 (1787).

[200] 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 97 (J. Elliot ed. 1888) [hereinafter cited as DEBATES].

[201] THE FEDERALIST No. 46, at 300 (J. Madison) (Mentor ed. 1961).

[202] THE FEDERALIST No. 26, at 173 (J. Madison) (Mentor ed. 1961).

[203] THE FEDERALIST No. 46, at 299 (J. Madison) (Mentor ed. 1961).

[204] *See generally* L. CRESS, CITIZENS IN ARMS 78-92 (1982); J. MAHON, THE AMERICAN MILITIA, DECADE OF DECISION 1789-1800, at 6-8 (1960).

[205] 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 378 (M. Jensen ed. 1976).

[206] 2 *id.* at 509.

Lee, who was the first to raise the question of a bill of rights in the Constitutional Convention,[207] dealt extensively with this concern in his widely-read pamphlet, *Letters from the Federal Farmer to the Republican*.[208] Lee warned that liberties might be undermined by creation of a select militia that "[would] answer to all the purposes of an army."[209] He concluded that "the Constitution ought to secure a genuine and guard against a select militia by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the states, all men capable of bearing arms ...."[210] It is noteworthy that Lee's role in the future Second Amendment did not end with his service in the convention or his subsequent advocacy of a bill of rights; he later served in the first Senate, which extensively redrafted and then voted out the Second Amendment in its current form.

3. *Individual Citizen Armament as the Guarantee of Freedom*

Underlying all these positions was a belief in the virtue of individual citizen armament as a guarantee of individual freedom. Few phrased the matter as clearly as Lee's *Letters from the Federal Farmer*: "To preserve liberty it is essential that the whole body of the people always possess arms and be taught alike, especially when young, how to use them ...."[211] Lee's opponent, James Madison, put it more fluently in *Federalist* No. 46:(pg.602)

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate [state] governments ... forms a barrier against the enterprises of ambition .... Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust their people with arms.[212]

4. *Individual Arms and Self-Defense as a Natural Right*

Others saw the issue as a straightforward one of self-defense. "Common Sense," writing in the *New York Journal and Daily Advertiser*, argued that, under the proposed Constitution, "a citizen may be deprived of the privilege of keeping arms for his own defense" or denied jury trial in civil

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[207] *See* P. SMITH, THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY 236 (1978).

[208] LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (W. Bennett ed. 1978) [hereinafter cited as LETTERS]. The "Federal" in the title comes from the period when the group today known as the "Anti-Federalists"—those who opposed the proposed constitution—considered themselves the true federalists, and their opponents nationalists. *See* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 287 (1971).

The supporters of the national government eventually appropriated the mantle of Federalism. The *Letters* saw exceptionally wide distribution. During the New York debates, for instance, a front-page newspaper advertisement proclaimed their availability at five booksellers' shops in New York City. *See* N.Y. Journal & Daily Advertiser, July 26, 1788, at 1, col. 3. The *Letters* went through four editions, with several thousand copies being distributed in critical states. *See* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 290 (P. Ford ed. 1971).

[209] LETTERS, *supra* note 208, at 21-22.

[210] *Id.* at 124.

[211] *Id.* at 22.

[212] THE FEDERALIST No. 46, at 299 (J. Madison) (Mentor ed. 1961).

cases.[213] The emphasis on self-defense had been shared by the Pennsylvania and Massachusetts bills of rights, which had listed among the most fundamental rights of the citizens that of "defending their lives."[214] The issues relating to the militia and to individual armament were inevitably interrelated. Patrick Henry, for instance, referred to the militia as "our ultimate safety" while elaborating that "the great object is that every man be armed" and "everyone who is able may have a gun."[215] Framers such as George Mason saw individual armament as the central object and the militia as a peripheral issue. Mason warned the Virginia convention that the British plan had been "to disarm the people—that was the most effectual way to enslave them—but that they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia."[216]

5. *Convention Demands for a Constitutional Guarantee of a Right to Keep and Bear Arms*

While these and related concerns were not sufficient to prevent (pg.603) ratification, they were sufficiently disturbing to lead a number of ratifying conventions to accompany their vote with a call for a bill of rights. These calls are especially relevant to any construction of the Bill of Rights, because they were the concrete manifestation of the people's desire for such guarantees and represent the perceived needs that the Bill of Rights was meant to address. The first demand for an individual right to bear arms was advanced in a minority report from the Pennsylvania ratifying convention, which emphasized:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States or, the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed or real danger of public injury from individuals ....[217]

The Pennsylvania delegates thus not only stressed the individual nature of the right they wanted recognized, but also made it clear that the right to "bear" arms extended to self-defense and even hunting.[218] They did not quite secure enough votes to condition Pennsylvania's ratification upon such a call, but their report was circulated throughout the remaining states and was carefully studied by advocates of a bill of rights in the other conventions.[219] Madison, when drafting the Bill of Rights

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213 N.Y. Journal & Daily Advertiser, April 21, 1788, at 2 col. 2. The article is described as being "from the *Wilmington Centinel*," suggesting that it was circulated in other states as well, and was probably being circulated by Anti-Federalists throughout the States.

214 *See supra* notes 180, 186 and accompanying text.

215 DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA ... TAKEN IN SHORTHAND BY DAVID ROBERTSON OF PETERSBURG 272, 274, 275 (Richmond 2d ed. 1805) [hereinafter cited as DEBATES AND OTHER PROCEEDINGS].

216 *Id.* at 270.

217 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 205, at 597-98.

218 As if to make their stress upon individual armsbearing still clearer, the Pennsylvania minority also proposed recognition of a constitutional right to hunt and fish on federal lands. *Id.* This unusual request is probably traceable to inclusion of similar right in the Pennsylvania Constitution, as a protection against British-style Hunting Acts and resulting arms seizures. *See supra* notes 181 & 182.

219 *See* E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 11 (1957).

in the First Congress, worked from a reprint of state demands that was headed by the Pennsylvania report.[220]

The movement for a bill of rights next surfaced in Massachusetts, where patriot leader Samuel Adams proposed a demand that included the statement: "[t]hat the said constitution shall never be construed to authorize Congress ... to prevent the people of the United States who are peaceable citizens from keeping their own arms ...."[221] When New Hampshire gave the Constitution its needed ninth vote for ratification, it appended (pg.604) a demand for a bill of rights to include the guarantee that "Congress shall never disarm any citizen except such as are or have been in actual rebellion."[222] Three later conventions, while giving the right of arms-bearing first listing, attached a guarantee of militia status. Virginia proposed "that the people have a right to keep and bear arms; that a well-regulated militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free state."[223] New York proposed the same with the minor modification that the militia was to be one "including the body of the people capable of bearing arms."[224] North Carolina accompanied a refusal to ratify with a demand identical to Virginia's.[225]

With the close of the ratifying conventions, the Constitution secured both the necessary votes for its legal effect and the approval of the States necessary for its practical operation. At the same time, the call for a bill of rights was obvious and pressing. The call to include a right of arms bearing was no less pressing. State conventions had made no fewer than five appeals for such a right; such accepted rights as freedom of speech, of confrontation, and against self-incrimination could boast but three endorsements.[226]

E. *The Second Amendment to the Federal Constitution*

It is difficult for a Twentieth-Century American to understand the outlook of those who drafted the Bill of Rights. In order to understand those individuals, we must first understand that they lived at a time of changing political perceptions, which included a new theory of rights. In their age, the concept of "rights" was a living thing, part of the innermost life of all thinkers and those who aspired to understand the art of good government. Rights were not conceived of as codifiable—trapped within a written document. Codification of such concepts clarifies them to a certain extent, but to a larger extent, it (pg.605) kills them. In our own age, the concept of "rights of man" has become absorbed into that of "constitutional rights," consisting mainly of rights expressly listed in the Constitution and its amendments or recognized in specific decisions of the Judiciary. This approach would have been foreign to many late Eighteenth-Century thinkers, to whom the concept of "rights"

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220 *See* 1 I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800, at 264-65 (1950).

221 DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 86-87 (Boston, Peirce & Hale eds. 1856). *See also* P. LEWIS, THE GRAND INCENDIARY 361 (1973); 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971).

222 H.R. DOC. NO. 398, 69th Cong., 1st Sess. 1026 (1927). *See also* J. WALKER, BIRTH OF THE FEDERAL CONSTITUTION: A HISTORY OF THE NEW HAMPSHIRE CONVENTION 51 (1888).

223 H.R. DOC. NO. 398, *supra* note 222, at 1030.

224 *Id.* at 1035.

225 *See id.* at 1047.

226 *See* 2 B. SCHWARTZ, *supra* note 221, at 1167 (1971). Among the eight states requesting a bill of rights, freedom of the press and freedom against unreasonable searches also mustered five endorsements; freedom of assembly, due process, and protection against cruel and unusual punishments claimed four each. *See id.*

was a part of their life and being, a concept to be lived rather than researched. Even Alexander Hamilton, scarcely the most liberal of the patriots, had seen no problem in replying to the Tory objection that because New York had no charter rights, it had no true rights:

> The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole record of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.[227]

This view largely explains why, although Madison assumed the role as chief sponsor and drafter of the Bill of Rights, his references to the document are for the most part slighting. To Jefferson he wrote that, while he had favored such a Bill of Rights, "At the same time, I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for other reason than that it is anxiously desired by others."[228] He referred to existing bills of rights as mere "parchment barriers," which were cheerfully violated "by overbearing majorities in every state," and he was at most prepared to describe his creation as "calculated to secure the personal rights of the people so far as declarations on paper can."[229] The notion that Madison and his contemporaries thought that their Bill of Rights was intended to embody rights woven from the whole cloth may thus be discarded. Their intent was not to *create* entirely new rights; it was to embody a present consensus of opinion about the obvious rights of human beings.[230] Indeed, Madison began his drafting efforts (pg.606) by purchasing a pamphlet that conveniently listed the amendments proposed by the state ratifying conventions, and his list of amendments was chosen from that pamphlet.[231] He did not intend any listed right, much less his right to keep and bear arms, to be superfluous: His correspondence makes obvious that he knew that amendments had to secure a two-thirds majority of each house of Congress and three quarters of the States, and he therefore included only rights that were "objectionable in the eyes of none."[232]

Of all the rights that Madison drafted, the right to keep and bear arms was then one of the least controversial. Freedom from establishment of religion forms an interesting contrast. New Hampshire and Massachusetts had, after all, guaranteed in their own constitutions a power of the

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227 C. ROSSITER, *supra* note 55, at 107.

228 11 PAPERS OF JAMES MADISON 297 (R. Ruthland & C. Hobson eds. 1977).

229 *Id.*; 12 *id.* at 258.

230 It is vital to distinguish between what the Framers saw as "law" and their "rights" and what can be found in the British statutes and case law of the period. The latter might state a minimum standard of the abstract rights the colonists and later Americans felt they possessed, but they certainly did not state the outer limits of their perception of rights. To cite but a few examples, freedom from an establishment of religion has hardly been a key point of British law. Freedom of expression fared little better. Until 1695, British statutes required a government license to publish a book on politics, religion or philosophy; well into the last century, it was illegal to publish anything relating to the proceedings of Parliament, or a biography of a member of Parliament, without consent. *See* 5 LORD CAMPBELL, LIVES OF THE LORD CHIEF JUSTICES 26 (7th ed. 1888). As late as 1762, the author of a legal text was threatened with prosecution for having criticized judicial rulings of the House of Lords in a book published without the Lords' consent. *See id.* Yet it seems clear that when the Framers spoke of "the right" to freedoms of religion, speech and expression, they hardly had in mind the constricted versions allowed by English case law and statute.

231 *See* 12 PAPERS OF JAMES MADISON, *supra* note 228, at 58. Fisher Ames, an opponent of Madison, during the debate on the Bill of Rights wrote to a friend that Madison "has hunted up all the grievances and complaints of newspapers, all the articles of conventions, and the small talk of their debates." 1 WORKS OF FISHER AMES 53 (S. Ames ed. 1859, reprinted 1969).

232 1 WORKS OF FISHER AMES, *supra* note 231, at 219. Likewise, he wrote to Jefferson that "everything of a controvertable nature which might endanger the concurrence of two thirds of each house and three quarters of the states, was studiously avoided." *Id.* at 272.

state to employ Protestant teachers "of piety and morality" and to compel the people to attend their sermons.[233] Madison had, with cause, written Jefferson of his worry that even raising this issue in a bill of rights might prove counterproductive: "[T]he rights of conscience, in particular, if submitted to the public definition would be narrowed much more than they are likely ever to be by an assumed power."[234] Nor was freedom of the press sacrosanct: Jefferson had told Madison that "a declaration that the federal government will never restrain the presses from printing anything they please, will not take away the liability for false (pg.607) facts printed." A dozen years after the Bill of Rights, New York courts not only upheld criminal libel prosecutions but ruled that truth was no defense.[235] Only three state conventions had proposed guarantees of freedom of speech, while proposals on the right to keep and bear arms surfaced in seven.[236]

Added to this background was the fact that the owning, collecting, and using of guns was then universal. Washington is estimated to have owned over fifty firearms, including rifles, shotguns and a number of pistols, while Jefferson's records show frequent reference to purchase, repair, and shooting of his guns, and Madison himself collected firearms on a smaller scale.[237] Ownership of firearms was regarded as both a personal pursuit and as the basis of character and citizenship. In later life, Madison wrote of oligarchies that they "could not be safe ... without a standing army, an enslaved press, and a disarmed populace."[238] Jefferson, on the one hand, wrote Washington that "one loves to collect arms" and, on the other, in advising a nephew on the virtues of exercise, wrote "As to the species of exercise, I recommend the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise and independence to the mind."[239] To late Eighteenth-Century Americans, arms ownership was the right and duty of free men, and liberal allowance of such ownership the hallmark and guarantee of a free government. Few put it as succinctly as Madison's good friend, Joel Barlow:

> Only admit the original, unalterable truth, that all men are equal in their rights, and the foundation of everything is laid; to build the superstructure requires no effort but that of natural deduction. The first necessary deduction will be, that the people will form an equal representative government .... Another deduction follows, that the people will be universally

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233 *See* 3 F. THORPE, *supra* note 177, at 1889-90; 4 *Id.* at 2454.

234 11 PAPERS OF JAMES MADISON 297 (R. Ruthland & C. Hobson eds. 1977). Madison's concerns were well-founded. During the House debates on the Bill of Rights, the members objected that what became the First Amendment "might be thought to have a tendency to abolish religion altogether," or would be "extremely hurtful to the cause of religion." 1 ANNALS OF CONGRESS 730 (J. Gales ed. 1789).

235 *See* 13 PAPERS OF THOMAS JEFFERSON 442 (J. Boyd ed. 1959); N. SCHNACHNER, ALEXANDER HAMILTON 413-18 (1961).

236 *See* Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 38 (1976); Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 77-79 (1983). This count reflects Samuel Adams's proposal and Rhode Island's rejection; Schwartz, omitting these, puts the count at five states. *See supra* note 226 and accompanying text. By either count the right to bear arms clearly emerges as one of the major constitutional concerns of the American people in the years 1787-1791.

237 THE AMERICAN RIFLEMAN, July 1981, at 22-24.

238 R. KETCHAM, JAMES MADISON: A BIOGRAPHY 640 (1971).

239 9 WRITINGS OF THOMAS JEFFERSON 341 (1903); 8 PAPERS OF THOMAS JEFFERSON 407 (J. Boyd ed. 1953).

armed, ... A people that legislate for themselves (pg.608) ought to be in the habit of protecting themselves, or they will lose the spirit of both.[240]

Given this background, it is scarcely surprising that a right to keep and bear arms would have been inserted in the Bill of Rights. Nor is it surprising that such right appears to have been intended as a specifically individual right. Madison's rather wordy initial proposal had indeed placed the right to arms first and incorporated a conscientious objection clause: "The right of the people to keep and bear arms shall not be infringed, a well-armed and well-regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."[241]

Madison's notes for the speech he gave upon the introduction of the Bill of Rights in the First Congress further document that this was intended as an individual right. These notes contain a list of reasons for proposing the amendments, including a note that he should "read the amendments—they relate first to private rights."[242] The outline lists what appears to be a listing of objections to the limited nature of rights under the English unwritten constitution, most notably the Declaration of Rights of 1689. It first objects that this is merely an act of Parliament and second that the guarantees are inadequate. A part of the latter argument notes that the bearing of arms was limited only to Protestants, as indeed it had been ("The subjects that are Protestant may have arms for their defence suitable to their conditions, and as allowed by law."):

Falacy on both sides—especy as to English Decln. of Rts.—
1. Mere act of Parlt.
2. No freedom of press—conscience
3. Gl Warrants—Habs. Corpus
4. Jury in civil causes—Criml.
5. Attainders—arms to Protts.[243] (pg.609)

That Madison intended this right to be an individual one, not merely a protection of the States' right to organize a formal militia, is borne out by his placement of the right. Madison's initial plan, (only rejected late in the House deliberations) was to designate the amendments as inserts between specific sections of the existing Constitution, rather than as separate amendments to be

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240 J. BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE 46-47 (London 1792, reprinted 1956).

241 12 PAPERS OF JAMES MADISON, *supra* note 228, at 201.

242 *Id.* at 193.

243 *Id.* at 193-94. These notes were used as the framework for Madison's second speech on 8 June in the House of Representatives. Unfortunately, either Madison trimmed the speech when delivered to omit the discussion of general warrants, habeus corpus, civil jury trial, and keeping of arms, or (what is more likely) the compilers of the *Annals of Congress* omitted this portion of his speech. 1 ANNALS OF CONGRESS 436 (J. Gales ed. 1789). The author's examination of the original notes, now in the Library of Congress, shows the reason for their brevity and organization. They are written in a cramped hand upon a scrap of paper approximately two and a half by five inches. They appear intended for actual use during the speech rather than as a mere draft or outline. It is not improbable that Madison's speech was reproduced in the *Annals* only in abridged form. The *Annals* are not a verbatim transcript of House debates, but were compiled, after the fact, from newspaper accounts of each day's debate. 2 B. SCHWARTZ, *supra* note 175, at 984.

added at the end of that document.[244] He did not designate the right to keep and bear arms as a limitation on the militia clause contained in Section 8 of Article I. Instead, he placed it as part of a group of provisions (together with freedom of religion and the press) to be inserted in "Article 1st, Section 9, between Clauses 3 and 4."[245] This would have placed it immediately following the designation of the few individual rights protected in the original Constitution, relating to suspension of habeas corpus, bills of attainder and ex post facto laws. Madison viewed the right he was designating as related to those of freedom of speech and press, rather than congressional powers to regulate the militia.

This understanding was mirrored by Madison's contemporaries. Only a week after introduction of his proposals, an article explaining their effect was published in the *Federal Gazette and Philadelphia Evening Post*.[246] The author was Tench Coxe, a friend of Madison who had, years before, attended with Madison the Annapolis convention that led to Virginia's call for a constitutional convention.[247] The *Federal Gazette*'s explanation for Madison's right to keep and bear arms proposal reads:(pg.610)

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must occasionally be raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in the right to keep and bear their private arms.

On the day of publication, Coxe sent a copy of the article with a cover letter to Madison.[248] Madison responded, noting that "the printed remarks enclosed in it are already [those that] I find in the Gazettes here," a testimony to the popularity of Coxe's explanations. Madison took no issue with Coxe's explanation, but instead replied with praise, concluding, that the proposed bill of rights was "indebted to the cooperation of your pen."[249]

Later in the summer, the *Philadelphia Independent Gazetteer* reprinted another explanatory article from a Massachusetts journal. This article asserted with parochial pride that "[i]t may well be remembered that the following amendments to the new constitution of the United States, were introduced to the convention of this Commonwealth by ... Samuel Adams" and specifically listed

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[244] Particularly interesting on this point is the debate found in 1 ANNALS OF CONGRESS 707-08 (J. Gales ed. 1789), where Sherman protests that "we ought not to interweave our propositions into the work itself, because that will be destructive of the whole fabric," and Madison replies that "there is a neatness and propriety in incorporating the amendments into the constitution itself." Others, apparently under the impression that Madison proposed to have the amendments physically interlineated on the original document, urged that this document be instead preserved as a monument to its drafters.

[245] *Id.* at 201. The Committee of Eleven, to whom the proposal was originally referred, kept the same organization. *See* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 186-87 (1905).

[246] The Federal Gazette & Philadelphia Evening Post, June 18, 1789 at 2, col. 1. Students of the Bill of Rights are indebted to Stephen Halbrook, of Fairfax, Virginia, for the discovery of this invaluable contemporary commentary.

[247] 1 DEBATES, *supra* note 200, at 177.

[248] 12 PAPERS OF JAMES MADISON, *supra* note 228, at 239-41:

> I observe you have brought forward the amendments you proposed to the federal Constitution. I have given them a very careful perusal .... It has appeared to me that a few well tempered observations on these propositions might have a good effect. I have therefore ... thrown together a few remarks upon the first part of the Resolutions. I shall endeavor to pursue them in one or two more short papers. It may perhaps be of use in the present turn of the public opinion in New York state that they should be republished here. It is in the Fed. Gazette of 18th instant.

[249] *Id.* at 257.

Adams's call for a ban on all laws that might "prevent the people of the United States, who are peaceable citizens, from keeping their own arms," as an antecedent of Madison's resolutions.[250] Both these contemporaneous articles thus stressed an "individual rights" and not an "organized militia" understanding of the proposed bill of rights.

In the House of Representatives, Madison's proposals were referred to committee, and when reported to the floor, had been modified slightly to bring the militia reference to the front of the amendment: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled (pg.611) to bear arms."[251]

This provision led to relatively little controversy in the House. What controversy there was related to the last phrase dealing with conscientious objection, which was ultimately omitted by the Senate.[252] The provision passed by a voice vote.

Of the debates in the Senate we have no record; at this point in time, the Senate debates were conducted in secret and not even briefly reported, and only the conclusory minutes are available. However, those minutes make it clear that the Senate rejected a proposal to limit the right to keep and bear arms to keeping and bearing "for the common defense,"[253] thereby ensuring that the right would not be limited to specific military-related activities.

Commentaries by early American legal scholars also shed light on the true nature of the right to bear arms. One of the first such commentaries was drafted by St. George Tucker, then a professor of law at the College of William and Mary, and later a justice of the Virginia Supreme Court. He brought a comprehensive perspective, born of experience with constitutional issues, to his scholarship. Tucker had himself lived through the political controversies of the time. As a law student, he had listened to Patrick Henry's "Give me liberty or give me death" speech, and has left us one of only two detailed accounts of the debate that provoked Henry's oration.[254] During the Revolutionary War, he served as a colonel in the Virginia militia, fought with distinction at Guilford Courthouse and Yorktown, and was wounded in action several times.[255] He was a lifetime friend of Jefferson—indeed, Jefferson had in his younger days helped plant the trees in front of the Tucker house[256] —and, in later years, a nostalgic Jefferson acknowledged Tucker as one (pg.612) of his "earliest and best friends, and acquaintances."[257] With Madison and Tench Coxe, Tucker was one of the delegates to the Annapolis Convention.[258] Tucker's brother Thomas was a senator from North Carolina during the First Congress and often visited Tucker during recesses, and Tucker's closest

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250 The Philadelphia Independent Gazetteer, Aug. 20, 1789, at 2, col. 2.

251 1 ANNALS OF CONGRESS 749 (J. Gales ed. 1789).

252 *See id.* at 731-39, 750-52. The argument against the conscientious objection clause was that Congress might define it so broadly as to permit almost everyone to evade militia service, then use the inadequacy of enrollment as an excuse to raise a standing army.

253 "On motion to amend article the fifth, by inserting these words: 'for the common defense' next to the words 'to bear arms': it passed in the negative." JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820). The significance of this proposed qualifier was realized at the time. *See supra* notes 187 & 188 and accompanying text.

254 *See* M. TYLER, PATRICK HENRY 137 (1887).

255 *See* M. COLEMAN, ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY 53-59 (1938).

256 *See id.* at 124, 182.

257 T. JEFFERSON, PAPERS, reel 19, at 207 (Library of Congress microfilm ed.) (letter from Thomas Jefferson to St. George Tucker, Sept. 10, 1793).

258 *See* M. COLEMAN, *supra* note 255, at 87.

friend, John Page, represented Virginia in the House of Representatives.[259] A person with a much better position to examine the Bill of Rights could hardly be imagined.

Early in the Nineteenth Century, Tucker published a five-volume edition of Blackstone's *Commentaries*, each volume containing footnotes and an appendix comparing the American law and Constitution to British common law. Tucker's work remained the primary American commentary on Blackstone for half a century, and the treatise most frequently cited by the Supreme Court until around 1827.[260] Jefferson praised it as "the last perfect digest of both branches of law."[261] Tucker's commentaries on the American law left no doubt that he viewed the Second Amendment as an individual right of the citizen. To Blackstone's listing of the "fifth and last auxiliary right of the subject ... that of having arms suitable to their condition and degree and such as are allowed by law," Tucker added a footnote to the effect that "The right of the people to keep and bear arms shall not be infringed. Amendments to C., U.S., art. 4, and this without any qualification to their condition or degree, as is the case in the British government."[262] In an appendix, he expanded upon the advantages of the American Bill of Rights over the English common law:

> The right of self defence is the first law of nature; in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep (pg.613) and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally under the specious pretext of preserving the game; a never-failing lure to bring over the landed aristocracy to support any measure .... True it is, their Bill of Rights seems at first view to counteract this policy; but their right of bearing arms is confined to Protestants, and the words "suitable to their condition or degree" have been interpreted to authorize the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game.[263]

Nor was Tucker the only contemporary authority with this view. William Rawle was a Quaker who sat out the war, studying law in New York and in England, where he was admitted to

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[259] *See id.* at 35, 61, 113-14.

[260] *See* W. BRYSON, LEGAL EDUCATION IN VIRGINIA 682 (1982).

[261] *Id.* at 26. It was widely relied upon by the Supreme Court—most notably in *Gibbons v. Ogden*—and lower courts. *See* E. BAUER, COMMENTARIES ON THE CONSTITUTION 1790-1960, at 346 (1965).

[262] 2 W. BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS 143, n.40 (St. George Tucker ed. 1803) [hereinafter cited as W. BLACKSTONE'S COMMENTARIES]. Tucker's citation of "Art. 4" reflects the Second Amendment's original position as the fourth of twelve amendments proposed by Congress, the first two of which were not ratified. *See* ENCYCLOPEDIA OF AMERICAN HISTORY 145-46 (R. Morris ed. 1976).

[263] 1 W. BLACKSTONE'S COMMENTARIES, *supra* note 262, at 300. Tucker's claims that the hunting laws had disarmed most Englishmen are incorrect. As noted above, this had been a part of their original intent, but the 1692 amendments removed firearms from the list of contraband. *See supra* note 101 and accompanying text. Nonetheless, the English hunting statutes of the period were among the most confusing segments of statutory law.

> Between 1671 and 1831, Parliament passed no fewer than two dozen acts designed to regulate the hunting of game. Since Parliament was reluctant to repeal these even when they were superceded and since the laws were often poorly worded in the first place, the game laws soon became a legal thicket .... When, for example, Sir William Ashurst of the Court of King's Bench was asked in 1782 [to interpret the Game Acts] he could only reply that "the act, as it stands, is nonsense."

P. MUNSCHE, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 9 (1981). The present author, whose duties include interpretation and application of federal game acts of the current day, is in full sympathy.

the bar of Middle Temple.[264] During the Constitutional Convention, he met with many delegates informally.[265] He was offered an appointment as the first Attorney General by George Washington, which appointment he declined for family reasons;[266] the decision left him free to serve in the Pennsylvania Assembly when it ratified the Bill of Rights.[267] In 1825, he drafted his *View of the Constitution*, which was soon "adopted as a textbook in many of the institutions of learning in the United States."[268]

Rawle divided the Second Amendment into two clauses and (pg.614) discussed each separately. In regard to the first clause, recognizing that "a well-regulated militia is necessary to a free state," he discussed the risk both of standing armies and of undisciplined militia and concluded: "The duty of the state government is to adopt such regulations as will tend to make good soldiers with the least interruption of the ordinary and useful occupations of civilian life."[269] He continued with a discussion of the right to keep and bear arms clause:

> The corollary, from the first position is that the right of the people to keep and bear arms shall not be infringed. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in some blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.[270]

Tucker and Rawle's individual rights understanding was joined later in the century by Justice Joseph Story, who, in his great *Commentaries*, suggested that the right to keep and bear arms "offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[271] Thomas Cooley, no less an eminent American legal scholar, espoused the individual rights interpretation in even stronger words:

> It may be supposed from the phraseology of this provision that the right to keep and bear arms was guaranteed only to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But ... if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government

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264 *See* D. BROWN, EULOGIUM UPON WILLIAM RAWLE 8-9 (Philadelphia 1837).

265 He was then Secretary of the Library Company, and signed the letters inviting each delegate to use their facilities; moreover, he was a friend of Ben Franklin and a member of his "Society for Political Inquiries," where he probably first met Washington. *See* E. BAUER, *supra* note 261, at 61.

266 *See id.* at 15; MEMOIRS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA 55 (1840).

267 *See* E. BAUER, *supra* note 261, at 61.

268 D. BROWN, *supra* note 264, at 38.

269 W. RAWLE, A VIEW OF THE CONSTITUTION 125 (Philadelphia, 2d ed. 1829).

270 *Id.* at 126.

271 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (Boston, Philadelphia 1833).

> to have a (pg.615) well-regulated militia; for to bear arms implies something more than mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.[272]

To Madison, his contemporaries, and the earliest constitutional commentators, there was little doubt that the Second Amendment recognized an individual and natural right to keep and bear arms.[273]

F. *The Second Amendment in the Courts*

The Nineteenth Century saw the creation of a considerable amount of case law construing state laws affecting the right to keep and bear arms. The earliest series of decisions came in response to the enactment of concealed weapons laws in frontier (pg.616) states. The general thrust of these decisions was that the right to keep and bear arms was an individual right, but that the bearing of arms could be subjected to reasonable regulations. A later series of cases grew primarily out of post-Civil War enactments, in the former Confederate states, of general bans upon carrying all or some handguns. These cases generally gave rise to what has earlier in this Article been defined as a "hybrid" right: This conceives of the right as an individual one, but covering only individual use of weapons suitable for military use or training. The narrow "collective right" interpretation, which holds that the Second Amendment right only extends to organized militia units and individuals participating in militia activities, appears in none of these cases. Only in 1905 was such an

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[272] T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (3d ed. 1898).

[273] The same opinion was shared by contemporary popular commentaries on the American system. Prominent among these were John Taylor, Timothy Dwight, and Joel Barlow. Taylor was a Revolutionary War veteran and boyhood friend of both Jefferson and Madison, at whose request he introduced the Virginia portion of the Virginia and Kentucky Resolutions. Jefferson thought his work "the most effective retraction of our government to its original principles which has ever yet been sent by heaven to our aid." R. SHALHOPE, JOHN TAYLOR OF CAROLINE 21-23 (1980). *See also* J. TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 21 (Fredericksburg, Va. 1814, reprinted 1950). Taylor's critique stressed citizen armament as the only way to tolerate that necessary evil, the standing army:

> Arms can only be controlled by arms. An Armed nation only can keep up an army, and also maintain its liberty .... An armed nation only can protect its government against an army. Unarmed, and without an army, a nation invites invasion. Unarmed, and with an army, it invites usurpation. All nations lose their liberties by invasion or usurpation.

Id. at 178, 180.

Barlow, another Revolutionary War veteran, boasted of American laws "not only permitting every man to arm, but obliging him to arm," adding that "so long as they have nothing to revenge in the government (which they cannot have while it is in their own hands) there are many advantages in their being accustomed to the use of arms, and no possible disadvantage.... Only admit the original, unalterable truth, that all men are equal in their rights," Barlow argued, "and the foundation of every thing is laid .... The first necessary deduction will be that the people will form an equal representative government .... Another deduction follows, that the people will be universally armed; they will assume those weapons for security which the art of war has invented for destruction." J. BARLOW, *Advice to the Privileged Orders in the Several States of Europe*, *supra* note 240, at 16-17, 46.

Dwight, writing for a predominantly British readership, explained that "to trust arms in the hands of the people at large has, in Europe been believed ... to be an experiment fraught with danger. Here by a long trial it has been proved to be perfectly harmless." 1 T. DWIGHT, TRAVELS IN NEW ENGLAND AND NEW YORK xiv (New Haven 1823). *See generally* Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

interpretation put forward.[274] The "collective right" approach was unknown, not only to the Framers and their contemporaries, but also to their children and grandchildren.[275]

The earliest bans on carrying concealed weapons were enacted in Kentucky and Louisiana in 1813. Other states followed suit. In Kentucky, the law was stricken as violative of the right to keep and bear arms, the court arguing that any restriction upon the exercise of that right was sufficient to render the statute invalid.[276] In Louisiana and Alabama, the laws were upheld, the courts accepting the right as an individual one but treating the statute as a regulation of the manner of exercising the right rather than as an infringement of it.[277] As concealed weapons statutes spread, so did the judicial challenges to them and, in later rulings, the position of the Louisiana and Alabama courts was generally accepted.[278] Some of these courts felt compelled to add *dicta* clarifying that only a limited regulation of the right (pg.617) was permissible. The Alabama Supreme Court, for instance, added the comment: "[W]e are inclined to the opinion that the legislature cannot inhibit the citizen from bearing arms *openly*, because it authorizes him to bear them for the purpose of defending himself and the state, and it is only when carried openly that they can be effectively used for defense."[279] The Supreme Court of Tennessee added: "The citizens have the unqualified right to *keep* the weapon, it being of the character before described, as being intended by this provision. But the right to bear arms is not of that unqualified character."[280]

Later statutes going beyond a simple ban on concealed carrying were struck down. Georgia, in 1837, completely banned the sale of handguns, exempting "such pistols as are known and used as horsemen's pistols," which term at that time was used to designate the largest and heaviest handguns.[281] Despite the lack of a state bill of rights, the Georgia Supreme Court had no difficulty striking down the enactment.[282] The Georgia court simply held that the Second Amendment applied

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274 *See* City of Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905).

275 For that matter, even today, "collective rights" claims are strangers to the remainder of the Bill of Rights: The author has encountered only one use of the collective approach outside the Second Amendment—and in that case the analysis was proposed in order to *broaden* the right involved. *See* Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983).

276 Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822).

277 State v. Chandler, 5 La. Ann. 489, 52 Am. Dec. 599 (1850). ("It interferes with no man's right to carry arms [to use its words] 'in full open view,' which places men upon an equality. This is a right guaranteed by the Constitution of the United States ...."); State v. Reid, 1 Ala. 612 (1840).

278 *See* State v. Mitchell, 3 Black. 229 (Ind. 1833) (per curiam); State v. Buzzard, 4 Ark. 18 (1842); Aymette v. State, 21 Tenn. (2 Hum.) 154, 159-60 (1840).

279 State v. Reid, 1 Ala. 612, 619 (1840).

280 Aymette v. State, 21 Tenn. (2 Hum.) 154, 159-60 (1840).

281 DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA IN EFFECT PRIOR TO THE SESSION OF THE GENERAL ASSEMBLY OF 1851, at 818 (1851).

282 Nunn v. State, 1 Ga. 243 (1846).

to the state as well as to the federal government.[283] The court, moreover, explained its view of the Second Amendment:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not merely such as are used by the militia, shall not be infringed, curtailed, or broken in on, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying of a well regulated militia, so vitally necessary to the security of a free state.[284] (pg.618)

This broad construction of the Second Amendment secured the indirect endorsement of the United States Supreme Court in the *Dred Scott* case, which played such a role in bringing on the Civil War.[285] Chief Justice Taney, in arguing that the Framers of the Constitution could not have intended free black Americans to be citizens, listed what the court perceived to be the rights of citizens at that time:

> For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operations of the special laws and police regulations which they [the states] conceive to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one state of the union, the right to enter every other state whenever they pleased .... [A]nd it would give them full liberty or speech in public and in private upon all subjects upon which its own citizens might meet; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[286]

The antebellum cases at both federal and state levels thus gave unqualified support to an "individual rights" view of the Second Amendment.

The end of the Civil War brought Reconstruction, as well as a lengthy and bloody internal conflict, to the Southeast. It is hardly surprising that a new series of firearm laws sprang into existence in that region, or that prompt and vigorous judicial challenges ensued. The outcome of the challenges varied widely. The antebellum cases had generally held that keeping a firearm was absolutely protected while some modes of carrying a weapon could be regulated. The postbellum cases generally held that the existence of constitutional protection keyed upon whether the weapon was a type whose possession or use aided military skills. The postbellum period was thus the period of ascendancy of the "hybrid" interpretation of the right to keep and bear arms.

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283 "I am inclined to the opinion, that the article in question does extend to all judicial tribunals .... The provision is general in its nature and unrestricted in its terms .... Every article which is not confined by the subject matter to the national government [is] equally applicable to the states." *Id.* at 205-51. While the *Nunn* court was undoubtedly wrong in terms of the law at the time—the United States Supreme Court had long before declared the federal Bill of Rights to bind only the federal government (*See* Baron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833))—it was remarkably prescient. It designated certain rights other than the Second Amendment—assembly, search and seizure, confrontation, public trial, trial by jury, assistance of counsel—as rights "as perfect under the state as under the national legislature, and [which] cannot be violated by either." Nunn v. State, 1 Ga. at 251. The list contains most of the portions of the Bill of Rights that were held, over a century later, to be binding on the States via the Due Process Clause of the Fourteenth Amendment, and omits those—grand jury indictment, for instance—that have not so been held.

284 Nunn v. State, 1 Ga. at 251.

285 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

286 *Id.* at 416-17.

The first of the challenged postbellum statutes was enacted in Tennessee. In 1869, the legislature forbade the carrying of pistols and certain other weapons in elections, fairs, races and other "public assemblies of the people."[287] In 1870, Tennessee amended its constitution and added the provision that "the (pg.619) Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."[288] The state legislature then prohibited the carrying of "any belt or pocket pistol or revolver" whether "publicly or privately."[289] The ban on carrying all pistols was voided. The Tennessee Supreme Court distinguished between arms that were "adapted to ... the efficiency of the citizen *as a soldier*" and "arms worn or which are carried about the person." The right to the former class of arms was absolutely protected. The right to carry these arms to places like church or a public assembly, where it was unnecessary to acquire familiarity or to train with them, was restricted.[290]

The following year, Texas likewise prohibited the carrying of "any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife ...." on or about the person, except for "immediate and pressing" self defense.[291] The statute was subjected to a prompt judicial challenge. In *English v. State*, the Texas Supreme Court held that the Second Amendment applied to the States as well as to the federal government: "[T]hough most of the amendments are restrictions on the general government alone, not on the States, this one seems to be of a nature to bind both the State and the National legislatures, and doubtless it does."[292] It also held, however, that the arms whose possession and carrying is protected by the Second Amendment are "the arms of the militia man or soldier." The Court listed the weapons thus protected according to the branch of the service using the weapon: "the musket and bayonnet ... holster pistol and carbine ... the field piece, siege gun and mortar, with sidearms," depending upon the branch of service.[293]

Four years later, Arkansas enacted a similar statute banning the carrying of, *inter alia*, "any pistol of any kind whatever."[294] The Arkansas court that reviewed the inevitable challenge held that the Second Amendment was a restraint only on federal action and went on to examine the law under the state constitution (pg.620) that, however, protected the right to keep and bear arms only for the "common defense."[295] It held that the "arms" that were protected by the Arkansas Constitution were such "as are found to make up the usual arms of the citizen of the country, the use of which will properly train and render him efficient in the defense of his own liberties, as well as of the state."[296] These included "the rifle, of all descriptions, the shotgun, the musket and repeater," which last category included "the army and navy repeaters that, in recent warfare, have very generally superseded the old-fashioned holster [pistol]," but not including "the pocket pistol."[297] Although the statute banned carrying "of any pistol of any kind whatever," the court construed it to apply only to

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287 Act of Dec. 1, 1869, ch. 22, § 2 , 1869 Tenn. Pub. Acts 23-24.

288 TENN. CONST. of 1870, art. I, § 26.

289 Act of June 11th, 1870, ch. 13 § 1, 1870 Tenn. Pub. Acts 28.

290 Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178-79, 182 (1871).

291 Act of April 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25.

292 35 Tex. 473, 475 (1872).

293 *Id.* at 476.

294 Act of Feb. 16, 1875, § 1, 1874-75 Ark. Laws 155.

295 Fife v. State, 31 Ark. 455, 458 (1876).

296 *Id.* at 460 (quoting Andrews v. State, 50 Tenn. (3 Heisk.) at 179).

297 31 Ark. at 460-61.

the small pocket pistols which it found were not "effective as a weapon in war" and could therefore be regulated.[298]

Two years later, the same court struck down a conviction where the trial judge had instructed the jury upon the statute's literal words rather than the court's limiting construction. The court observed: "[T]o prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey traveling through the country with baggage, or acting as or in aid of an officer, is an unwarranted restriction upon the constitutional right to keep and bear arms."[299] The "hybrid" interpretation enunciated in these case—holding that individuals, not the organized militia, are beneficiaries of a right to bear arms, but that the right is applicable only to militia or military-related arms—was common in late Nineteenth-Century jurisprudence.[300]

Paradoxically, this "hybrid" construction of the Second Amendment has been hardly a factor at all in the Twentieth Century. The Twentieth Century saw the birth of the narrow "collective right" interpretation in the 1905 Kansas decision of *City of Salina v. Blaksley*,[301] where the court held that the right to (pg.621) keep and bear arms extends only to members of organized militia units. Other cases tended, to a very great degree, to split between this view and the older "individual right" approach, with virtually no mention of the hybrid interpretation.[302]

Paradoxically, one of the few mentions of the hybrid approach in Twentieth-Century case law comes from the United States Supreme Court. The case, *United States v. Miller*, involved a challenge to the National Firearms Act of 1934, which required registration of, and a $200 tax on, transfers of certain arms, chiefly machine guns, "sawed-off" shotguns, and rifles.[303] The district court had dismissed a prosecution against one Jack Miller, based upon transportation of a "sawed-off shotgun," finding that the statute usurped the police power reserved to the States and also violated the Second Amendment. A direct appeal was taken to the United States Supreme Court, which reversed the dismissal.

The Supreme Court noted that the Second Amendment was drafted "with obvious purpose to assure the continuation and render possible the effectiveness" of the militia and therefore "must be interpreted and applied with the end in view."[304] It went on, however, to define the term "militia" broadly and found that, in the light of history and American law:

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[298] *Id.* at 461.

[299] Wilson v. State, 33 Ark. 557 (1878).

[300] *See*, *e.g.*, Dabbs v. State, 39 Ark. 353, 357 (1882); *cf.* State v. Rosenthal, 75 Vt. 295, 55 A. 610 (1903); State v. Wilforth, 74 Mo. 528, 530 (1881) and cases cited therein. *See generally* Note, *The Right to Keep and Bear Arms for Private and Public Defense*, 1 CENT. L.J. 260-61, 273-275, 285-87, 295-96 (1874).

[301] 72 Kan. 230, 83 P. 619 (1905).

[302] Taking the individual rights view are, for example: State v. Kessler, 289 Ore. 359, 614 P.2d 94 (1980); City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972); People v. Liss, 406 Ill. 419, 94 N.E.2d 320 (1950); In re Brickey, 8 Ida. 597, 70 P.609 (1902). Taking the collective right view are: Eckert v. Philadelphia, 477 F.2d 610 (3d Cir. 1942) (per curiam); Cases v. United States, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); United States v. Tot, 131 F.2d 261 (3d Cir. 1942), *rev'd*, 319 U.S. 463 (1943).

[303] 307 U.S. 174 (1939); *See* National Firearms Act of 1934, 48 Stat. 1237 (codified at 26 U.S.C. §§ 5801-5872 (1982)). Technically, the Act did not apply to shotguns or rifles with sawed-off barrels, but rather with those whose barrels or overall size fell below certain limits. Because shotgun barrels tend to be rather long, most shotguns with barrels below the limit had in fact been sawed down, and the term "sawed off shotgun" came into wide use to describe the firearms subject to the law.

[304] *Miller*, 307 U.S. at 178.

> [T]he militia comprised of all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.[305]

However, the district court had taken no evidence on the military usefulness of nature of the firearm in question, and the (pg.622) Supreme Court noted that "certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[306] It accordingly reversed and remanded.

Miller was subsequently widely construed as an endorsement of the "collective right" approach. Yet a close reading of the decision shows that it is actually an endorsement of the "hybrid" view. Nowhere does the Court indicate that the right to keep and bear arms is to be limited to organized militia. The judicial notice that the trial court had incorrectly taken related, not to Jack Miller's membership in any organized militia unit— indeed, there is no indication he ever claimed such membership—but solely to the nature of the weapon that he was carrying. The authority upon which the Supreme Court relied, *Aymette v. State*,[307] was not a "collective right" decision at all and did not indicate that membership in an organized militia unit was pivotal or even relevant. The one thing certain about the *Miller* decision is that it is not in any way a decision in favor of the "collective right" approach.

II. A TEXTUAL ANALYSIS OF THE SECOND AMENDMENT

The Second Amendment may also be analyzed from a purely textual standpoint, albeit with the caveat that we must proceed cautiously in any analysis from the text alone. The drafters of the Bill of Rights did not irrationally designate "the" right of freedom of speech, "the" right of freedom of press, or "the" right to keep and bear arms. Their purpose was not to weave rights from original materials, but to designate ones already known and for the most part readily defined by consensus among their contemporaries.[308] One who creates a right may be expected to delineate its hitherto unknown limits in some detail; one who recognizes an accepted right is unlikely to feel bound to fill in every detail of its extent. Additionally, it is best (pg.623) always to resolve the doubts of a textual analysis in favor of a liberal construction of a constitutional guarantee.[309]

A close textual analysis of the Second Amendment strongly suggests an individual rights interpretation. For purposes of this analysis, the text of the amendment will be divided into five parts.

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[305] *Id.* at 179.

[306] *Id.* at 178.

[307] Aymette v. State, 21 Tenn. (2 Humph.) 154 (1840). *See generally* Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976).

[308] Madison wrote to Tench Coxe that one of his objects in drafting was "avoiding all controvertible points which might endanger the assent of 2/3 of each branch of Congs. and 3/4 of the State Legislatures." 12 PAPERS OF JAMES MADISON, *supra* note 228, at 257. He gave a similar explanation to Jefferson. *Id.* at 272. Jefferson observed more succinctly that "half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can." 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 162 (1905).

[309] Byars v. United States, 273 U.S. 28, 32 (1927); Fairbank v. United States, 181 U.S. 283, 289 (1901); *cf.* Kansas v. Colorado, 206 U.S. 46, 91(1907).

"A well-regulated militia, being necessary to a free state ...."

The "collective right" approach relies on this phrase to the almost complete exclusion of the rest of the Second Amendment's language. The collective right approach rests upon two premises: (1) This language indicates the remainder of the Second Amendment was meant only to protect the organization known as "the militia," and (2) "the militia" describes (and *only* describes) organized militia units such as the modern "National Guard."[310]

There are several obvious difficulties with this argument. The first is logical. Emphasis on an effective militia does not rule out the protection of an individual right as a means to achieve that objective. As noted above, individual armament was seen by some Framers as a useful means to keep a standing army from developing. Thus, proof of a militia-related intent does not exclude *other* purposes, yet the essence of the collective right position is the belief that the Second Amendment has no purpose *other* than the militia.

The second flaw is historical. The term "militia" first came into the English language at about the time of the Spanish Armada invasion scare and came to be used to designate the entire body of people capable of bearing arms. This term was distinguished from "trained bands," men who received special training and government-supplied weapons.[311]

This distinction continued in effect throughout early American history. Organized militia units were never known simply as "militia," but usually as "select militia". Significantly, the (pg.624) Framers of the Constitution were as vociferous in their criticism of organized militia units as they were in their praise of the general militia.[312] Among both American and English Whigs, such select militia were regarded as suspect and were frequently likened to a standing army.[313] It seems highly unlikely that the Framers would have devoted an entire amendment to the protection of an organization they regarded as subversive of their rights.

Significantly, the original definition of militia is still a matter of current law. Existing federal statutes define the unorganized militia of the United States as including all males between certain age brackets and certain females.[314] Many state laws define the term even more broadly.[315]

The argument that the Second Amendment was intended to protect only state governments in the formation of organized militia units is also undermined by the fact that many state constitutions had, at the time of the framing of the Second Amendment, provisions similar to the Amendment that either recognized a "right of the people" to keep and bear arms, or recognized the

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310 *See* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HAST. CONST. L. Q. 961 (1975).

311 J. HILL, *supra* note 44, at 26-27. The Oxford English Dictionary notes the use of "milicia" for a citizen army as early as 1590, although by the mid-Seventeenth Century "militia" had parallel and general meanings relating to the act of war, to military service, or to military forces. 6 THE OXFORD ENGLISH DICTIONARY 439 (1933).

312 *See supra* notes 199-203 and accompanying text.

313 *See supra* notes 205 & 209 and accompanying text. Similar arguments were advanced by English Whigs following the 1757 Militia Act, 30 Geo. 2, ch. 2 (1757), under which only about 32,000 men were to be enrolled. *See* C. BARNETT, BRITAIN'S ARMY 174 (1970). The Lord Mayor of London, for instance, told the Commons that the militia "could no longer be deemed a constitutional defense, under the immediate control and direction of the people; for by that bill they were rendered a standing army for all intents and purposes." 1 THE NORTH BRITISH INTELLIGENCER 20 (1776).

314 *See id.*; 10 U.S.C. § 311(a) (1982).

315 *See*, *e.g.*, ARIZ. CONST., art. 16, § 1.

importance of a militia.[316] If the right in question related solely to protecting the state against federal interference, there would be little reason to put it in state bills of rights (particularly those adopted before there *was* a federal government) as well as the federal Bill of Rights.[317] The only reason for recognizing such a right in both state and federal constitutions would be to create a right secure against infringement by *either* state or federal governments. This necessarily suggests that the right at issue is an individual right.(pg.625)

Moreover, the assertion that the National Guard is the constitutional militia is untenable. The National Guard simply is not the constitutional militia. In fact, the National Guard was specifically organized to avoid classification as a militia. The Constitution designates only three conditions under which the federal government may call forth the "militia": invasion, insurrection, or necessity to execute the laws of the Union.[318] All three conditions suggest that the militia may operate only within the territorial United States. Indeed, a 1912 opinion of the Attorney General established that the "militia" may not be called forth for foreign duty.[319] However, the United States needed some reserve military units that could be used for service outside its borders. After the federal government's power to draft citizens for military service was upheld, it became clear that the federal power to raise and support armies could include the organization of military personnel other than militiamen.[320] Accordingly, the federal government proceeded to draft wholesale the members of organized state militias for service in the First World War, breaking up the existing units and treating their members on a par with ordinary draftees.[321] The result was inexpedient to the military and offensive to the units involved. Not long after the war, the National Guard Association resolved: "We favor appropriate amendments of the National Defense Act so that the federally recognized National Guard shall be at all times, whether in peace or war, a component of the Army of the United States ...."[322]

In response to this resolution, Congress passed the Army Reorganization Act of 1920. The Act provided that "The Army of the United States shall consist of the regular army, the National Guard while in the service of the United States, and the organized reserves ...."[323] This statute obviously did not apply to the peacetime National Guard. Thirteen years later, however, new legislation made the National Guard a part of the army at all times.[324](pg.626)

> It did this by conferring a new status on the Guard, by constituting it a reserve component of the Army, to be known as the National Guard of the United States. In its militia capacity, the National Guard was organized and administered under the Militia Clause of the Constitution, and available only for limited duties .... The purpose of the 1933 Act was to

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316 *See*, *e.g.*, MASS. CONST. of 1780, art. xvii; N.C. CONST. of 1776, Declaration of Rights, § 17; PA. CONST. of 1776, Declaration of Rights, § 13; R.I. CONST. of 1776, art. I, § 22. Other states, admitted in the decades after adoption of the federal Bill of Rights, placed similar provisions in their bills of rights. *See e.g.*, ALA. CONST. of 1819, art. I, § 23; ARK. CONST. of 1836, art. II, § 21.

317 *See* Hardy & Stompoly, *Of Arms and the Law*, 51 CHI-KENT L. REV. 62, 75 (1974).

318 *See* U.S. CONST., art. I, § 8.

319 29 Op. Att'y Gen. 322 (1912).

320 Selective Draft Law Cases, 245 U.S. 366 (1918). *See also* Cox v. Wood, 247 U.S. 3 (1918).

321 Weiner, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 204-05 (1940).

322 H.R. REP. NO. 141, 73d Cong., 1st Sess. 2 (1933).

323 Act of June 4, 1920, § 1, 41 Stat. 759.

324 Act of June 15, 1933, 48 Stat. 153.

> obviate this in the future; there was to be no more drafting of national guardsmen. The National Guard of the United States, in its capacity as a reserve Component of the Army, was organized and was to be administered *under the Army clause*.[325]

Indeed, the 1933 enactment abolished the "Militia Bureau" and instituted in its place the "National Guard Bureau."[326] The existing National Guard can hardly be considered the constitutional militia, much less the *sole* group protected by the Second Amendment. This distinction was drawn even more clearly in the debates on a 1940 joint resolution on calling the National Guard into the federal service.[327] The Senate Subcommittee on the Constitution recently concluded: "That the National Guard is not the 'militia' referred to in the Second Amendment is even clearer today .... The modern National Guard was specifically intended to avoid status as the constitutional militia, a distinction recognized by 10 U.S.C. Section 311(a)."[328] (pg.627)

The Second Amendment's introductory clause, relating to a well-regulated militia, is not by its express terms a limitation or restriction of the right recognized in the following clause. It is, at best, an explanation of the partial motivation for creating such a right and not a statement of its outer boundaries. Even where such language is expressly made a part of a general right, the courts have generally not viewed that right as limited by it. The clearest example is the First Amendment's recognition of a "right of the people peaceably to assemble, and to petition the government for a redress of grievances." The right to assemble is expressly limited to assembly to petition the

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325 Weiner, *supra* note 321, at 208 (emphasis supplied).

326 *See id.*

327 *See* 86 CONG. REC. 9914 (Aug. 6, 1940):

> The militia of the United States are citizens between certain ages capable of performing military service. That is the militia of the United States. It consists of all citizens of that type .... The National Guard of the States and Territories are organizations composed of these militiamen, members of the unorganized militia, who voluntarily have enlisted in specific organizations ....

See also id. at 10056:

> For peacetime purposes the Army of the United States is composed of "the Regular Army, the National Guard, the Organized Reserves" .... The militia of the United States, which, of course is divided, as has been said over and over again, into the unorganized militia, composed of men between certain ages and with certain other qualifications, the Organized Militia, and the National Guard of the United States. Often they comprise the same component units, but not necessarily so. Congress has drawn the distinction.

328 SUBCOMM. ON THE CONSTITUTION OF THE SEN. JUDICIARY COMM., 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS, 11 (Comm. Print 1982).

Nor can reliance be placed upon the qualifier "well-regulated," which was inserted before the word "militia" in the Second Amendment. The use of such qualifiers is almost as old as the term "militia" itself. Beginning in 1623, Charles I began pressing for an "exact militia," by providing extensive training for all militiamen. *See* L. BOYNTON, THE ELIZABETHAN MILITIA 237-38 (1967). While today "regulated" is most often taken as synonymous with "government-controlled," its earlier meaning in connection with military troops was "properly disciplined." 2 COMPACT EDITION, OXFORD ENGLISH DICTIONARY 2473 (1971). There is little question that, to the Framers, creation of a "well-regulated militia" did not mean establishment of a small, government-controlled one, but rather involved furnishing training to the citizenry at large. Thus, in 1775, George Mason, later a member of the Constitutional Convention, drafted a compact whereby "all the able-bodied freemen from eighteen to fifty years of age" were to be embodied in the militia because he was "thoroughly convinced that a well-regulated militia, composed of the Gentlemen, Freeholders and other Freemen, is the natural strength ... of a free Government." 1 PAPERS OF GEORGE MASON 215-26 (1970). Indeed, some in the House of Representatives objected to, and the Senate removed, a conscientious objector clause from the Second Amendment for fear that

> this clause would give an opportunity to the people in power to destroy the Constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms ... if we give them a discretionary duty to exclude those from militia duty who have religious scruples, we might as well make no provision on this head.

1 ANNALS OF CONGRESS 749-50 (J. Gales ed. 1789). The First Congress thus meant the "well-regulated" militia as beyond Congressional definition and restriction. *See also* 2 ANNALS OF CONGRESS 1853, 1869 (1790).

government, and the debates over the proposal in the first House of Representatives centered exclusively upon assembly to petition members of Congress and the effects of such a petition.[329] But with the exception of one century-old decision, now uniformly ignored,[330] the courts have not hesitated to construe the right to assembly to include a right to "associate" whether for political or other motives, and have extended this to political groups who were hardly likely to be interested in submitting petitions to the legislature.[331] To consider the introductory clause to the Second Amendment a limitation upon the right (pg.628) expressly granted in the Amendment would be to enshrine inconsistency in constitutional interpretation.

Finally, as discussed above, Madison drew primarily from state bills of rights and ratification convention demands in drafting the Bill of Rights. The antecedents of the "well-regulated militia" clause of the Second Amendment are clearly the Virginia ratification demand and its predecessor, the 1776 Virginia Bill of Rights. The latter, as previously mentioned, dealt only with a well-regulated militia and phrased all its guarantees as hortatory statements rather than commands. Yet if Madison and the First Congress had intended *only* to ensure the existence of a militia, they could have stopped there. That they did not—that the subsequent clause recognizing a right of the people to keep and bear arms survived both Madison's synthesis and both House's elimination of redundancies—illustrates forcefully the intent to address also the concerns raised in other states that individual rights of arms bearing needed protection as well. It is to the latter portions of the Second Amendment that we must now turn.

"The right of the people"

A few commentators have suggested that the phrase "the right of the people," contained in the Second Amendment indicates that the right conferred was collective, because the Framers used "people" to mean "states."[332] This argument is probably the weakest of the collective rights claims. A simple examination of the Bill of Rights shows that the Framers frequently used the phrase "right of the people" to designate individual rights. The Fourth Amendment refers to the "right of the people" to freedom from unreasonable searches and seizures; the First Amendment recognizes a "right of the people" to assemble; the Ninth Amendment provides that the enumeration of rights in the Bill of Rights "shall not be construed to deny or disparage others retained by the people."[333] (pg.629)

The Framers, moreover, did draw a distinction between "the people" and "state governments." The Tenth Amendment's provision that all powers not expressly delegated by the

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329 1 ANNALS OF CONGRESS 732-38 (J. Gales ed. 1789).

330 United States v. Cruikshank, 92 U.S. 542, 552-53 (1876) (dismissing a Civil Rights Act prosecution for failure to allege that the meeting of free blacks, disrupted by defendants acting under color of law, was being held for the purpose of petitioning the government). *Cruikshank* has never been expressly overruled; the Court has simply ignored its ruling in taking clearly contrary positions. *See generally* 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON 780-81 (1968).

331 *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Wallace v. Brewer, 315 F. Supp. 431, 443 (M.D. Ala. 1970); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961).

332 *See* Comment, *Constitutional Limitation on Firearms Regulation*, 1969 DUKE L.J. 773, 796-97.

333 The Ninth Amendment has never secured much support or use by the Supreme Court, but its recognition of individual as against state rights does not seem to be questioned by that Court or any other. Justice Goldberg's concurrence in *Griswold v. Connecticut* was based in part upon the Ninth Amendment, 381 U.S. 479, 487-93 (1965), and the majority in *Roe v. Wade* mentioned with approval the district court's use of the Amendment, while resting its decision solely upon the Fourteenth Amendment. 410 U.S. 113, 153 (1973).

Constitution are reserved "to the states respectively, or to the people," indicates that the Framers viewed the two as different entities and were quite capable of using the term "states" when they meant "states."

Nor can we ignore the vital role played by the use of the words "We the people" in the Preamble to the Constitution. The phrase establishes that the Constitution was an expression of the will of citizens not state governments, and could not therefore be dissolved by state action.[334] The argument for a collective right approach based on the Framers' use of the words "right of the people" can be discarded. If anything, the use of that term (as opposed to "the right of the states") indicates an intention to create an individual right analogous to that recognized in the First, Fourth, and Ninth Amendments and retained by the same "people" whose compact was reflected in the Constitution itself.

"To Keep and bear"

It has occasionally been argued that the use of the term "bear arms" is a military one because the bearing of arms is a phrase more familiar in a formal military sense than in a civilian sense. Soldiers "bear" arms; civilians "carry" them. Most conspicuously, a recent article by Don Kates employs this assertion to conclude the Second Amendment guarantees a right to arms outside the home only for military service.[335] Yet, the right safeguards not only the bearing of arms, but also the *keeping* of arms. The concept of keeping has no special military connotation. Keeping is not often used in any but a common sense. Moreover, the historical evidence suggests that this argument is erroneous and that in the Seventeenth and Eighteenth Centuries "bear arms" was often used in relation to civilian carrying. James Harrington, the Seventeenth-Century Whig writer whose works were found in the libraries of Eighteenth-Century (pg.630) American statesmen,[336] considered that the independence of a citizen was "in the last analysis measured by his ability to *bear* arms and use them in his own quarrels ...."[337] Samuel Johnson's 1755 dictionary defined "bear" as "to convey or carry."[338] The minority report of the Pennsylvania ratifying convention proposed recognition of "a right [of citizens] to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game." The reference in both the Vermont and Pennsylvania Declarations of Rights to a right of the people to "bear arms in defense of themselves" as well as of the state reinforces this understanding of the term's meaning.[339] In Eighteenth-Century terminology, "bear arms" carried no exclusively military connotations and included carrying for such varied

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[334] This phrase formed the pivot of the famed Webster-Calhoun debates. *See* 4 DEBATES, *supra* note 200, at 506, 510, 528.

[335] *See* Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1983). Kates has since substantially modified this position. *See* Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 149 (1983).

[336] For example, John Adams maintained that the principles of good government could be found in but eight writers, including Harrington. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, *supra* note 116, at 45.

[337] *See* Pocock, *supra* note 120, at 553-54.

[338] S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (unpaginated) (1755); *see also* Dowlut, *supra* note 236, at 77 n.54.

[339] *See supra* notes 180 & 184, and accompanying text.

purposes as self defense and hunting.[340] Reliance on the use of the term "bear arms" as support for a collective rights approach, is accordingly, questionable.

"Arms"

The collective right theory does not heavily depend upon the construction given the word "arms," because it emphasizes the nature of weapon use rather than the nature of the weapon. However, the distinction between the individual right approach and the "hybrid" approach centers upon the proper scope of this term. The hybrid approach requires a narrow construction: "Arms" means only those arms suitable for militia or military training or duty—leaving for disposition in particular cases the factual issue of which arms are suitable for these purposes. The individual rights approach argues that the term "arms" should be interpreted according to its commonly understood meaning of instruments suitable for defense or offense. Little can be done to elaborate upon either view. As noted above, the Pennsylvania minority report's use of "arms" in conjunction with self-defense and hunting, and the Vermont and Pennsylvania (pg.631) uses in relation to self-defense, does suggest that contemporaries of the Framers (and specifically those whose proposals were intended to be incorporated into what became the Second Amendment) viewed the term "arms" as inclusive of more than military-issue weapons.[341] The refusal of the first Senate to limit the Second Amendment to keeping and bearing of arms "for the common defense"[342] likewise argues against a narrow construction of "arms" to those suitable for militia or military duty. The contemporaries of the Framers were familiar with the entire spectrum of firearms available today: "Among eighteenth-century civilians who traveled or lived in large cities, pistols were common weapons. Usually they were made to fit into pockets, and many of these small arms were also carried by military officers."[343] It is difficult to argue that the use of the term "arms" was intended to have a very narrow and restrictive meaning when firearms suitable for hunting or self defense were included in the common conception of the term.

"Shall not be infringed."

The closing phrase of the Second Amendment favors neither the collective nor the individual right interpretation, but its absolute language suggests that the Framers intended to recognize the right in the strongest possible language. Early courts and commentators were in accord with this view, stressing that "No clause in the Constitution could by any rule of construction be conceived to give to Congress a power to disarm the people."[344] Some early courts and commentators even suggested that the choice of the term "shall not be infringed" rather than "*Congress* shall make no

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340 *See* authorities cited in notes 217 & 218 *supra*.

341 *See* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 205, at 597-98.

342 *See* authority cited in note 253, *supra.*

343 G. NEUMANN, THE HISTORY OF ARMS OF THE AMERICAN REVOLUTION 150-51 (1967). As early as 1622, a shipment of "300 short pistols with fire locks" had been sent to Jamestown colony. *See* H. GILL, THE GUNSMITH IN COLONIAL VIRGINIA 3 (1974).

344 *See supra* note 270 and accompanying text.

law" (as is used in the First Amendment) indicated a desire to prohibit such action by states as well as the federal government.[345] (pg.632)

Summary

A collective right approach to the Second Amendment requires us to ignore evidence of the Framers' understanding of the right to keep and bear arms, including the demands that brought about a Bill of Rights, the terms chosen to recognize the right and the opinion of early commentators, including many who were personal friends of Jefferson, Madison, Washington and others who played a major role in the period. The individual right interpretation, in contrast, enables us to give meaning to all these different indications of purpose. The hybrid right interpretation enables us to give meaning to the bulk of such evidences of intent, and actually differs from the individual rights approach only in taking a narrow view of the term "arms," thereby requiring a factual inquiry about the nature of the weapon in question. That the collective right approach apparently did not occur to any courts or commentators before 1905, when the Framers and all who knew directly of their intent were long dead, does not appear to be coincidence. Virtually the only basis for the collective rights approach seems to be that "everyone knows" that the Second Amendment refers only to the militia, and the militia refers only to the National Guard. The time has come to lay this myth to a well-deserved rest.

One objection—which is neither historical, nor logical, nor textual, but nonetheless quite real—remains to the acceptance of an individual rights theory. Simply stated, the technology of weapons has evolved both quantitatively and qualitatively in the years since 1791. The Framers were most decidedly not thinking of neutron bombs in basements or heat-seeking missiles in the flight path of a major airport when they wrote of the right of the citizen to keep and bear arms. Yet the problem of technological change is not unique to the Second Amendment. It is equally obvious that the Framers were not thinking of hundred kilowatt transmitters in every backyard, jamming the radio spectrum with conflicting transmissions, when they wrote that "Congress shall make no law" abridging freedom of speech. The existence of technological change illustrates, not the need for wholesale abolition of constitutional rights by historically and intellectually dishonest interpretations, but rather the need for the development of an appropriate jurisprudence that can take account of such developments.(pg.633)

III. TOWARD A JURISPRUDENCE OF THE SECOND AMENDMENT

A. *Problems and Non-Problems: An Analogy*

To gain a better perspective on Second Amendment issues, let us suppose for a moment either that no rights of free expression had been placed in the First Amendment, and recognition of such rights was just now being proposed, or that such rights had been recognized, but no authoritative judicial exposition of these rights had ever been made. It might then be argued that:

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[345] *See id*; 2 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 124 (Boston 1865); Nunn v. State, 1 Ga. 243, 250 (1846) ("The language of the second amendment is broad enough to embrace both Federal and state government—nor is there anything in its terms which restricts its meaning.").

> To propose a constitutional limitation that Congress shall make no law abridging freedom of speech or of the press is to propound a notion that is either absurd or pernicious. Under this language, extortion and blackmail would be legalized—these, after all, involve the exercise of speech or writing, or an offer to avoid exercising them in return for money. Revealing vital government secrets even in time of war, by word of mouth or in a letter, would be a constitutionally protected activity. Every fanatic who could afford a sound truck would be free to cruise the streets at any hour of the night, awakening and harassing all. The electronic media would be wiped out, because anyone could broadcast his message, jamming every frequency.
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> How could these effects be avoided? A statute saying who may and may not transmit on a given radio frequency is undoubtedly a "law abridging freedom of speech."
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> If, conversely, a limitation of this type is viewed as *no* infringement on speech, then there is nothing in this language to distinguish powers to license presses, to allow only one person or group to speak on a given issue, to bar vulgar or tasteless expression, and to enact countless other restrictions. In that event, why claim that "Congress shall make no law" on this topic? This proposal to assert that Congress shall make no law abridging freedom of speech or press is, at least in a modern society, either a disaster or a nullity.

Actually, the scenario above is far from hypothetical; it occurred in substantial part barely half a century ago. In the early 1920s, Congress had not made any laws infringing freedom of speech via radio; at one point, twenty-six new broadcasting stations entered operation in one week.[346] As the Supreme Court in *Red Lion Broadcasting v. FCC* had noted, when "the allocation of frequencies was left entirely to the private sector ... the (pg.634) result was chaos."[347] Eventually, extensive regulation of the medium was enacted,[348] which the Supreme Court had little trouble upholding: "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio is not inherently available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation."[349]

At the core of the distinction is the recognition that a new technology, one qualitatively different from those known to the Framers, may require different standards. No one would claim, for instance, that a modern high-speed printing press may be regulated in a manner akin to a radio station; the Framers knew the risks of presses, and chose accordingly—a high-speed press merely lets one exercise the right of freedom of the press more rapidly and in a more widespread manner. The key is the qualitative difference:

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346 D. GINSBURG, REGULATION OF BROADCASTING: LAW AND POLICY 29 (1979).

347 Red Lion Broadcasting v. FCC, 395 U.S. 367, 375 (1969). *See also* FCC v. Pacifica Foundation 438 U.S. 726 (1978).

348 The breadth of this regulation is easily underestimated. Although the electromagnetic spectrum usable for broadcasting extends from about 50 kilohertz almost to infinity (some forms of transmissions today exceed two million hertz), only the tiny 550-1600 kilohertz segment is available for public AM radio; the shortwave spectrum, twenty-five times as wide, may not be licensed for domestic public broadcasting; licensed shortwave amateurs may not make true broadcasts but must speak only to specific persons. In contrast, in order to permit clearer transmission of music, FM radio stations are allotted 15 kilohertz "slots" whereas AM can be adequately transmitted in 5 kilohertz allocations and single-sideband in 2.5 kilohertz. Moreover, large separations between broadcast-band AM stations are retained, largely to permit production of cheaper, less precisely filtered receivers. The notion that Congress makes no laws, or only laws aimed at a "clear and present danger" with regard to the technical aspects of radio expression is thus almost laughable.

349 National Broadcasting Corp. v. United States, 319 U.S. 190, 226 (1943).

> When two people converse face to face, both should not speak simultaneously if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice, and the problem of interference is a massive reality .... It is idle to posit a First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.[350]

Yet the additional regulation permissible for the electronic media (pg.635) does not mean that the government may adopt restrictions across-the-board on traditional speech and writing. Only a few weeks after upholding the "fairness doctrine" as applied to radio stations,[351] the Court had no difficulty striking down a far more limited "right of reply" statute applied to newspapers.[352]

B. *Qualitative Leaps in Weapon Technology*

There can be little doubt that the Framers were familiar with rifles, shotguns, and pistols. Jefferson and Washington were both avid firearm collectors.[353] James Madison considered himself a reasonably good rifle shot, at a time when rifles were scarce and expensive firearms. At the outset of the Revolution, he wrote to a friend that "The most inexpert hands reckon it an indifferent shot to miss the bigness of a man's face at the distance of 100 yards. I am far from being the best and should not often miss it on a fair trial at that distance."[354] Carrying of handguns, in particular the smaller handguns, was common at the time.[355] When the residents of Boston were coerced into surrendering their private arms in 1775, about 600 handguns and 1,800 muskets were given up.[356]

Nor can it be said that the Framers were unfamiliar with the problem of criminal use of firearms when they chose to add the Second Amendment to the Constitution. As early as 1643, a (pg.636) flintlock pistol was used in an attempted assassination in New Amsterdam.[357] In the same year, the colony of Virginia was forced to order that any justice of the peace challenging a legislator to

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350 Red Lion Broadcasting v. FCC, 395 U.S. 367, 387-88 (1969).

351 *See id.* at 375.

352 *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 214 (1974). The *Miami Herald* Court rejected an argument for the right of reply statute premised upon economic concentration of the print media as a consideration unforeseen by the Framers, although presumably a monopolization of a print market would have the same effect as governmentally imposed monopolization of an electronic frequency.

353 *See* Tarassuk & Wilson, *Gun Collecting's Stately Pedigree*, THE AMERICAN RIFLEMAN, July 1981, at 22; Halsey, *Jefferson's Beloved Guns*, THE AMERICAN RIFLEMAN, November 1969, at 17.

354 R. KETCHAM, JAMES MADISON: A BIOGRAPHY 640 (1971).

355 *See* NEUMANN, *supra* note 343, at 150-51. Some travelled more heavily armed than others: "It would not however have been an easy matter to make him yield ... as he carried a pair of pistols in each pocket, he would have tried these in the first instance ...." JOURNAL OF A LADY OF QUALITY ... IN THE YEARS 1774 TO 1776, at 196-97 (E. Walker ed. 1922). One eyewitness to the Boston Tea Party commented that the participants were "each armed with a hatchet or axe, and pair [of] pistols," but that "it would puzzle any person to purchase a pair of p[isto]ls in town, as they are all bought up ...." AMERICAN HISTORY TOLD BY CONTEMPORARIES 432-33 (A. Hart ed. 1926).

Colonial militia laws frequently listed pistols among the arms that citizens were required to keep. *See* 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 232 (1894) (a "case of good pistolls"); 3 LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 338 (1823) (a "case of pistolls well fixt," or in repair).

356 *See* R. FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (1903).

357 *See* H. PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA 39 (1956).

a duel would be dismissed from office.[358] William Maclay, during his term as a member of the first Senate, which approved the Bill of Rights, described a bill as "meant to be used in the same way that a robber does a dagger or a highwayman a pistol."[359] In short, it is impossible to argue that when the Framers recognized that "the right of the people to keep and bear arms shall not be infringed," they were not aware of the possible social costs of such a recognition. It is apparent that they were aware of such costs and nevertheless chose to recognize a right to keep and bear arms. To view the right as inapplicable to private ownership of modern analogs of the weapons then owned—rifles, shotguns, and pistols—would be no more justifiable than viewing freedom of the press as protecting only Eighteenth-Century presses. The change in technology is not a qualitative difference.

On the other hand, it is clear that many weapons exist today that did not have an Eighteenth-Century analog. Anti-aircraft missiles, nuclear arms, and similar weaponry, involve risks that were not and could not have been foreseen in 1791. To view the Framers' recognition of the right of the people to keep and bear arms as automatically applicable to arms that could not have been foreseen in their time is impolitic and unrealistic. It requires treating the Framers as omniscient deities rather than statesmen laying the foundations of a free nation-state. Restricting the possession of such weaponry does no violence to the freedoms the Framers sought to protect.(pg.637)

Incidental limitations may be imposed upon exercise of First Amendment rights. These constraints can be extended to Second Amendment rights. Extremely narrow restraints are permitted in a variety of conditions that pose special dangers so long as the restriction does not materially impair the exercise of the entire right. The government may constitutionally require that sound trucks using artificial voice amplification do so in a manner that does not disturb residential areas at unreasonable hours.[360] It may restrict demonstrations in certain areas needing unusual security, in the immediate vicinity of courthouses and jails, for example, so long as the right to express the same views is protected elsewhere.[361] Controls on the exercise of the First Amendment in these very narrow circumstances, involving special considerations, do not imply that the First Amendment does not exist or that greater restrictions could be imposed upon the general exercise of the right.[362]

By the same token, we may accept the early cases that recognized that legislatures could constitutionally prohibit the carrying of concealed firearms so long as they permitted their open transport; as in the case of time, place, and manner restrictions on free speech, only one form of the right was restricted and the remaining form was an equally or even more efficacious means of self defense. Likewise, even carrying a weapon openly might be prohibited or restricted in areas of special sensitivity such as courthouses, airports, and public buildings. None of these restrictions

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358 *See* P. BRUCE, SOCIAL LIFE OF VIRGINIA IN THE SEVENTEENTH CENTURY 245 (1907, reprinted 1968). In 1728, dueling had become such a problem that the legislature imposed twelve months' imprisonment without bail as a minimum penalty for merely issuing a challenge to duel—twice the imprisonment given for second-offence highway robbery. *See* E. POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 191 (1966).

359 THE JOURNAL OF WILLIAM MACLAY 260 (C. Beard ed. 1927). Maclay's Journal is interesting reading for the constitutional historian, for its author was truly unbiased: He appears to detest every other member of the Senate equally. "Butler blustered away, but in a loose and desultory manner. King, Elsworth, Strong and Izard spouted for it," reads one comment. "I never heard such a scene of bestial badney kept up in my life. Mr. Morris is certainly the greatest blackguard in that way I ever heard open a mouth," reads another. *Id.* It is unfortunate that Maclay was bedridden during the debate over the Bill of Rights; his less than subtle viewpoints would be an interesting counterpoint to the dry official record.

360 Kovacs v. Cooper, 336 U.S. 77 (1949).

361 *See* Adderly v. Florida, 385 U.S. 39 (1966) (county jail); Cox v. Louisiana, 379 U.S. 559 (1965) (courthouse).

362 *See* Cox v. Louisiana, 379 U.S. 536 (1965) (striking down conviction based on demonstration near state capitol building); Brown v. Louisiana, 383 U.S. 131 (1966) (public library).

would totally bar carrying nor subject it to the practical equivalent of a ban; both simply regulate where and how the firearm is borne. The need for such special regulations, based upon special risks, cannot justify a general restriction against keeping or bearing arms; the constitutional exception cannot swallow the right expressly recognized.

CONCLUSION

The individual right interpretation of the Second Amendment is both true to the historical background and intentions of the Framers of the Second Amendment, and also capable of (pg.638) adaptation to modern technological change in weaponry. The collective right interpretation, in contrast, requires turning a blind eye to the entire history of the right to keep and bear arms and the expressions of intent by the Framers and their contemporaries. It also grounds the interpretation of the Second Amendment in an approach unknown to Eighteenth- and Nineteenth-Century jurisprudence, an approach apparently first conceived by a Kansas court in 1905.[363] The hybrid right theory, which appears to be the basis of the decision of the United States Supreme Court in *Miller*,[364] is essentially a narrow form of the individual rights approach, shares at least most of its historical virtues, but is incapable of dealing with changes in infantry weapons technology that have occurred in the Twentieth Century. Under that approach, legislatures would be prohibited from restricting the possession of dangerous modern weapons by private citizens because these weapons can be used for military purposes.

The formation of a jurisprudence of the Second Amendment is nearly two centuries overdue. Such a jurisprudence must be based upon an understanding of history, consistent methods of interpreting all amendments, and the ability to adopt to current conditions, to preserve the right in light of changing circumstances. We should expect Second Amendment jurisprudence to be guided by the judgments of the Framers and not subjective, personal, feelings that the Framers were wrong.

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[363] *See* City of Salina v. Blaksley, 72 Kan. 230, 83 P. 619 (1905); *see supra* text accompanying notes 274 & 275.

[364] United States v. Miller, 307 U.S. 174 (1939).