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Book Review

The Fifth Auxiliary Right

To Keep and Bear Arms: The Origins of an Anglo-American Right. By Joyce Lee Malcolm.* *Cambridge, MA: Harvard University Press*, 1994. Pp. xii, 232. $35.00.

Robert J. Cottrol† and Raymond T. Diamond††

> [I]n vain would these rights [personal security, personal liberty, and private property] be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.
>
> . . . .
>
> The fifth and last auxiliary right of the subject . . . is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute . . . and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[1]

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1. 1 WILLIAM BLACKSTONE, COMMENTARIES *136, *139.

Joyce Lee Malcolm's timely study, *To Keep and Bear Arms: The Origins of an Anglo-American Right*,[2] brings the insights of a student of early modern English political history to the contemporary debate over the Second Amendment.[3] Through an examination of statutes and cases, of English constitutional thought, and of the political, social, and cultural background of English history and law from the seventeenth century to the twentieth, Malcolm does more than simply outline the history of the English right to arms. As her subtitle promises, Malcolm brings into sharp relief the origins of the right to arms not only in English ideological and constitutional thought, but in American constitutionalism as well.

Malcolm's study traces the transformation of the traditional duty of the English population to have arms for the common defense into the notion of a political right to arms to resist potential excesses of the Crown. She first focuses on the political turmoil that was seventeenth-century England, a unique century in modern English history. A Scottish family occupied the English throne.[4] A King, Charles I, was beheaded. A most un-English experiment, eleven years of republican rule, the Protectorate, was attempted. And by the end of the century, the English exacted a Declaration of Rights from their new rulers, William and Mary. That declaration included the right to arms. Then, Professor Malcolm takes her study beyond the seventeenth-century background that helped produce a formal recognition of the right to arms. She examines the subsequent history of the right to arms in England and how it became a virtual nullity in the twentieth century.

This Review examines Malcolm's study. Part I explores the modern American debate over the Second Amendment—the quality of which will be greatly improved by Malcolm's contribution of *To Keep and Bear Arms*. Part II examines Malcolm's treatment of seventeenth-century English constitutionalism and how the right to arms became part of English constitutional thinking. Part III traces the social and cultural developments that led to the ultimate evisceration of the right to arms in the United Kingdom in the twentieth century. Part IV concludes by discussing the significance of Professor Malcolm's history of the English right to arms for late-twentieth-century Americans concerned both with guns and violence and with arms and rights.

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2. JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994) [hereinafter TO KEEP AND BEAR ARMS].

3. "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." U.S. CONST. amend. II.

4. Historian Roger Lockyer suggests that the friction between the English and their Stuart Kings that started at the beginning of the seventeenth century may have been rooted in the more authoritarian tradition of Scottish law, which, unlike the common law of England, was rooted in Roman law. *See generally* ROGER LOCKYER, TUDOR AND STUART BRITAIN, 1471–1714 (1964).

I. AN AMERICAN DEBATE, AN ENGLISH PREFACE

The debate over the Second Amendment is one of the more intriguing controversies in American constitutional discourse. Few issues excite greater passion. For better than a generation, the debate over the right to keep and bear arms has been a staple of editorial and op-ed writers in the popular press.[5] It is the subject of a vast polemical literature by partisans on both sides of the often acrimonious gun control debate. Respected legal scholars, in the pages of this law journal, have in recent years termed the Second Amendment "embarrassing"[6] and "terrifying."[7] Warren Burger has indicated his belief that the Amendment's inclusion in the Bill of Rights was a mistake, a startling assertion about a provision of the Bill of Rights by a former Chief Justice of the Supreme Court.[8]

Some see the Amendment as a guarantee of political freedom, a hedge against a potentially tyrannical government.[9] Despite prevailing stereotypes,

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5. For some examples from the last decade, see, e.g., Daniel Abrams, *What "Right To Bear Arms"?*, N.Y. TIMES, July 20, 1989, at A23; Warren E. Burger, *The Right To Bear Arms*, PARADE MAG., Jan. 14, 1990, at 4; Robert J. Cottrol, *It's Time To Enforce the Second Amendment*, CLEV. PLAIN DEALER, Feb. 17, 1990, at 5B; Erwin N. Griswold, *Phantom Second Amendment "Rights"*, WASH. POST, Nov. 4, 1990, at C7; Michael Kinsley, *Slicing Up the Second Amendment*, WASH. POST, Feb. 8, 1990, at A25; Sue Wimmershoff-Caplan, *The Founders and the AK-47*, WASH. POST, July 6, 1989, at A17.

6. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). It should be stressed that Levinson's use of the term "embarrassing" to describe the Second Amendment was not an indication that he believed the provision inappropriate or out of place in the American constitutional order. Instead his article pointed out how the legal academy regarded the right to arms as a constitutional blind alley, unworthy of scholarly attention. Levinson's purpose was to inform the academy that important constitutional and political issues lie behind the Second Amendment and to encourage scholars to treat those issues with due seriousness. His article, along with the deepening of the gun control debate in the 1990's, the observance of the two-hundredth anniversary of the Bill of Rights in 1991, the revival of interest in civic republicanism in the legal academy, and the reinvigorated debate over the Fourteenth Amendment and the incorporation of the Bill of Rights, have all combined to create something of a mini-boom of Second Amendment scholarship among law teachers. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1210--12 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Glenn H. Reynolds, *The Right To Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994). Literary scholar Elaine Scarry has taken the Second Amendment issue beyond the traditional confines of the gun control debate and has asked provocative questions concerning the Second Amendment's implications for the President's war-making powers in the nuclear age. Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right To Bear Arms*, 139 U. PA. L. REV. 1257 (1991); *see also* Stephanie A. Levin, *Grassroots Voices: Local Action and National Military Policy*, 40 BUFF. L. REV. 321 (1992) (discussing Second Amendment implications for national war-making powers). Nicholas Johnson has looked at possible Ninth Amendment protection for the right to arms. Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right To Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

7. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

8. *MacNeil/Lehrer NewsHour* (PBS television broadcast, Dec. 16, 1991), *available in* LEXIS, News Library, Script File.

9. *See, e.g.*, Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

this position cuts across familiar ideological lines.[10] It has been embraced, to varying degrees, by the generally conservative National Rifle Association, by liberal constitutional scholar Sanford Levinson,[11] and by retired-Army-Colonel-turned-syndicated-columnist Harry Summers.[12] Others, including former Chief Justice Burger,[13] conservative former Supreme Court nominee Robert Bork,[14] and various gun control advocacy groups, see the Second Amendment as having been inappropriately used as a tool to combat needed public safety and anticrime measures.[15]

Oddly enough, this often-rancorous exchange has long been neglected by those to whom we normally turn for constitutional interpretation: the legal academy and the courts, particularly the U.S. Supreme Court. Members of the legal academy, until relatively recently, have been reluctant to join the Second Amendment debate,[16] and the nature of the right to arms remains a historical

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10. Ironically, in light of the general tendency of liberals to favor stricter gun control measures and the tendency of conservatives to oppose such measures, in the not-too-recent past strong support for the right to bear arms as a means of preventing state oppression often came from political figures on the left. Both Malcolm X and the Black Panthers urged black people to acquire arms as protection against police brutality and attacks by white racists. *See* Raymond G. Kessler, *The Political Functions of Gun Control*, *in* FIREARMS AND VIOLENCE 457, 479–82 (Don B. Kates, Jr. ed., 1984). Also, that exemplar of postwar liberal thinking, Hubert Humphrey, once vigorously endorsed the link between the right to keep and bear arms and political freedom. Writing in a magazine for gun enthusiasts, Humphrey stated:

> Certainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of citizens to keep and bear arms. This is not to say that firearms should not be very carefully used and that definite safety rules of precaution should not be taught and enforced. But the right of citizens to bear arms is just one more guarantee against arbitrary government, and one more safeguard against a tyranny which now appears remote in America, but which historically has proved to be always possible.

Hubert Humphrey, *Know Your Lawmakers*, GUNS, Feb. 1960, at 4.

11. Levinson, *supra* note 6.

12. Harry Summers, *Gun-Collecting in Lithuania*, WASH. TIMES, Mar. 29, 1990, at F4.

13. *MacNeil/Lehrer NewsHour*, *supra* note 8.

14. *See, e.g.*, Robert Bork & Laurence Tribe, *The Advocates: Point and Counterpoint*, LIFE, Fall 1991 (special issue), at 96.

15. It should be noted that the vast majority of those who have commented on the Second Amendment in the popular press have tended, not surprisingly, to view the Amendment as confirming their own views of good public policy. Thus, supporters of stricter gun control measures have tended to argue for the collective rights view, that is, that the Amendment was only designed to protect the right of states to maintain militias, while opponents of stricter measures have tended to argue that the right protected is an individual one. *See infra* notes 21–37 and accompanying text. There are at least two interesting exceptions to this general rule. Syndicated columnist Michael Kinsley, a member of the gun control advocacy group Handgun Control Inc. and an advocate of stricter gun control, has conceded, reluctantly, that the Second Amendment was meant to protect an individual right to arms and that at some level such an intention must be honored. *See* Kinsley, *supra* note 5, at A25. George Will, another advocate of stricter gun control, has conceded: "The National Rifle Association is perhaps correct and certainly is plausible in its 'strong' reading of the Second Amendment protection of private gun ownership." George F. Will, *America's Crisis of Gunfire*, WASH. POST, Mar. 21, 1991, at A21. This view has led him to call for the Amendment's repeal.

16. *See supra* note 6. Second Amendment scholarship is one area where practicing attorneys, usually activists in the gun control controversy, have done pioneering work, often leaving their academic colleagues to follow in their footsteps. Three of the most prolific and influential practitioner-scholars in the field whose writings, beginning in the 1980's, have played a major part in producing the ongoing academic reexamination of the subject in the 1990's are Stephen P. Halbrook, David T. Hardy, and Don B. Kates, Jr. Their writings have played a major role in reinvigorating the individual rights view of the Second Amendment and in revealing the links between the Second Amendment and such themes as individual self-defense, classical republican ideology, and the Fourteenth Amendment's incorporation of the Bill of Rights.

controversy more faithfully attended to by partisans on different sides of the gun control debate than by professional historians.[17] The Second Amendment also continues to be an arena of jurisprudence from which the nation's highest Court has largely been absent. The nation's highest tribunal has seriously addressed the issue in only three cases,[18] and the most recent of these, *United*

See, e.g., STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984) [hereinafter HALBROOK, EVERY MAN]; Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To "Bear Arms"*, 49 LAW & CONTEMP. PROBS. 151 (1986) [hereinafter Halbrook, *What the Framers Intended*]; David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL'Y 1 (1987) [hereinafter Hardy, *Historiography*]; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Handgun Prohibition*]; Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992).

17. In part because the Second Amendment debate is fundamentally a debate about historical meaning, historians entered the debate somewhat earlier than members of the legal academy. One important debate about the implications of classical republican political ideology for the collective rights and individual rights perspectives on the Second Amendment occurred in the 1980's in the leading journal on U.S. history, *The Journal of American History*. *See* Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right To Bear Arms*, 71 J. AM. HIST. 22 (1984); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); Robert E. Shalhope & Lawrence D. Cress, *The Second Amendment and the Right To Bear Arms: An Exchange*, 71 J. AM. HIST. 587 (1984). Joyce Malcolm had also done considerable writing on the subject, even before the publication of *To Keep and Bear Arms*. *See, e.g.*, JOYCE L. MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND; Joyce L. Malcolm, *The Creation of a "True Antient and Indubitable" Right: The English Bill of Rights and the Right To Be Armed*, 32 J. BRIT. STUD. 226 (1993); Joyce L. Malcolm, *The Right of the People To Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983) [hereinafter Malcolm, *The Right of the People*]; Joyce L. Malcolm, Book Review, 54 GEO. WASH. L. REV. 452 (1986) (reviewing HALBROOK, EVERY MAN, *supra* note 16).

18. *See* United States v. Miller, 307 U.S. 174 (1939); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876). The Second Amendment actually has had a somewhat curious history in the nation's highest Court. *Cruikshank* and *Presser* really tell us more about the Court's reaction to the Fourteenth Amendment than to the Second. *Miller*, the only case in which the Court has had to decide the extent to which the Second Amendment limits the ability of the federal government to restrict the possession of certain types of firearms, was decided even though the Court heard only the government's case. *See* Robert J. Cottrol, *The Second Amendment: Invitation to a Multi-Dimensional Debate*, *in* GUN CONTROL AND THE CONSTITUTION at ix, xxvi–xxix (Robert J. Cottrol ed., 1994). Since *Miller*, although a number of lower federal courts have upheld various gun control measures by reasoning either that the Second Amendment does not restrict action by state governments or that it protects only the right of a state to maintain militias, the Supreme Court generally has declined to hear these cases and make a definitive modern pronouncement on the subject. *See* Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

Although the Court has done little to develop an actual jurisprudence of the Second Amendment, it has a long history of presenting the Amendment in what might be termed "family portraits" of the rights of the American people. This has occurred in cases having nothing to do with the issue of firearms regulation. Thus in *Dred Scott v. Sanford*, Chief Justice Roger Taney argued that Negroes, slave or free, could not be citizens because they were commonly subject to restrictions that would, presumably, have been impermissible if imposed on whites:

> 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, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.*

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857) (emphasis added).

In more recent times, even as the right to arms has become more politically controversial, the Second Amendment has served as a kind of curious bit player in Supreme Court opinions dealing with the right

States v. Miller, is over fifty years old.

This controversy occurs at the most fundamental level: It is a debate over the Amendment's basic meaning. Briefly stated, the modern debate over the Second Amendment is about the extent to which that constitutional provision was intended to limit the ability of government to prohibit or severely restrict private ownership of firearms. It is a debate shaped in part by high national crime rates—an average of 11,000 homicides occur annually in incidents involving firearms[19]—and in part by the presence of firearms in roughly half the households in the country.[20]

This debate has produced two familiar interpretations of the Second Amendment. Advocates of stricter gun controls have tended to stress the Amendment's Militia Clause ("A well-regulated Militia, being necessary to the security of a free State"), arguing that the purpose of the Amendment was to maintain state militias against federal encroachment.[21] Advocates of this view,

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to privacy. Starting with Justice Harlan's dissent in *Poe v. Ullman*, a case involving Connecticut's anticontraception statute, Court decisions have reiterated Harlan's view that the rights of Americans are more extensive than those enumerated in the Bill of Rights:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms.*

Poe v. Ullman, 367 U.S. 497, 543 (1961) (emphasis added); *see, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2811 (1992) (quoting *Poe*, 367 U.S. at 543); Moore v. City of E. Cleveland, 431 U.S. 494, 501 (1977) (same); Roe v. Wade, 410 U.S. 113, 169 (1973) (same).

More recently, in his discussion of the scope of the term "the people," Chief Justice William Rehnquist hinted at his views on the Second Amendment:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." *The Second Amendment protects "the right of the people to keep and bear Arms,"* and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." . . . While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (emphasis added) (citations omitted).

In a very real sense, for the modern Supreme Court, the Second Amendment has become akin to a disreputable member of the family. The modern Court acknowledges the Second Amendment on occasions when generally discussing the constitutional rights of Americans, even though the Court remains reluctant to grapple with cases squarely addressing the Second Amendment. William Van Alstyne makes the valuable observation that the Court's treatment of the Second Amendment is very much like its treatment of the First Amendment before World War I. The Amendment was acknowledged but was not the subject of any meaningful case law or jurisprudence. Van Alstyne, *supra* note 6, at 1239.

19. Homicides, however, do not constitute the majority of firearm-related deaths. Criminologist Gary Kleck breaks the 31,606 total firearm deaths for the year 1985 into the following categories: accident (1649); suicide (17,369); homicide (11,621); legal intervention, i.e., killings by police in the line of duty (486); undetermined (481). GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 60–61 (1991).

20. *Id.* at xiii; JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 116–17 (1983).

21. *See, e.g.*, Cress, *supra* note 17; Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975).

the so-called collective rights theory, argue that the Framers' sole concern was preventing the concentration of military power in the hands of the federal government.

Opponents of stricter gun controls have tended to stress the Amendment's second clause ("the right of the people to keep and bear Arms, shall not be infringed") and note that the Framers intended a militia of the whole, or at least one consisting of the entire able-bodied white male population. They argue that this militia of the whole was expected to perform its duties with privately owned weapons. Advocates of this individual rights theory also argue that the Militia Clause should be read as an amplifying rather than a qualifying clause; that is, although maintaining a "well-regulated militia" was a major reason for including the Second Amendment in the Bill of Rights, it should not be viewed as the sole or limiting reason. Instead, other reasons, such as a right to individual self-defense, must be understood as within the Framers' contemplations.[22]

Little in either the historical record or the language of the Amendment supports the collective rights theory, at least at its most simplistic level—i.e., that the Second Amendment simply was meant to reserve states the right to raise or maintain militia units.[23] The historical evidence overwhelmingly supports the view that the militia envisioned in the Second Amendment consisted of virtually all adult white men[24] equipped with their own arms.[25]

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22. For two representative examples of these opposing viewpoints, see Cress, *supra* note 17, and Kates, *Handgun Prohibition*, *supra* note 16.

23. *But see* Michael K. Beard & Kristen M. Rand, *The Handgun Battle*, 20 BILL RTS. J. 13 (1987) (arguing that Second Amendment is concerned with states' rights rather than individual rights).

24. For a discussion of the sentiments of the Framers' generation concerning the armed populace, select and universal militias, and the maintenance of political freedom, see HALBROOK, EVERY MAN, *supra* note 16, at 55–87; *see also* Cottrol & Diamond, *supra* note 6, at 327–30. The first militia act, the Uniform Militia Act of 1792, called for the enrollment of every free, able-bodied white male citizen between the ages of 18 and 45. Militia members were required to arm themselves. Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271. We have argued that, even though the Act specified the enrollment of white men, women and free black men were also part of the militia. *See* Cottrol & Diamond, *supra* note 6, at 316 n.22, 331–32.

It is of dual significance that, overwhelmingly, commentators in the antebellum years of the 19th century wrote of the Second Amendment as a right of individuals. To our knowledge, no commentator in the antebellum era offered an interpretation of the Second Amendment that indicated that the right was only a right of the states or was limited to those actively involved in militia service. *See, e.g.*, Nunn v. Georgia, 1 Ga. 243, 250 (1846); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708–09 (Carolina Academic Press 1987) (1833).

The importance of such antebellum interpretations does not end with the light they may shed on the original meaning of the Second Amendment. Such interpretations also have much to tell us about how the framers of the Fourteenth Amendment viewed the Second Amendment and the extent to which they intended to protect the right to bear arms against state infringement. The best evidence indicates that the proponents of the Fourteenth Amendment in the 39th Congress saw the individual right to arms as a fundamental one requiring federal protection against state infringement. *See* MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 6, at 1237; Cottrol & Diamond, *supra* note 6, at 342–49; Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, *supra* note 16, at 9–11.

25. Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271. The *Miller* Court recognized this point:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators.

A universally or even widely armed population was seen as supporting a well-regulated militia in at least two ways. First, it ensured arms for the individual militiaman: He brought his own. Second, it guaranteed widespread familiarity with arms amongst the population, enhancing the military effectiveness of the militia of the whole.

The text of the Second Amendment also poses unmet challenges for those who would claim that it was not meant to protect an individual right.[26] Several points should be noted. To begin with, the first clause, discussing the well-regulated militia, seems to be the dependent clause. According to this reading, a well-regulated militia depends on the right of the people to keep and bear arms. The language does not support the opposite reading, that the right of the people to keep and bear arms depends on the maintenance or preservation of a well-regulated militia. It should also be noted that the Amendment has two parts: (1) an observation, or perhaps a cautionary note ("A well-regulated Militia, being necessary to the security of a free State") and (2) a command or legal requirement ("the right of the people to keep and bear Arms, shall not be infringed"). The plain language of the first clause appears to impose no legal requirement or restriction on the federal government. Only the second clause indicates a right that the government cannot infringe.

In addition, the second clause speaks of the "right of the people." We agree with Chief Justice Rehnquist's assertion in *United States v. Verdugo-Urquidez*[27] that "the people" referred to in the Second Amendment are the same as "the people" discussed in the First, Fourth, Ninth, and Tenth Amendments. It is hardly credible to assume that the Framers' reference to "the people" indicated intent to protect the rights of private individuals to assemble peaceably and to petition the government in the First Amendment, but was somehow transformed in the Second Amendment to refer to a right of states to keep and bear arms, and then miraculously reverted to indicate an individual right to be secure in one's person, house, papers, and effects in the Fourth Amendment and an individual's residual rights and powers in the Ninth and Tenth Amendments. It should also be noted that the term "the people" is a broader term than "the militia." Although the First Congress envisioned a militia that would encompass virtually the entire adult male population below the age of forty-five,[28] the term "the people" certainly was meant to include

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> These show plainly enough that the Militia comprised 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.

United States v. Miller, 307 U.S. 174, 179 (1939).

26. For two studies that have contributed to the textual interpretation of the Second Amendment, see Halbrook, *What the Framers Intended*, *supra* note 16; Van Alstyne, *supra* note 6.

27. 494 U.S. 259, 265 (1989); *see supra* note 18.

28. Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271.

adult white men over that age, adult white women, and, arguably, free Negroes.

Closer examination of the second clause further supports the individual rights interpretation. The phrase "to bear arms" is ambiguous. It could be interpreted either as bearing arms for militia purposes or as bearing arms for private purposes. An individual right to *keep* arms, however, can only be looked upon as a private right, a right to have arms in one's home. Even the most restrictive view of that right—that the right protected is only a right to keep arms in one's home to ensure availability for militia duty—presents the right as the individual's right and not the state's.

Finally, the language of the Second Amendment suggests an intent to preserve a recognized, preexisting right rather than to create a new one. If, for example, the Amendment was intended to create a right to address the needs of states to maintain militias, the text might have read: "A well-regulated Militia being necessary to the security of a free State, the people shall have the right to keep and bear Arms." The use of the phrase "the right of the people" instead of the phrase "the people shall have the right" suggests a preexisting right that at the very least encompasses the right to arms for militia purposes but that presumably is even broader.[29]

Although the most simplistic variant of the collective rights theory runs into such stubborn historical and textual resistance that, at its most extreme, it can be readily dismissed as a type of result-oriented constitutional denial, there is a more sophisticated version of the collective rights view that raises more difficult questions and deserves closer scrutiny. The sophisticated collective rights view acknowledges that the Second Amendment was designed to protect individual ownership of arms, but then argues that this individual guarantee was inextricably linked to the maintenance of the militia.[30] In short, unlike the individual rights theorists, the sophisticated collective rights adherents see the individual right as existing but also see the Amendment's well-regulated militia clause as qualifying rather than amplifying. For these theorists the answer becomes simple: Because the militia of the whole has essentially disappeared, then the individual right has ceased to exist. The Second Amendment poses no impediment to gun control measures, however restrictive.

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29. Roger Sherman's 1789 proposal for the Bill of Rights offers an actual point of comparison. That proposal included a provision designed to safeguard state militia prerogatives. Note how its language differs from that of the Second Amendment:

> The militia shall be under the government of the laws of the respective States, when not in the actual Service of the united States, but such rules as may be prescribed by Congress for their uniform organization & discipline shall be observed in officering and training them, but military Service shall not be required of persons religiously scrupulous of bearing arms.

ROGER SHERMAN, PROPOSAL FOR A SEPARATE BILL OF RIGHTS (1789), *quoted in* Herbert Mitgang, *Handwritten Draft of a Bill of Rights Found*, N.Y. TIMES, July 29, 1987, at A1, C21.

30. *See, e.g.*, Cress, *supra* note 17.

The issue is not so simple. If the relationship between the armed citizen and the militia has become somewhat theoretical, if not tenuous, in late twentieth-century America,[31] important questions about arms and rights nonetheless remain. Perhaps the most fundamental of these questions has to do with the militia itself. What, from the point of view of the Framers of the Second Amendment, was the reason for attempting to guarantee a militia and an armed population to support it? One might view the sole purpose as the military goal of enabling states and communities to meet their security needs by being able to draw upon an armed population whenever necessary. If so, then the frequently advanced argument that the preemption of national, state, and community security by the police and armed forces has largely made the Second Amendment moot has some merit, even granting the claim that an armed population retains a residual security function. If the purpose of the Second Amendment was purely military, then the right of the government to dissolve the militia of the whole and substitute more efficient police and military organizations is clear. The right protected is simply a right of the government to raise militias or similar bodies. When the government no longer needs to do so, it may disarm the population. This purely military view of the Second Amendment in turn raises the question of why the Amendment was ever needed. Governments that need to raise emergency security forces on an ad hoc basis from the population at large can, of course, store weapons to be distributed to the population during times of emergency. This can be, and often has been, done even by totalitarian states that do not guarantee a right to arms, nor indeed many other rights.[32]

But there is considerable evidence that the armed population and the militia were intended to serve more than a simple military function. They were seen as fulfilling political and perhaps moral purposes as well.[33] Indeed, the government's ability to disarm the population must be questioned if the purposes of guaranteeing a right to arms and organizing popular militias include allowing the citizen to resist governmental tyranny and preventing the citizen from becoming overly dependent on the government for survival.[34]

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31. It should be noted that federal law still recognizes the concept of the militia at large. *See* 10 U.S.C. § 311 (1988). Also, the majority of states still recognize that fraternal twin of the militia at large, the *posse comitatus*, the power of law enforcement officials to summon the citizenry at large to aid authorities in making arrests and quelling civil disturbances. *See, e.g.*, CAL. PENAL CODE § 150 (West 1991); MONT. CODE ANN. § 45-7-304 (1993); N.M. STAT. ANN. § 30-22-2 (Michie 1978); N.C. GEN. STAT. § 17-22 (1993); OHIO REV. CODE ANN. § 2921.23 (Anderson 1993).

32. During World War II, the Nazi government managed to mobilize a significant civilian militia in Germany, the *Volksturm*, which was equipped with government-supplied arms. ALAN CLARK, BARBAROSSA: THE RUSSIAN GERMAN CONFLICT, 1941–1945, at 397–98, 425 (1965).

33. *See, e.g.*, Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 126–33 (1986).

34. *See* Kates, *The Second Amendment and the Ideology of Self-Protection*, *supra* note 16, at 91–98; Shalhope, *supra* note 33, at 126–33; Will, *supra* note 15, at A21. Richard Henry Lee succinctly expressed the fears of many Framers concerning unhealthy reliance on select forces for the security of the citizenry when he charged that such reliance "commit[s] the many to the mercy, prudence, and moderation of the

Can the government, in effect, extinguish the population's right to the means of resistance and self-reliance by determining that its right to raise police and military forces is best served by allocating resources to professional and semiprofessional organizations rather than by maintaining the unwieldy, and admittedly less effective, militia of the whole?

This question of the balance of power between the state and its citizens is one of long-standing concern in the history of arms and rights. For example, the seventeenth-century Stuart monarchs both established select militias and attempted to disarm large portions of the English population.[35] Well into the late nineteenth century, a consensus about the relationship between arms and political liberty existed among constitutional commentators. In 1833, U.S. Supreme Court Justice Joseph Story expressed his fear that popular neglect of the militia, which even by that date had considerably less than universal participation, could weaken the arming of the population:

> The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[36]

Michigan Supreme Court Justice Thomas M. Cooley also expressed the traditional view linking the preservation of the right to arms and the ability of the population to resist potential governmental usurpation. His analysis anticipated and answered the modern view that the right only extended to members of the militia:

> *The Right is General.*—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed 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 the law, are liable to the

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few." *Quoted in* THE ANTIFEDERALISTS 229 (Cecelia M. Kenyon ed., 1966).

35. *See generally* TO KEEP AND BEAR ARMS, *supra* note 2, at 17–53 (discussing efforts of Charles I and Charles II to prevent rebellion by disarming English population).

36. STORY, *supra* note 24, at 708–09.

> performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and 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 to have a well regulated militia; for to bear arms implies something more than the 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.[37]

The writings of Justice Story and Justice Cooley reflected a constitutional consensus that had been developing in Anglo-American jurisprudence and political philosophy since the seventeenth century. Part II of this Review examines the origins of that consensus in seventeenth-century England.

II. FROM ANCIENT DUTY TO INDUBITABLE RIGHT

Malcolm focuses in *To Keep and Bear Arms* on the origins of the constitutional consensus concerning the right to arms in the political turmoil of seventeenth-century England. The first to treat the subject at book length,[38] Malcolm traces the notion of a right to arms from the subject's traditional duty under English law to have arms and participate in the militia and sheriff's *posse* to the political conflict that led to the adoption of a provision safeguarding the right of Protestants to have arms in the English Declaration of Rights of 1689.[39] Her study continues beyond the seventeenth century, examining how the notion of a right to arms and its link to political liberty became a major element of the Whiggish variant of Anglo-American political thought on both sides of the Atlantic in the eighteenth century.

Malcolm begins with the important insight that the notion of a right to arms was a relatively late development in English political thought. A legal duty to own arms to participate in the common defense had existed from the

37. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298 (Andrew C. McLaughlin ed., Boston, Little, Brown, 3d ed. 1898); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 498–99 (Victor H. Lane ed., 7th ed. 1903).

38. Malcolm had previously published articles addressing the English right to arms. *See* sources cited *supra* note 17.

39. "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." English Declaration of Rights, 1 W. & M., sess. 2, ch. 2 (1689) (Eng.).

dim beginnings of English history.[40] Lacking a standing army until the seventeenth century and professional police forces until the nineteenth, English authorities traditionally relied on privately equipped citizen forces for both internal security and defense of the realm.[41] Beginning in the twelfth century, the duty to be armed was specifically codified. In 1181, the Assize of Arms was proclaimed, requiring that all free men possess arms and armor suitable to their condition.[42] By the thirteenth century the requirement to possess arms to participate in the common defense was extended to medieval England's unfree class, the villeins.[43] Those of that class possessing sufficient property also were required to be armed and to participate in maintaining the security of their communities.[44]

Participation was meant to be vigorous. All able-bodied men were part of the militia. Sheriffs employed the *posse comitatus*, the legal power to summon the help of all men between the ages of sixteen and sixty. All subjects were expected to participate in giving chase to criminal suspects, supplying their own arms for the occasion. There were legal penalties for failure to participate.[45]

From the beginning, this requirement of an armed population coexisted with regulation of the possession of arms along class[46] and later religious lines.[47] By the sixteenth century, Parliament passed a statute that limited the carrying of some handguns and crossbows to those with incomes over one hundred pounds per year.[48]

This world of the universally deputized English population, ready to assist either the sheriff's *posse* or the king's militia with arms appropriate to station in life, began to change fundamentally in the sixteenth century. As religious

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40. TO KEEP AND BEAR ARMS, *supra* note 2, at 1–11.

41. *Id.*

42. WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 181–84 (H.W.C. Davis ed., Oxford Univ. Press, 9th ed. 1948) (1870).

43. Pollock and Maitland note that villeinage was a type of unfree land tenure in which the tenant in villeinage might be either a serf or a free man. In either case the property rights connected to the tenure were not protected by the king's courts or law but instead by the custom of the manor. A free man who held in villeinage could leave the property or acquire other property not connected to his lord. A serf, on the other hand, was an unfree man holding an unfree land tenure. He usually passed to the lord's heirs with the land, though, like the free villein, the serf could be ejected from the land at the lord's will without any recourse to the king's courts. For students of American slavery it is interesting to note that, while an English serf seems to have had no ability to take legal action against the lord, he was to be treated by the law as a free man in disputes with those other than his lord. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 356–83, 412–23 (2d ed. 1959).

44. *Id.* at 421, 565.

45. TO KEEP AND BEAR ARMS, *supra* note 2, at 3; *see also* ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 59 (1966); Malcolm, *The Right of the People*, *supra* note 17, at 291.

46. *See supra* notes 43–44 and accompanying text.

47. TO KEEP AND BEAR ARMS, *supra* note 2, at 11.

48. Malcolm, *The Right of the People*, *supra* note 17, at 292–93 (challenging view that restriction was on arms ownership generally).

conflict intensified towards the end of the sixteenth century, Catholics experienced greater restrictions on the use and possession of arms. Increasingly, arms in the hands of Catholics were seen less as contributions to the common defense and more as instruments of potential subversion. Still, as Malcolm tells us, these restrictions never rose to the level of total prohibition of arms for defense of the home.[49]

Other developments further weakened the traditional link between the people, their arms, and the common defense. By the sixteenth century it was becoming clear that the indifference to militia training and discipline against which Justice Story[50] would caution his fellow citizens some three centuries later had overtaken the English people. Despite Henry VIII's best efforts to revive militia training, particularly marksmanship practice, the militia remained an indifferent military force. The population at large was reluctant to devote much time to military drill, and the Crown had to contend with the possibility that the militia would prove politically unreliable when called upon to suppress internal dissension.[51]

This sixteenth-century world—characterized by waning adherence to the traditional obligation to be armed, religious turmoil, and the Crown's dependence on an often less-than-reliable militia—would provide, later in the seventeenth century, some of the principal ingredients for the first serious attempts at large-scale disarming of the English people. Charles I's attempts to create a more reliable militia led to efforts at intensified training,[52] which frequently increased friction between the Crown and its subjects. Both James I and his son Charles I enforced game laws with a greater vigor than their Tudor predecessors.[53] Both asserted a royal monopoly on production of gunpowder.[54]

By the time of the English Civil War in 1642, the mechanisms were in place for wholesale attempts to disarm large portions of the English population. Royalists attempted to disarm republicans who—naturally—sought to return the favor, particularly after the execution of Charles I and the establishment of the Commonwealth Interregnum under Oliver Cromwell. Republican rule brought about a professional army and efforts to disarm the eleven-year Protectorate's enemies, among them royalists and Catholics.[55] With the New Model Army usurping the militia's role as the nation's primary defense force, the militia increasingly came to be used for police purposes such as disarming dissidents.[56]

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49. *Id.*
50. *See* STORY, *supra* note 24; *see also supra* text accompanying note 36.
51. TO KEEP AND BEAR ARMS, *supra* note 2, at 1–15.
52. *Id.* at 7.
53. *Id.* at 13–15.
54. *Id.* at 17–18.
55. *Id.* at 23.
56. *Id.* at 24.

The Restoration brought a reversal of republican and royalist fortunes. That the Commonwealth government had only sought to disarm a minority of the English population[57] attested to a governmental belief that the majority actively or tacitly supported the republican cause.[58] For Charles II and his supporters, the relationship between the armed population and the threat of rebellion was even more acute than it had been for Cromwell. Faced with a well-armed populace, much of which had republican sympathies, and initially lacking military forces and arms, Charles II approached the business of disarming potential subversives with caution. One of the tools used to perform this task was the establishment of a select militia, volunteer units given intensive military training. Such units were valuable because they received training superior to the often haphazard drill of the militia at large. They could also be selected for their political reliability. Charles II, suspicious of the English tradition of the armed population, used this select militia to disarm those considered "politically unreliable," a category that continued to expand under his reign.[59] Charles II's efforts were aided by Parliament's passage of the Game Act of 1671.[60]

But Charles II failed to achieve his goal of large-scale disarmament. Restrictive firearms legislation seems to have been enforced with a decided ambivalence by the courts and the nobility.[61] It would take the reign of James II and increased fears of monarchical absolutism and Catholic domination[62] to cause widespread opposition to disarmament and the formal introduction of a right to arms into English constitutional sensibilities. James II sought to enforce arms restrictions with greater vigor than his predecessor.[63] And the pattern that had prevailed for nearly a century—that Protestants' possession of arms was unquestioned while Catholics' was viewed with suspicion—was

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57. *Id.* at 23.

58. *Id.*

59. *Id.* at 31–53.

60. *Id.* at 54–76.

61. *Id.* at 31–76.

62. A not altogether insubstantial case can be made that modern Americans and Britons have had their historical perceptions concerning James II and the popular antipathies that he generated irrevocably biased by some three centuries of subsequent Whig historiography and commentary. It is, of course, clear that modern Anglo-American conceptions of individual rights and limitations on state power, including the right to arms, owe much to the Whig opposition to James II. *See infra* note 65 and accompanying text. Nonetheless it should be remembered that a good deal of the popular dissatisfaction with the Stuart monarch stemmed from religious intolerance. Whatever his motivations, James II officially promoted a policy of toleration for Catholics and dissenting Protestant sects. His First and Second Declarations of Indulgence removed the legal disabilities of Catholics and Protestant dissenters, allowing them to engage in public worship. That policy met with large-scale resentment and fears that it would pave the way for ultimate Catholic domination. Indeed, it was the Second Declaration that led to the famous Trial of the Seven Bishops, one of the precipitating events of the Glorious Revolution. *See* LOCKYER, *supra* note 4, at 355–61; J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603–1689, at 250–60 (1962).

63. TO KEEP AND BEAR ARMS, *supra* note 2, at 94–112.

reversed. James II sought to disarm the increasingly restless Protestant majority—while keeping arms in the hands of his Catholic allies.[64]

The Glorious Revolution, the Protestant rebellion that swept James II from the throne and replaced him with William and Mary, brought with it a demand for formal limitations on royal power and recognition of the rights of subjects. The Declaration of Rights of 1689 expressed what, by the end of the seventeenth century, had come to be regarded as the "ancient rights of Englishmen." Included was a right to arms for Protestants.[65]

Among the many strengths of Malcolm's study is that it takes the discussion of English sentiments on the right to arms beyond the 1689 Declaration. In the eighteenth century, Whiggish thinkers warned against the dangers posed by standing armies and extolled the virtues of an armed citizenry, or at least an armed Protestant citizenry. Malcolm's examination of the growth of this sentiment and how it translated into legislative and judicial

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64. *Id.*

65. The plain text of the English provision, the obvious ancestor of the Second Amendment, has posed problems for collective rights theorists. Some have tried to read the seventh provision of the English Declaration of Rights as only protecting the right of the militia to be armed, *see, e.g.*, Weatherup, *supra* note 21, at 973–74, but that is a highly strained reading of a provision in which the word "militia" is nowhere used. Malcolm's previous research also indicates that the convention that drafted the Bill of Rights initially discussed the drafting of a dual collective and individual rights provision, ultimately rejecting that possibility for the final provision with which we are familiar. The arms provision went through three drafts:

> [1.] It is necessary for the publick Safety, that the Subjects which are Protestants, should provide and keep Arms for their common Defence. And that the Arms which have been seized, and taken from them, be restored.
>
> . . . .
>
> [2.] That the Subjects, which are Protestants, may provide and keep Arms, for their common Defence.
>
> . . . .
>
> [3.] That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.

Quoted in Malcolm, *The Right of the People*, *supra* note 17, at 307.

Nor have those attempting to read a militia-only right into the English provision been able to explain how it is that 18th-century English commentators such as Blackstone saw the right in individual terms. *See infra* note 68 and accompanying text.

Some collective rights theorists also have tried to explain away the 1689 right to arms by noting that it did not prevent subsequent regulation of arms in Britain, including a fairly draconian regime (by American standards) of gun control in the 20th century. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, THE CITIZEN'S GUIDE TO GUN CONTROL 142–43 (1987); Ehrman & Henigan, *supra* note 21, at 9–10. Subsequent firearms regulation, however, in no way casts doubt on the intended meaning of the 1689 provision. The 1689 provision was a statutory provision intending to limit the King's power. Under British constitutional doctrine of Parliamentary supremacy, the provision could not restrict subsequent acts of Parliament. Despite Sir Edward Coke's efforts to introduce the notion that fundamental English legal principles, as reflected in the common law, could restrict Parliament, *see* Dr. Bonham's Case, 77 Eng. Rep. 646 (C.P. 1610), that notion has been rejected, *see* Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926). Thus, although it might be possible to debate the extent to which the 1689 provision reflected long-standing English notions of a right to arms or merely a reaction to the 17th-century experience, to discuss it in American constitutional terms as limiting future legislation is to fail to take into account the profound difference between American and British constitutionalism.

support for the subject's right to arms[66] supplies an important addition to a too-long-neglected chapter in English intellectual and legal history.

Undoubtedly the most important of the eighteenth-century jurists and commentators to discuss the right to arms was William Blackstone. Blackstone discussed the right to arms as one of the five auxiliary rights of the subject. Some modern advocates of the collective rights theory have tried to argue that because Blackstone listed the right to arms as an auxiliary right, the right was somehow seen as a lesser right.[67] In one sense, this is a correct reading, but further exploration of Blackstone's text reveals that he did not regard the right to arms as a right of minor importance. Blackstone's primary rights (personal security, personal liberty, and private property) were what he considered the inherent rights of Englishmen. But Blackstone also believed that these rights, if they were to have any effect, had to be protected by constitutional mechanisms. In his view, these mechanisms consisted of five auxiliary rights:

> 1. The constitution, powers, and privileges of parliament . . . .
> 2. The limitation of the king's prerogative . . . .
> 3. A Third Subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.
> 4. If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely the right of petitioning the king, or either house of parliament, for the redress of grievances.
> 5. The fifth . . . is that of having arms for their defence . . . .[68]

Far from being inferior rights, in the practical constitutional sense, Blackstone understood these auxiliary rights as the mechanisms that protected the subjects' natural or inherent rights. Thus, taking Blackstone at his stated meaning, one would no more deem the right to arms as one of minor importance because it is listed as an auxiliary right than one would deem unimportant the right to petition the courts, the legislature, or the sovereign.[69]

Ironically, the growth of the pro-arms ideology, as reflected by Blackstone and other commentators, was accompanied by decreasing participation of the population in the militia at large.[70] Despite the militia's decline, strong

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66. As Malcolm notes, the provision in the 1689 Declaration of Rights did not specifically overturn previous statutes restricting the ownership or use of arms. It expressed a principle and was certainly meant to bind William and Mary and to restrict their ability to disarm Protestant subjects. But it was legislative action and judicial decisions, particularly in the early eighteenth century, that made the right a robust reality in English life. Of special value is Malcolm's discussion of how the courts provided narrow interpretations of game laws and other restrictive statutes so that they would not be construed as barring the simple ownership of firearms. *See* TO KEEP AND BEAR ARMS, *supra* note 2, at 128–34.

67. *See, e.g.*, Ehrman & Henigan, *supra* note 21, at 10.

68. 1 BLACKSTONE, *supra* note 1, at *136–39.

69. *Id.* at 136.

70. TO KEEP AND BEAR ARMS, *supra* note 2, at 133.

support remained for permitting Protestants the right to arms based on an understanding that this right was part of the "ancient rights of Englishmen."[71]

This English heritage—which mixed arms and rights, militias and duties, and fears of standing armies—migrated across the Atlantic. It did so in stages, but the American experience in some respects was quite different from the parallel English history. Although by the early seventeenth century the ability of the English to rely on popular militias had become increasingly tenuous, this was not the case in the frontier settlements of colonial America. Beset by internal and external threats, early American settlements had very active militias.[72] Settlements made considerable efforts to ensure the migration of white men capable of bearing arms.[73] The survival of colonies, particularly in their early stages, rested on virtually[74] universal militia participation.

Americans entered the eighteenth century conditioned by the English heritage of a population armed for the common defense, but also altered by their unique American experience. The seventeenth-century experience in frontier America had revitalized the concept of the militia at large, and had demonstrated the need for private arms as a means of self-defense. The seventeenth-century experience also altered views about law, arms, and classes of citizens. For the white population, class and religious distinctions, and even distinctions between English and non-English, became decreasingly important. The entire white population had to be enlisted to counter threats posed by the Indian population, the enslaved black population, as well as hostile European powers.[75] Also, the abundant resources of the new continent ensured that game laws such as Charles II's statute of 1671, which helped disarm large numbers of common people in England, would not play a significant role in early American life. Seventeenth-century American experience considerably strengthened the colonies' transplanted English tradition of an armed population.

There would also be a comparable shift in thinking about arms. As was the case in England by the eighteenth century, the duty to have arms for the common defense became increasingly conceived of as a right. This sentiment would intensify by mid-century as differences with England grew and Whiggish Americans increasingly perceived themselves to be the true heirs of the Revolution of 1689 and the conservators of "the rights of Englishmen."[76]

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71. *Id.*

72. For an argument that to a considerable degree the militia was needed for racial control, see Cottrol & Diamond, *supra* note 6, at 323–27.

73. *Id.*

74. In most colonies, militia membership was restricted to white men. As a practical matter, every colony had free blacks, and occasionally slaves, who would participate in the colony's defense when it was under attack. *Id.*

75. *Id.*

76. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 184–89, 193–94 (1992). John Phillip Reid has given us an especially important reminder of the influence of the 17th-century English experience on attitudes towards arms and standing armies: "There are other dimensions that the

In the final chapter, Malcolm makes a highly persuasive case that the Militia Clause of the Second Amendment, at the time of its drafting and immediately thereafter, was widely understood to be advisory and cautionary, an expression of preference for the militia over a standing army.[77] The second clause was even better understood: It was a broad grant of an individual right.[78]

Malcolm's afterword traces the ultimate evisceration of the right to arms in the United Kingdom. Although British law and sentiment continued to recognize the right to arms into the early twentieth century, the aftermath of World War I brought with it restrictive gun control statutes that have increased in severity as the twentieth century has unfolded.[79] Of course, the right has come under severe attack in the United States as well, especially since the 1960's—often with considerably less intellectual honesty than in the United Kingdom.[80]

Among its other strengths, *To Keep and Bear Arms* is a meticulously researched work in political and legal history. Whether unraveling the often-tangled strands of seventeenth-century English politics, showing how interest, ideology, and sometimes sheer happenstance helped to transform a duty into a right, or explaining the difference between the law of arms as formally stated and the actual practice of jurists and juries, Malcolm demonstrates a keen sensitivity to both historical process and the role of historical actors in producing change. Her study illuminates an often wrongfully neglected chapter in the constitutional and ideological histories of two nations. Through her study of the right to arms, Malcolm also raises critical questions about the relationship between custom and constitutional norm, and the extent to which rights are produced not only through formal constitutional processes but also through a people's social history.

How might a consideration of social history augment the essentially legal and political history of the development of the right to arms in seventeenth-

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standing-army controversy, when studied from the perspective of law, adds to our knowledge of the American Revolution. *One is the degree to which eighteenth-century Americans thought seventeenth-century English thoughts*." JOHN P. REID, IN DEFIANCE OF THE LAW 4 (1981) (emphasis added).

77. TO KEEP AND BEAR ARMS, *supra* note 2, at 163–64.

78. *Id.* at 162.

79. *Id.* at 165–77; *see also* DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 71–74 (1992).

80. Malcolm notes that Parliament, spurred by fears of disaffected World War I veterans, Irish revolutionaries, and Bolshevism, debated arms control in 1920. Advocates of stricter arms control, unlike many of their present-day American counterparts, forthrightly acknowledged that the right to arms was part of existing constitutionalism. They argued, nonetheless, that it was obsolete and should be discarded. TO KEEP AND BEAR ARMS, *supra* note 2, at 175.

Undoubtedly, one reason that British supporters of stricter gun control were able to acknowledge the existence of the right to arms as a constitutional principle while their American counterparts have not is the different nature of the two constitutional regimes. While acknowledging that the 1689 Declaration of Rights indeed included a right to arms would not prevent contrary legislation by Parliament, a similar acknowledgment concerning the Second Amendment would pose real difficulties for gun control advocates because, presumably, it would set a limit beyond which Congress could not go absent constitutional amendment.

century England? It might shed yet further light on England's transformation from a society that imposed a duty on the subject to be armed to one that formally proclaimed the right of the subject to have arms. The formal constitutional story is clear enough. Before 1689, there was no stated recognition of a right to arms. That year, the right was officially recognized in the Declaration of Rights. And yet, why is it that the opponents of Charles II and James II could get strong agreement that the Stuart Kings were attempting to infringe an "ancient[] and indubitable" right of Englishmen,[81] even though that right had not previously been formally expressed?

Part of the answer lies in the legal and political history ably related in Malcolm's study. Another part of the answer lies in a cultural and social history that Malcolm's study points us towards. Briefly stated, the English tradition of arms created its own set of cultural dynamics. An armed population, and one to whom a considerable portion of the society's defense is entrusted, constrains the power of the state in a number of significant ways. The most obvious of these, and one that traditionally has been a part of the discourse on arms and rights, is that an armed population makes state oppression more difficult and makes citizen resistance, even rebellion, more possible. More relevant, from the point of view of the English in the seventeenth century, is that a government largely dependent for its security on its armed population is greatly constrained in its actions. While professional police forces and armies can readily be enlisted to enforce unpopular laws or to punish popular lawbreakers, mobilizing the population at large for such endeavors is more problematic.[82] The English thus were accustomed to a government whose use of force, whether ordered by the county sheriff, or indeed the monarch, was circumscribed by the need to get the consensus of the ordinary people who responded to the hue and cry, or constituted the militias.[83]

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81. English Declaration of Rights, 1 W. & M., sess. 2, ch. 2 (1689) (Eng.).

82. For details on the unpopularity of mandatory militia service, see generally *id.* at 4–5.

83. A very strong parallel can be drawn between the English use of the population at large to secure the physical safety of the society and the use of the jury to decide the outcomes of trials. Just as community sentiment constrained the sheriff's physical ability to enforce the law, popular sentiment in the form of the jury limited the ability of the Crown and the courts to convict criminal defendants. It is probably no accident that a formal recognition of this power of the jury came during the Restoration in 1671 with Chief Justice Vaughan's opinion in Bushell's Case, 1 Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670). For a useful overview of the development of the jury's role, see THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800 (1985).

One also could argue that the same distrust of popular power that has weakened the prerogatives of the jury in American law has also served to erode the right to bear arms and the notion of universal participation in the defense of the community. In both cases, the growth of professions—the legal profession in the case of juries, and the military and police in the case of *posses* and militias—with vested interests in truncating community participation helped weaken the role of the population at large in safeguarding the community or determining its legal standards. For a good discussion of the erosion of the American jury's powers, see generally Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994).

Although the traditional link between the role of private arms and the preservation of an English society less oppressive than its continental contemporaries[84] has escaped formal discussion by jurists and other legal commentators, distrust of armed professionals and belief in the importance of private arms as a means of self-defense had long pedigrees in English society and culture.[85] The importance of this traditional culture of arms to the ultimate constitutionalization of the right to arms at the end of the seventeenth century cannot be underestimated. Certainly by the sixteenth century, if not long before, English belief in the superiority of their institutions and customs as compared with those of the rest of Europe was pronounced. Spurred on by English difference—the early adoption of a variant of Protestantism in contrast to the Catholic dominance of much of the continent, a relatively limited government, a relative respect for individual liberty—Englishmen came to contrast what they saw as the happy condition of their kingdom with less-enlightened conditions elsewhere.[86] English custom was seen as not simply superior, but indeed as somehow more accurately reflecting the natural order. This was not simply a popular view, but indeed one that came to be the view

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84. *See* G.M. TREVELYAN, ENGLISH SOCIAL HISTORY 166–67 (1942).

85. The Magna Charta indicated an early English distaste for standing armies. Article XLI stated "[t]hat the King shall remove all Foreign Knights, Stipendiaries, Crossbowmen, Infringers, and Servitors who came with horses and arms to the injury of the kingdom." RICHARD THOMSON, AN HISTORICAL ESSAY ON THE MAGNA CHARTA OF KING JOHN 57 (London, Johnson 1829). Without indulging in too much speculation, one might draw some interesting parallels with regard to the right to arms between the granting of the Magna Charta, the announcement of the English Declaration of Rights of 1689, and the creation of the U.S. Bill of Rights of 1791. All three documents, which express limitations on governmental power and set forth individual rights, were the products of insurrections by armed populations. The role of private arms in bringing about the new constitutional order was the subject of an extensive celebratory literature. The Robin Hood legend, describing the rebellions against King John, is the most prominent of these; and, of course, the Minutemen at Lexington and Concord retain a mythic value for most Americans to the present day. In a similar vein, it is probably not coincidental that the modern nation with one of the strongest traditions of an armed citizenry and a universal militia, Switzerland, is a nation whose founding myth, the story of William Tell, involves armed rebellion against a foreign tyranny. These are the kind of foundations on which a folk culture linking private arms and individual liberty are likely to persist regardless of the state of legal commentary.

The link between possession of arms and freedom and full membership in the community appears to have been a long-standing part of Germanic culture, from which English culture was partly derived. Sociologist Orlando Patterson notes that in England and other Germanic cultures, the freeing of slaves generally was accompanied by presenting the former slave with his own arms. ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 217–18 (1982).

86. This sentiment was perhaps best captured by Gaunt in *Richard the Second*:

> This royal throne of kings, this sceptered isle,
> This earth of majesty, this seat of Mars,
> This other Eden, demi-paradise,
> This fortress built by Nature for herself,
> Against infection and the hand of war,
> This happy breed of men, this little world,
> This precious stone set in the silver sea,
> Which serves it in the office of a wall,
> Or as a moat defensive to a house
> Against the envy of less happier lands;
> This blessed plot, this earth, this realm, this England . . . .

WILLIAM SHAKESPEARE, RICHARD THE SECOND act 2, sc. 1.

of English jurists who saw English custom, as reflected in the common law, as embodying immutable principles of natural law.[87]

Thus, in important ways, the Stuart attempts to limit the right to arms ran counter to strong cultural traditions, traditions that distinguished English society from the societies of continental Europe. At a time when English custom was taken as a reflection of the natural order, it was not hard to convince the drafters of the Declaration of Rights that an "ancient[] and indubitable" right had been encroached by James II. In this sense, Malcolm's book furnishes us with an important reminder that constitutional sensibilities are shaped not only by the elite cultures of jurists and legal commentators but by prevailing custom and folk tradition as well.

III. CUSTOMARY NEGLECT AND CULTURAL DESUETUDE: THE WANING OF A CONSTITUTIONAL CONSENSUS

If the robust English tradition of the community at arms helped shape the constitutional sensibilities that led to the formal recognition of the right to arms in 1689, subsequent developments would ultimately shift the notion of a right to arms from near the center of British constitutional thinking to the far periphery. That transformation in attitude, occurring over centuries, represented more than a shift in sentiments on the part of legislators, jurists, and legal theorists. It also reflected a decreasing English experience with the resort to private arms for community, or even personal, defense in the centuries following the Declaration of Rights. As such, the English experience with arms and rights raises important questions that go beyond the question of private arms and constitutionalism. The erosion of the English right to arms and its ultimate evisceration in the twentieth century illustrate the difficulty of maintaining a right solely through theoretical abstraction in the face of widespread disuse.

A. *Before the Fall: Public Safety and the Security of Rights—A Resolution*

The nineteenth century would begin with apparent continued agreement that the right to arms played a critical role in securing the liberties of the English subject. Certainly the English experience in the eighteenth century enhanced the ideology of arms, rights, and freedom proclaimed in the 1689

87. Undoubtedly the strongest expression of the view that common law embodied natural law was Sir Edward Coke's opinion in 1610 in *Dr. Bonham's Case*. In that case, Coke expressed the view that common law principles even controlled acts of Parliament, making contrary acts void. Although this early notion of judicial review would not be adopted by English jurists, it clearly had an important influence on American jurisprudence. Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (C.P. 1610); *see also* STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621–1628, at 15–16 (1979); Plucknett, *supra* note 65.

Declaration and reiterated a century later in the American Bill of Rights. Blackstone's writings would highlight the issue for lawyers and jurists on both sides of the Atlantic. And although the concept of the universal militia increasingly gave way to the efficiencies of more selectively trained units,[88] political observers in the eighteenth century still accepted the notion that the right to arms and the preservation of political freedom were inextricably linked. For example, Swiss constitutional commentator Jean DeLolme, author of the 1775 classic, *The Constitution of England*,[89] perceived that the key to the preservation of rights in England was the right to resist governmental tyranny.[90] He suggested that this right of resistance should be seen not only in rights such as freedom of speech, freedom of the press, and freedom to petition government for redress of grievances, but also in the right of the English to be "provided with arms for their own defence."[91] DeLolme saw this right as a deterrent, establishing a hedge against governmental tyranny: "The power of the people is not when they strike, but when they keep in awe: it is when they can overthrow everything, that they never need to move . . . ."[92]

Social conditions reinforced this Whiggish celebration of the armed population. The widespread violence of eighteenth-century England, a condition that would persist well into the next century,[93] made the ownership and use of arms necessary for much of the English population. Professional police forces would not begin to take over the task of law enforcement from the citizenry at large until the first decades of the nineteenth century.[94] Although eighteenth-century legal commentators and political philosophers extolled the virtues of the armed population with one eye on the excesses of the seventeenth-century Stuarts, the average subject had more immediate concerns—the need for arms to fend off common criminals. In an important

88. Hardy, *Historiography*, *supra* note 16, at 24–27.

89. JEAN DELOLME, THE CONSTITUTION OF ENGLAND (John MacGregor ed., London, J. Cuthell 1853) (1775). Jean DeLolme arrived in England in 1765 as Blackstone's *Commentaries on the Laws of England* appeared, and ten years later produced *The Constitution of England*, a work of such significance that Disraeli would later praise DeLolme as "England's Montesquieu." TO KEEP AND BEAR ARMS, *supra* note 2, at 166.

90. TO KEEP AND BEAR ARMS, *supra* note 2, at 166.

91. DELOLME, *supra* note 89, at 215; *see also* TO KEEP AND BEAR ARMS, *supra* note 2, at 166. The right to resistance was not merely abstract, but of true consequence. Resistance to arbitrary power, DeLolme pointed out, "gave birth to the Great Charter," DELOLME, *supra* note 89, at 214, and had as well accounted for the overthrow of James II, *id.* at 215. Thus, not only did political theory prescribe, but experience had taught, that "resistance is . . . the ultimate and lawful resource against the violences of power." *Id.* at 214.

92. DELOLME, *supra* note 89, at 219; *see also* TO KEEP AND BEAR ARMS, *supra* note 2, at 166.

93. *See* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 36–37, 252–64 (1986). For a collection that provides vivid portraits of crime and punishment in 18th-century England, see DOUGLAS HAY ET AL., ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND (1975).

94. *See* TREVELYAN, *supra* note 84, at 230, 482; R.K. WEBB, MODERN ENGLAND: FROM THE 18TH CENTURY TO THE PRESENT 184–85 (1970).

sense, however, the two sets of concerns reinforced each other, sustaining a consensus on the right to arms.

The importance ascribed to the right to arms can be seen in Malcolm's description of the passage and aftermath of the 1820 Seizure of Arms Act.[95] The French revolutionary wars had been followed by a decline in real wages for workers in England, and social unrest, including riots in industrial districts, ensued. Fears for public safety reached crisis levels after August 1819, when, at St. Peter's Fields in Manchester, a peaceful crowd protesting increased bread prices and demanding reform of Parliament was fired upon. Twelve people were killed and hundreds injured. In November 1819, another crowd gathered near Burnley to protest the Manchester killings and discuss parliamentary reform. A confrontation with soldiers ensued; many in the crowd drew concealed weapons, including pikeheads and pistols.[96]

In the end, the crowd dispersed without injury, but not without further consequence. Several of the organizers were arrested and six were convicted of causing people to go armed to a public meeting. In his summation of the case to the jury, the trial judge cited the English Declaration of Rights in asking, given the right of Protestant English to "Arms for their Defence suitable to their Conditions, and as allowed by Law," whether the weapons in question were "suitable to the condition of people in the ordinary class of life, and are they allowed by law?" The judge registered his discomfort with the idea that carrying arms was a mechanism for controlling government excess, but he recognized that "a man has a clear right to arms to protect himself in his house . . . [and] to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business," including the purpose of attending a public meeting, except "to create terror and alarm."[97] Thus, while still confirming the underlying utility and legitimacy of the right to bear arms as an instrument of self-defense, the trial judge reserved judgment on Blackstone's statement of the right to arms as a hedge against tyranny and held the door open for the jury to find the defendants guilty.

Parliament responded to the Manchester and Burnley riots by passing the Seizure of Arms Act.[98] Adopting the rationale provided by the trial judge in the Burnley riot case, the Act authorized search warrants allowing constables in specified troubled industrial areas to search for and seize weapons kept "for a purpose dangerous to the Public Peace."[99] In view of the seemingly

95. Seizure of Arms Act, 1 Geo. 4, ch. 2 (1820) (Eng.); *see also* TO KEEP AND BEAR ARMS, *supra* note 2, at 168–69 (discussing passage and aftermath of Seizure of Arms Act).

96. *See* TO KEEP AND BEAR ARMS, *supra* note 2, at 166–67.

97. *Id.* at 168 (citation omitted). The fact that one anticipates an attack by the police is no excuse for carrying a weapon if one's underlying reason for carrying the weapon is to cause terror and alarm.

98. *Id.*

99. Seizure of Arms Act, 1 Geo. 4, ch. 2 (1820) (Eng.).

imminent social upheaval, support for this legislation would have been certainly understandable. Yet, as Malcolm points out, the opponents in Parliament to this legislation vigorously argued that the measure violated the right to bear arms—the right to defend oneself and one's family and property.[100] Even the government's spokesman, Lord Castlereagh, conceded this, but argued that a situation of public necessity demanded the constitutional right be compromised.[101] Parliament agreed, but the Seizure Act was not renewed upon its expiration two years later.

One of the central ironies concerning the right to arms emerged in the events surrounding the Seizure of Arms Act. Clearly, the legislation compromised the right to arms. And although both Parliament and courts remained willing to support the possession of arms for personal self-defense, they demonstrated a clear reluctance to uphold the political dimension of a right to arms: maintaining an armed population as a deterrent to potential governmental misconduct. This history demonstrates an inherent difficulty in the right to arms as a constitutional notion. Ultimately, to have legal meaning, constitutional rights must be safeguarded by legislatures or courts. It fairly can be said that legislators and jurists are fundamentally conservative, regardless of their stands on the issues of the day and regardless of where they are located on contemporary political and ideological spectrums. Can individuals who have risen to the top of a society's political apparatus be trusted, in the long run, to safeguard the right to arms, the popular means of resisting that apparatus? Or does the continuing viability of such a right, like its origins, owe more to custom and tradition than to constitutional theory? The experience in nineteenth-century Great Britain suggests the latter. The British experience in the twentieth century and the divergent paths taken by the United Kingdom and the United States in the twentieth century provide vivid reminders of the importance of custom in maintaining constitutional traditions.

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100. TO KEEP AND BEAR ARMS, *supra* note 2, at 169. George Bennet spoke with perhaps a bit of hyperbole when he remarked that "the distinctive difference between a freeman and a slave was a right to possess arms; not so much, as had been stated, for the purpose of defending his property as his liberty." 41 T.C. HANSARD, THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME 1130–31 (1819), *quoted in* TO KEEP AND BEAR ARMS, *supra* note 2, at 169.

101. Lord Castlereagh admitted "'that the principle of the bill was not congenial with the constitution, that it was an infringement upon the rights and duties of the people, and that it could only be defended upon the necessity of the case.'" TO KEEP AND BEAR ARMS, *supra* note 2, at 169 (quoting 41 HANSARD, *supra* note 100, at 116). Thus he argued, "some restrictive measures were necessary to preserve the tranquility of the country." HANSARD, *supra* note 100, at 1132–33. Others who argued for the bill pronounced the Seizure Act, consistent with the right to arms, as "'recogniz[ing] the right of the subject to have arms, but qualif[ying] that right in such a manner as the necessit[ies] of the case require[d].'" TO KEEP AND BEAR ARMS, *supra* note 2, at 221 n.25 (quoting HANSARD, *supra* note 100, at 1162 (remarks of George Canning)).

B. *Fall from Grace: Twentieth-Century British Regulation of Arms*

The twentieth-century history of the right to arms began inauspiciously enough. The only significant firearms statute that would survive the nineteenth century was the 1870 Gun License Act,[102] and until 1903 it remained Britain's only important firearms statute.[103] But even the Gun License Act served primarily as a revenue measure, requiring those who wished to carry a firearm outside the home to pay a nominal tax of ten shillings.[104] The House of Commons rejected stringent handgun control legislation in 1893 and 1895.[105] As the twentieth century opened, the right to bear arms remained secure. Gun control legislation would pass in 1903, but it merely prohibited sales to minors and felons, and little more.[106]

In 1920, however, Parliament passed "a comprehensive arms control measure that effectively repealed the right to be armed by requiring a firearm certificate for anyone wishing to 'purchase, possess, use or carry any description of firearm or ammunition for the weapon.'"[107] Only those who could demonstrate to the local chief of police a "good reason for requiring such a certificate"[108] could obtain a certificate or license, and a local chief could reject anyone "of intemperate habits, unsound mind, or 'for any reason unfitted to be trusted with firearms.'"[109] Malcolm maintains that the incidence of armed crime was low in Britain at this time, and that the prevalence of guns in society was not related to crime. Thus, she argues that political reasons, not fear of violent crime, provided the primary impetus for the 1920 legislation.[110] This is certainly the case. Parliament was concerned that demobilization had brought back from the Great War thousands of soldiers trained in arms, desensitized by combat, and disillusioned by the years and lives lost in a seemingly senseless conflict.[111] Russia's participation in the war had been followed by a revolution that swept the czar, the nobility, and

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102. Gun License Act, 1870, 33 & 34 Vict., ch. 57 (Eng.).

103. TO KEEP AND BEAR ARMS, *supra* note 2, at 170. Restrictions on the right to arms were relatively minor until the 20th century. *See also* COLIN GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 25 (1972).

104. TO KEEP AND BEAR ARMS, *supra* note 2, at 170.

105. *Id.*

106. The Pistols Act of 1903, 3 Edw. 7, ch. 18 (Eng.).

107. TO KEEP AND BEAR ARMS, *supra* note 2, at 170 (quoting Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43 (Eng.)).

108. Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43 (Eng.).

109. TO KEEP AND BEAR ARMS, *supra* note 2, at 170 (quoting Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43 (Eng.)).

110. *Id.* at 171, 173.

111. Unquestionably, since the War, there are far more people in this and every other country than there were before the War, who not only know how to use firearms, but who, as the result of their War experience, and of the small value necessarily placed upon life during the War, are prepared to use those firearms against the State and its officers.

130 PARL. DEB., H.C. (5th ser.) 663 (1920) (remarks of Edward Winterton, M.P.).

the monied class from power and eventually put Communists in control of government. At home, the Communist Party was being organized, along with the Trades Union Congress; Ireland, which would win its freedom in 1921, was as yet "in a state of virtual civil war."[112]

Facing desperate times, the British government decided on a radical measure. In 1918, the British Home Office had drafted a secret memorandum proposing that firearms control measures be adopted before demobilization of the troops at the end of the war, so that the arms carried by soldiers would not be dispersed throughout the country.[113] The memorandum's drafters warned the Cabinet that the measure would be controversial.[114] Although the proposal remained secret until after Britain's armistice with Germany in 1918, by 1920 both the Cabinet and Parliament decided to move for the bill's passage.

Malcolm emphasizes that the tenor of the debate over the 1920 Act exposed a sea change in attitudes toward the right to bear arms. Only one member of Parliament argued in favor of self-defense as a reason to vote against the bill[115]—and he nevertheless voted in favor of its passage.[116] And though members questioned the propriety of allowing the police to determine who would hold arms in the country,[117] they dismissed the argument suggesting that the right to arms was of utility as a hedge against governmental tyranny.

Even this argument's ardent proponent, Lieutenant-Commander Joseph Kenworthy—who suggested that it had been "'a well-known object of the Central Government in this country to deprive people of their weapons'"—did not think that the right to arms was a necessary means of keeping the government in check:

> "I do not know whether this Bill is aimed at any such goal as that but, if so, I would point out to the right hon[orable] Gentleman that if he deprives private citizens in this country of every sort of weapon they could possibly use, he will not have deprived them of their power, because the great weapon of democracy to-day is not the halberd or the sword or firearms, but the power of withholding their labour. I am sure that the power of withholding his labour is one of

112. TO KEEP AND BEAR ARMS, *supra* note 2, at 171–72.

113. *Id.* at 172, 222 n.45.

114. *Id.* at 172.

115. *Id.* at 173.

116. John Jameson thought that "'for very many peaceful, law-abiding people it is a necessity of life almost that, if they are to remain in life, they shall have firearms with which to defend themselves against murderers and rebels.'" *Id.* (quoting 133 PARL. DEB., H.C. (5th ser.) 86 (1920)). Only because permits were available that would give individuals "a chance of defending themselves" could Jameson vote for the bill. 133 PARL. DEB., H.C. (5th ser.) 86 (1920).

117. See the remarks of Lieutenant-Commander Joseph Kenworthy, who preferred such powers to be in the hands of a magistrate. TO KEEP AND BEAR ARMS, *supra* note 2, at 174 (quoting 130 PARL. DEB., H.C. (5th ser.) 659 (1920)).

> which certain Members of our Executive would very much like to deprive him. But it is our last line of defence against tyranny."[118]

This lukewarm support for the political dimension of the right to arms drew vehement disagreement:

> "[Kenworthy's] idea is that the State is an aggressive body, which is endeavouring to deprive the private individual of the weapons which Heaven has given into his hands to fight against the State . . . [.] Holding those views, and believing that it is desirable or legitimate or justifiable for private individuals to arm themselves, with . . . [.] the ultimate intention of using their arms against the forces of the State, he objects to this Bill. There are other people who hold those views in this country, and it is because of the existence of people of that type that the Government has introduced this Bill."[119]

Indeed, another member countered that the right to arms was an anachronism, arguing that there would be "'nothing more dangerous at the present time, or indeed at any time, than to lead the people of the country to believe that their method of redress was in the direction of armed resistance to the State.'"[120] Rather, the proper mode of resistance to governmental misconduct—and indeed the only proper way to redress one's grievances—was through an appeal to Parliament and the courts.[121]

In the end, the Firearms Control Act passed with little opposition, 254 in favor and only 6 against.[122] Refined in 1937 and extended in 1968 to include shotguns, the Act continues in force today.[123] The Act, as the debates surrounding it demonstrated, certainly represented the waning of the constitutional ideology of the right to arms proclaimed in the Declaration of 1689 and reiterated by Blackstone in the eighteenth century. British fears of foreign-induced radicalism,[124] further fueled by the presence of large

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118. *Id.* (quoting 130 PARL. DEB., H.C. (5th ser.) 658 (1920)). Even if Kenworthy thought the right to arms not so important as the power of the subjects to withhold their labor, he thought the right of resistance of paramount importance: "'[T]he very foundation of the liberty of the subject in this country is that he can, if driven to do so, resist, and I hope he will always be able to resist. You can only govern with the consent of the people.'" *Id.* (quoting 130 PARL. DEB., H.C. (5th ser.) 663 (1920)).

119. *Id.* (quoting 130 PARL. DEB., H.C. (5th ser.) 662–63 (1920) (remarks of Edward Winterton, M.P.)).

120. *Id.* at 175 (quoting 130 PARL. DEB., H.C. (5th ser.) 670 (1920) (remarks of Harry Barnes, M.P.)).

121. To be sure, Major Harry Barnes correctly identified the powers and privileges of Parliament and the rights to petition Parliament and the courts among those five auxiliary rights that guaranteed maintenance of the three primary ones. *See* 1 BLACKSTONE, *supra* note 1, at *143–45. In this, however, Major Barnes rejected the reasoning of Blackstone that the three primary rights of personal security, personal liberty, and private property were meaningless without all *five* auxiliary rights he identified. *Compare id. with* TO KEEP AND BEAR ARMS, *supra* note 2, at 175 (quoting 130 PARL. DEB., H.C. (5th ser.) 671 (1920) (remarks of Harry Barnes, M.P.) (arguing that increased access to courts would "'turn [the subjects'] attention away from using weapons.'")).

122. TO KEEP AND BEAR ARMS, *supra* note 2, at 175.

123. Firearms Act, 1968, ch. 27 (Eng.).

124. TO KEEP AND BEAR ARMS, *supra* note 2, at 171–72.

numbers of embittered veterans—still recovering from the trauma of the Great War[125] and all too familiar with modern weaponry—undoubtedly played a significant role in reducing support for what was once deemed an ancient and indubitable right.

But something more seems to have played a role in the willingness of Parliament—and apparently the general public—to surrender this portion of the English constitutional heritage with so little dissent. The 1920 Act was the result not only of a shift in constitutional ideology, but also of a change in the sociology of arms and arms ownership. If Britons entered the nineteenth century owning arms on a widespread basis—reflecting a continued need for personal defense, and to a lesser extent, a means of community defense—the situation had become quite different by the dawn of the twentieth century. The widespread violence and lawlessness of early nineteenth-century Britain had been replaced by a considerably less violent, more law-abiding society as Britain entered the Edwardian era.[126] During the course of the century, the ad hoc *posse* had given way to professional police forces,[127] and citizen participation in self- or community defense had become less and less common place.

These developments meant that over the course of the nineteenth century fewer Britons felt the need to own "Arms for their Defence." This was of particular significance because it was roughly in the period from the mid-1860's until World War I—just when perceived popular needs for self-defense were waning—that modern firearms technology, as we are now familiar with it, came into being.[128] The inferential evidence[129] suggests that the British

125. *Id.*; *see* A.J.P. TAYLOR, ENGLISH HISTORY: 1914–1945, at 120 (1965) (indicating that 1.5 million British soldiers were wounded in World War I).

126. Ted R. Gurr, *On the History of Violent Crime in Europe and America*, *in* VIOLENCE IN AMERICA: HISTORICAL & COMPARATIVE PERSPECTIVES 353, 353–56 (Hugh D. Graham & Ted R. Gurr eds., 1979).

127. TO KEEP AND BEAR ARMS, *supra* note 2, at 169.

128. For references to the history and development of firearms technology, see generally EDWARD C. EZELL, SMALL ARMS OF THE WORLD (1983); ROBERT HELD, THE AGE OF FIREARMS: A PICTORAL HISTORY (1957); HAROLD L. PETERSON, THE TREASURY OF THE GUN (1962).

129. Two pieces of evidence suggest that the ownership of modern firearms was not widespread in the United Kingdom at the time of the passage of the Firearms Control Act. First, the fact that the Act could be passed with virtually no opposition suggests a relatively small constituency of pistol and rifle owners. Second, by 1940, the British government, facing the threat of a possible German invasion after Dunkirk, began mobilizing a citizen's militia, or Home Guard. According to David Kopel, a student of firearms regulation in cross-national perspective: "The Home Guard had to drill with canes, umbrellas, spears, pikes and clubs. When citizens could find a gun, it was generally a sporting shotgun—ill-suited for military use because of its short range and bulky ammunition." KOPEL, *supra* note 79, at 75. The British government requested small arms for Home Guard use from private parties in the United States, including the National Rifle Association.

If one were to contemplate a similar situation in the United States, it seems highly unlikely that legislation such as the Firearms Control Act would result in such a wholesale disarmament of the civilian population. If substantial numbers of gun owners were denied licenses under such an act, there would certainly be an observable political reaction. Also, large numbers of firearms owners in the United States would probably disobey such a law. In any event, the likelihood that 20 years after the enactment of such legislation it would be difficult to equip an American Home Guard in time of emergency seems highly improbable. This discussion suggests that the British firearms-owning population prior to the enactment of

public during this critical period did not acquire modern firearms in large quantities—in marked contrast to the contemporary American experience.[130] By the time of the 1920 Act, arms ownership for defense was an increasingly unimportant part of the experience of the average British subject. The constitutional change, therefore, essentially ratified already accomplished social and cultural developments.

IV. A CAUTIONARY TALE

It is in pointing us to the intersection of legal and social change that Joyce Lee Malcolm's *To Keep and Bear Arms* is at its most important and tantalizing. The temptation to use this study to shed light on the contemporary American gun control debate is compelling and entirely proper. Certainly Malcolm's work sheds further light on the Second Amendment controversy, creating even greater difficulty for die-hard adherents of the collective rights view of the Amendment.[131] If her only contribution were to clarify our discussion of the English origins of the right to arms, untangling the complexities of the conflicts between the Stuarts and their opponents along the way, it would be a significant one.

But her work does more. It raises important questions for our time. The history of arms and rights has taken a very different turn in the United States in the twentieth century than in the United Kingdom, less because of the protection afforded by the Second Amendment or analogous provisions in state constitutions[132] than because of the ubiquity of modern firearms in twentieth-century American society.[133] The high level of violence in American society

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the legislation was considerably less than what is currently the case in the United States.

130. The role of the Western frontier in fostering gun ownership in late nineteenth-century America is well known and has been celebrated in American folklore and popular culture. Although less celebrated, racial violence, particularly in the South, was another major contributor to the maintenance of a widely dispersed gun culture in the United States in the late nineteenth and early twentieth centuries. For a general overview of the American gun culture, see LEE KENNETT & JAMES L. ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA (1975); ROGER D. MCGRATH, GUNFIGHTERS, HIGHWAYMEN AND VIGILANTES: VIOLENCE ON THE FRONTIER (1984).

131. Malcolm's work indicates not only that the Framers saw the Second Amendment as protecting an individual right against federal infringement, but also that some of the Framers' contemporaries even saw the Amendment as protecting against potential state encroachment on the right to arms as well. *See* TO KEEP AND BEAR ARMS, *supra* note 2, at 164. At least one antebellum state case echoed this view. *See* Nunn v. Georgia, 1 Ga. 243 (1846). For an argument that Taney's decision in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), may have adopted the view that the Second Amendment constrained state action, see Cottrol, *supra* note 18, at xx–xxi.

It is interesting in light of this history that the Second Amendment's right to arms is one of the few provisions of the Bill of Rights that has not been incorporated. Presser v. Illinois, 116 U.S. 252, 265 (1886).

132. Forty-three states have state constitutional provisions protecting the right to arms. *See* STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989).

133. *See supra* note 20 and accompanying text; *see also* TASK FORCE ON GUN VIOLENCE, BAR ASS'N OF S.F. ET AL., REPORT TO THE HOUSE OF DELEGATES 9 (1994) [hereinafter TASK FORCE REPORT] (indicating that over 209 million firearms are in private hands in United States).

both increases calls for stricter gun control[134] and increases firearms sales and resistance to gun control measures.[135] A surprisingly large percentage of Americans have personal experience with gun violence, either as victims of criminal attack[136] or in the use of guns for self-defense.[137] This, of course, ensures a continued constituency for a right to arms for defensive purposes in late twentieth-century America, a constituency that was largely lacking in Britain earlier in the century.

To Keep and Bear Arms performs yet another service, reminding us of the importance of the debate over arms and rights and how, in too many ways, that debate has been trivialized. Malcolm's study convincingly demonstrates how the right to arms was once considered a vital cornerstone of Anglo-American political philosophy and constitutionalism. Today that ancient principle is largely defended by a group of hobbyists in the form of the National Rifle Association. And while that organization is undoubtedly more decent and indeed more perceptive than its over-demonized image might suggest, it is not a body to which Americans are accustomed to turning for serious political and constitutional commentary.[138] Nonetheless, the failure of the academy,[139] the civil liberties community,[140] and the legal and intellectual communities to engage more seriously the central issue posed by a right to arms is disturbing.

If, as Malcolm's work clearly demonstrates, the right to arms is essentially a question of the balance of power between a people and the state that governs them, that question is far more important today than when it was first formalized in seventeenth-century England. We have, in the twentieth century, seen the rise of monstrous states capable of deprivations of liberty far in excess of anything that the English Whigs who authored the Declaration of Rights of 1689—or their American successors in 1791—could have envisioned. By a conservative estimate, over sixty million people have been murdered by their own governments in this century.[141] Mass murder of defenseless

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134. *See* TASK FORCE REPORT, *supra* note 133, at 10.

135. *See, e.g., Federal Licensing Procedures for Importing and Selling Firearms: Hearings Before the Subcomm. on Federal Services, Post Office, and Civil Service of the Senate Comm. on Governmental Affairs*, 103d Cong., 2d Sess. 32 (1994) (statement of Richard Gardner).

136. Sociologist Gary Kleck reports that in 1985 there were 650,000 crimes involving guns. KLECK, *supra* note 19, at 44.

137. Kleck reports that survey research data indicate between 600,000 to 900,000 civilians use firearms for defense against crime each year. *Id.* at 106–07.

138. We tend to agree with William Van Alstyne's observation concerning Americans' virtual abandonment of serious consideration of and advocacy for Second Amendment rights to the NRA: "[T]hat it has taken the NRA to speak for them, with respect to the Second Amendment, moreover, is merely interesting—perhaps far more as a comment on others, however, than on the NRA." Van Alstyne, *supra* note 6, at 1254–55.

139. *See supra* note 16 and accompanying text.

140. *See* Van Alstyne, *supra* note 6, at 1244 & n.24.

141. Sixty million is an extremely conservative figure. Some recent remarks by Assistant Secretary of State for Human Rights John Shattuck hint at the extent of government sponsored mass murder in this century: "In the twentieth century the number of people killed by their own governments under

civilians has occurred in the heart of Europe in Hitler's Third Reich; across the breadth of Asia in Stalin's Soviet Union; in Mao's China, the world's most populous country; as well as in Pol Pot's Cambodia and the African nation of Rwanda, to name but a few. Nor do we lack American examples of how popular defenselessness and a state monopoly of force can threaten freedom and indeed life itself. That, in the light of the history of the twentieth century, those we rely on for serious constitutional and political commentary have failed to examine the issues of whether the state *should* have a monopoly of force and whether an armed population might still play an important role in deterring governmental excesses bespeaks a dangerous intellectual cowardice, a self-imposed limit on political and constitutional discourse that causes us largely to ignore one of the most critical questions of our time.

By tracing these questions to a time when they were first articulated in the modern era, Malcolm has performed an invaluable service in expanding the boundaries of the contemporary debate. She has shown that history can speak clearly to contemporary constitutional issues, not only by shedding light on the always-vexing issue of original intent, but also by showing, in the case of arms and rights, that the concerns that led to the constitutionalization of the right to arms were not simply the transitory concerns of one historical moment, but instead were vital issues with a long and enduring legacy.

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authoritarian regimes *is four times* the number killed in all this century's wars combined." John Shattuck, Remarks at the Women's National Democratic Club (Sept. 12, 1993), *available in* LEXIS, News Library, Fednew File (emphasis added).

If Shattuck's calculations are correct, they indicate that over 100 million individuals have been murdered by their own governments in this century. The casualty figures for World Wars I and II alone exceeded 25 million. *See* ROBERT R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 841 (3d ed. 1965).