THE POLITICAL PHILOSOPHY AND HISTORICAL ORIGINS OF THE SECOND AMENDMENT TO THE US CONSTITUTION

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Thomas James Schneider, candidate for the degree of Master of Arts in Political Science, has presented a thesis titled, *The Political Philosophy and Historical Origins of the Second Amendment to the US Constitution*, in an oral examination held on November 29, 2013. The following committee members have found the thesis acceptable in form and content, and that the candidate demonstrated satisfactory knowledge of the subject material.

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ABSTRACT

The Second Amendment to the US Constitution states that a well regulated militia and the right of the people to bear arms are necessary for the security of a free state. What were the philosophical and historical origins of this hallmark of American freedom? What was the ‘militia’ understood to mean for the founding generation of Americans? How have the courts and legislatures of the United States played a role in shaping the outcome of this right?

The right to bear arms is derived from a graduation of historical ideas that culminated in the American War for Independence. It is my contention that both republican and liberal influences over the course of European (primarily English) philosophical and legal history propelled the Americans to try to secure arms and militias through the Second Amendment. These two social institutions, the republican militia and the liberal democratic access to arms, are not mutually exclusive and in fact support one another.

The American militia was intended as a states-centric defensive military unit. The militia was also primarily intended to quell internal disturbances and provide an outlet by which moral virtue was achieved via a martial and engaged citizenry.

The courts have recently been concerned with the historical meaning of the Second Amendment as a means of properly deciding cases. Laws are being challenged and legal precedents reversed as a result of a wider understanding of where and why this right came into existence. These cases have had a long lasting impact upon American citizens and political scientists alike.
I utilized a variety of primary and secondary resources, delving deep into American and European history. It was only after a clear theme emerged that I was able to determine where in fact the Second Amendment originated and explore the nuances of the law, its philosophical underpinnings and legal ramifications. The Second Amendment as a concept and as an institution has been tested in American history – this was examined and explained. A free citizen is to be an armed citizen, capable of defending his freedom via a well-regulated militia.
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DEDICATION

This thesis is dedicated to my wife Jenice, in celebration of our ‘co-degree.’
# TABLE OF CONTENTS

ABSTRACT.................................................................................................................................................. I

ACKNOWLEDGEMENT .......................................................................................................................... III

DEDICATION............................................................................................................................................... IV

INTRODUCTION......................................................................................................................................... 2

LITERATURE REVIEW ............................................................................................................................. 8

1. THE ANGLO-AMERICAN TRADITION OF BEARING ARMS........................................ 17
   1.1 BEARING ARMS PRIOR TO 1689 ................................................................................... 18
   1.2 THE GLORIOUS REVOLUTION OF 1688 AND THE BILL OF RIGHTS......................... 20
   1.3 NATURAL AND PROPERTY RIGHTS .......................................................................... 29
   1.4 REPUBLICAN THEORY AND THE RIGHT TO KEEP AND BEAR ARMS ...................... 40

2. GUNS IN AMERICA ......................................................................................................................... 49
   2.1 THE AMERICAN CHARACTER AND ITS CONDUCIVENESS TO BEARING ARMS....... 51
   2.2 THE RIGHT TO ARMS AND STATE RATIFICATION ..................................................... 54
   2.3 THE MILITIA .................................................................................................................... 58
   2.4 LEGISLATING THE RIGHT OF ARMS IN AMERICA ...................................................... 61
   2.5 THE FOUNDERS’ VISIONS ......................................................................................... 66
   2.6 MEN OF THE FIRST ADMINISTRATIONS ..................................................................... 68
   2.7 THE VIRGINIA DYNASTY AND ARMS ........................................................................ 75
   2.8 THE MILITIA IN ACTION ........................................................................................... 82

3. THE SECOND AMENDMENT, THE COURTS AND MODERNITY .................. 91
   3.1 THE SECOND AMENDMENT ON TRIAL ................................................................. 93
   3.2 LATE NINETEENTH AND EARLY TWENTIETH CENTURY CASES ......................... 94
   3.3 LATE TWENTIETH AND EARLY TWENTY-FIRST CENTURY IN THE COURTS.......... 99
   3.4 MODERN LEGISLATION REGARDING THE SECOND AMENDMENT ....................... 103

CONCLUSION ........................................................................................................................................... 108

BIBLIOGRAPHY ....................................................................................................................................... 113
INTRODUCTION

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.

- Second Amendment to the United States Constitution

In the balmy dusk of April 18, 1775, the British military in New England sent out a military expedition from Boston to the small town of Concord. The troops assembled totaled in the hundreds and were ordered on their fateful mission by General Thomas Gage, British military governor of New England since 1774. To a military man, such as Gage or Lt. Col Francis Smith, the man in charge of the decisive march on Concord, this was an operation like any other. They had a mission to accomplish: to disarm rebellious citizens of the empire. The sound and ceremony of British arms on the move greeted Bostonians that evening and well into the morning. As the sun was rising and splashing dizzying rays of light across the backsides of the red on white of the British regulars, that dreary clanking, scuffling and trumping of a uniform march faded into the distance. The light was rising on Boston and Massachusetts, yet the British were heading towards the darkness of a foreboding wood.

Paul Revere’s famous ride and other messages sent through covert channels had already informed the American minutemen of the redcoats’ imminent arrival. They were prepared and had relocated the military supplies the British were after well before the seven hundred men of Smith’s corps arrived. But in this snap shot of conflict, we see the germ of the American passion for arms. At the behest of a tyrannical government, much
accustomed to violating the rights that American colonists perceived to be theirs, a military force was sent on a mission to compel the deliverance of arms and supplies from patriotic forces. This was the nightmare scenario for the future drafters of the American Bill of Rights, who desperately looked for a solution to a government they felt no longer respected their basic rights. However, the militia surprised and outmatched the British regulars, driving them back. The British, during their organized retreat, happened across an inferior militia force at a clearing near Lexington. They engaged and routed the outmatched militiamen. Afterward, the British managed to perform a tactical withdrawal back to Boston, while being harassed by various other regional militias. The patriots eventually besieged Boston and the American colonies won their freedom through a difficult war for independence that lasted several years.

Arms provided for both the genesis and eventual conclusion of the Revolutionary War that followed the military skirmishes at Concord and Lexington. The Americans believed that if they did give up their weapons, tyranny would follow. One could not trust the government of His Majesty to keep its word. Arms, to the British free subjects in America, were essential to their identity. To allow for a government that had continually been in opposition to colonial freedoms to seize arms that could, should the case be necessary, be used in a war for liberty was unthinkable. To disarm was not an option for the colonists for practical as well as philosophical reasons. They could not allow their militia supplies to be taken, lest they be at a disadvantage going forward into a revolution that they anticipated. The stockpiling of war materials had long since been underway, the violations of British commerce directives and various taxations on such goods had both helped contribute to such a campaign as well as potentially win it.
The English tradition of independent arms ownership and community defense was at issue as well. The English had always had a right to keep and bear arms, or at least this is what the English Bill of Rights professed. In truth, this tradition finds itself buried in various duties and obligations that date back to medieval England, with the only true codification of any sort of right to arms occurring in the 1689 Bill of Rights. This was still a rather complex and limited clause, but it transformed the issue to one of natural rights rather than good government. From this projection of liberal freedom the American derives the much vaunted access to firearms and the true protector of liberty – the Second Amendment to the Constitution. The founders of America drew from several reference points to convince themselves that an armed population and a disciplined militia provided the bedrock for a free society.

Did the founders truly just mean for a very specific, militia involved public to have access to arms? Or are such interpretations direct misrepresentations of their intent? What the founders said is vitally important, whether it was during a constitutional convention debate, or in a personal letter, their thoughts and opinions give guidance to the correct conclusion. Their thoughts and actions also help illuminate their true intentions, as the early republic was fraught with internal strife that required a dramatic examination of the Second Amendment, as well as the relationship and jurisdiction of the federal government to the individual states. America’s founding presidents (Washington, Adams, Jefferson and Madison) all faced concerns that required some sort of militia or military readiness. Their actions during these periods required the philosophical comprehension of standing armies and their relationship to a free society.
Since then, the debate has taken on a far more legal aspect since the eighteenth century. To unravel the issue requires a specific examination of how the courts in America have interpreted the Second Amendment. Of specific interest are the Supreme Court’s decisions which, since *Marbury v Madison*, have become critical to constitutional interpretation. The history in this cloudy legal realm of precedents and reinterpretations is fascinating, but it is not the fundamental conclusion to the argument. The parties involved, whether it is the gun lobby or gun-control advocates, will have their beliefs. These beliefs rooted in history or not, deal with a policy issue. But what the courts tend to do is provide at least a very interesting legal frame of reference for the intricate debate over where the Second Amendment begins and where it ends. They also affect the reality of gun ownership, striking laws and regulations from the books of counties, states, and federal bureaus at the stroke of a gavel. This power of judicial review gives the courts’ decisions about the Second Amendment special poignancy and therefore deserves to be examined.

Fundamentally, the questions surrounding the Second Amendment to the United States Constitution can be answered by political theory. Civic virtue, liberty, individualism, republicanism, and enlightenment principles converged into one vitally important issue: arms and society. Political theory not only describes these concepts, providing a framework by which to examine this topic, but also holds the skeleton key by which we may have access to the uncertainties surrounding the Second Amendment. By what right did the English colonists feel they had to bear arms for their liberty? And why did such a legacy continue into the new republic they founded? Are civic republicanism and democratic individualism in opposition? Or do they work symbiotically to establish
and maintain a civic harmony and virtue that can only exist with the use of arms? The
American Founders grappled with these questions and more.

Civic republicanism supposedly tempers the excesses of liberal individualism in
the case of arms and society. Republican thought provides for a well regulated militia
force. The republicanism present at the time of ratification in the United States did not
undermine the individual or states’ right to arms or a militia. Democratic individualism
did not war with civic republicanism on this issue. Instead, there seems to be a more
pervasive attitude that differs in either camp. For the republican, the militia is the more
vital institution. For the democrat, the insurance that free citizens have the ability to keep
and carry their arms is paramount. But these goals are not mutually exclusive. So long as
the militia has the capacity to quell unwarranted civil insurrections (which in every case it
has done) then the classical republican ideology remains firmly behind the Second
Amendment as it is worded. And should the people be able to resist tyranny through use
of the gun, the democratic individualist is satisfied.

Understanding the nature of civil republicanism and democratic individualism
helps provide scholars with a useful backdrop while contemplating the Second
Amendment. JGA Pocock and Gordon Wood have emphasized the classical republican
mindset of many of the founders. And although it may be true that some founders, like
Hamilton and Adams, leaned toward strong government institutions rather than rampant
democracy, this does not necessarily undermine the universal principles encapsulated
within the Second Amendment. On the other hand, commentators such as Michael
Zuckert, Lee Ward, and Stephen Halbrook stress the enormous effect rights theories had
on the individualist perceptions of the American colonists. It is my contention that both views are represented in the ratified version of the Second Amendment.

My goal has been to find the correct context by which to place the motives of the men who wrote one of the longest continuously used governing documents in human history and decipher from that what the meaning of the Second Amendment was intended to be. The history of England, North America, of the wars, politicians, kings and philosophers – these shaped and impressed upon the English colonies on the eastern seaboard of North America some stern lessons in republican statecraft. My work will therefore focus on the histories, philosophies, political realities and arguments that helped generate the Second Amendment in order to conclude the original intent.

The American Republic has allowed for wide-spread ownership of firearms by its citizens. The core beliefs and essential history of how this exceptional situation arouse, and is vital to the American political identity, will be examined. The ability to be armed, for various purposes, has been the American citizen’s prerogative as a result of a powerful and glorious history and a strong belief in individual rights and liberty. The enlightenment, the Magna Carta, liberalism, republicanism – political theory is at the core of this constitutional right. The Second Amendment provides for the individual right to keep and bear arms, as well as establishes the right to a militia for the purpose of defense and has its genesis in English parochial history, enlightenment and republican rights theories with a concern toward tyranny, all of which were supported and known about by the founding generation.
LITERATURE REVIEW

Philosophically speaking, the original intent of the Second Amendment should not concern itself with the realities of gun violence in the United States. This is also not a paper on the political feasibility of a Constitutional amendment altering an American’s access to arms nor is it advocating for any type of political engineering. As a result, the works enclosed within this literature review are of a philosophic and historic nature.

In general, scholars of the Second Amendment attempt to classify themselves into various groups and sub-groups of the field. The most common interpretations of the Second Amendment extol either the virtues of the republican ethos of the time period (the civic republican school), or the more liberal and universal principles supplied by the democratic individualist position. The civic republican desires a right for the militia to be armed. The other, the democratic individualist, wishes to have a right for all citizens, regardless of militia involvement, to be armed.

The American founders derived much of their philosophy and culture from England. It was a legacy which produced a kind of conspiratorial mindset, urging the citizen never to wholeheartedly trust one’s government. The fervent anti-Catholicism that plagued both England and some of her American colonies in the centuries leading up to the American Revolution is a prime example of just that. The relationship with the Monarch and the power of a standing army against the traditional militia also provides excellent insight into the mindset of the public and the intellectuals who guided history.

Insofar as the periods of English history that helped define the North American colonists’ persuasion, I used multiple authors’ research. For England, both prior to and
during the Glorious Revolution, I drew upon Lois Schwoerer’s *No Standing Armies! The Anti-Army Ideology in Seventeenth Century England*, as well as her article, “The Literature of the Standing Army Controversy, 1697-1699.” These provided ample evidence of the distrust shown toward standing armies in seventeenth century England, as well as the perceived malevolence of the Crown by the English public and parliament. The militia was perceived as a bulwark against centralized power – a power which the English people viewed with suspicion. She attributed a great deal of the unrest between Crown and Parliament to the issue over arms and who should possess them; a professional army employed by the king, or the militias drawn from the people.

Joyce Lee Malcolm complimented Schwoerer’s research with her articles “Doing No Wrong: Laws, Liberty, and the Constraint of Kings,” and “The Creation of a “True Antient and Indubitable Right: The English Bill of Rights and the Right to be Armed,” both of which were published in the *Journal of British Studies*. These incisive works illuminate the pre-Glorious Revolution period in England, as well as the creation of the English Bill of Rights in 1688-89. She also dealt directly with an English citizen’s right to be armed, the limitations on that right and the progress made during the seventeenth century towards a more democratic England. It is my contention that the English people had sufficiently evolved in the New World, separating themselves from the English found on the British Isles. Politically speaking, there was a fissure.

Next for this particular time period on England’s influence, I employed studies done by J.R. Jones. He focuses on the social aspects of the time in his book *The Revolution of 1688 in England* as well as the political manipulations that took place in *The First Whigs: The Politics of the Exclusion Crisis 1678-1683*. Jones develops many
ideas surrounding these events. He reports anti-Catholicism as having played a great role in the saga of the Glorious Revolution. This situation of religious mistrust created an aura of conspiracy that enlightens one to an important aspect of the Second Amendment. The distrust of government, especially a centralized and powerful unitary state (such as in Catholic France), helped encourage local militias and regional centers of power.

The first third of my thesis deals with the influence and history of England upon the colonies. The second third is dedicated to America itself. The philosophical, theory-based conceptions of society and arms which combine instinctively with a republican mindset produced a fair amount of literature and a number of questions. What form of militia is the best to safeguard liberty? Is a militia the most favoured of armed forces? Should citizens bear arms or should the activity be specialized? These are just some of the issues that surrounded the creation of the Second Amendment to the Constitution. Along the way, Americans considered the constitutional make-up of their fledgling country and tranquilized rural revolts. To define what an American was, and is, and how that relates to their use of arms, is essential to my thesis. I found these answers and more in Richard Dagger’s *Virtues: Rights, Citizenship, and Republican Liberalism*. Dagger argued that the retention of civic virtue was paramount to the American founders. That the yeoman farmer and militiaman of the northeastern colonies could provide for a shield of such a public trust they had no doubt, he argues. The rights passed down from the Philadelphia convention and multiple state ratification processes to the citizens of the new United States were simply those by which to safeguard the republican virtues so treasured during and after the American Revolution.
Richard Ellis provides a wealth of knowledge on Americans and their peculiar republican attitudes in his *American Political Cultures*. His list of American social opinions throughout the ages allows one to not only study the forces behind the harnessing of the Bill of Rights, but also how that document could be perceived generations later. Lee Ward’s *The Politics of Liberty in England and Revolutionary America*, enhanced such research by issuing a fine understanding of the eminent intellectuals of the enlightenment who so deeply influenced the colonist. Americans departed from their English cousins in so much as they carried the torch of liberty forward by creating a social contract based upon individual natural rights.

JGA Pocock’s *The Machiavellian Moment: Florentine Political thought and the Atlantic Republican Tradition* emphasis on republicanism was very important to my thesis. Pocock clearly explains how the great statesman Niccolo Machiavelli’s suggestions added to the varied beliefs of the American founding generation. I directly consulted Machiavelli’s *The Prince* on numerous occasions as a resource to further enhance my understanding of his ideals of good armies and good laws. Machiavelli supplied a point of view critical of mercenaries, professional armies and auxiliaries. It is my conclusion that the founders also held such misgivings, and provided for them with a provision that allowed for citizens to carry arms and become engaged in the defense of the safety of their own communities. This was in very similar fashion to the Roman ideal of farmer-warriors that Machiavelli describes.¹

A debate among historians exists as to whether or not the militia in early America was meant to be a general force, with every eligible white male possibly performing

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some martial role, or whether it was intended to be a rather limited branch of
government. The implications are obvious and deal with the widespread access and use of
firearms during the Revolutionary and early national periods. Edward Morgan’s *Birth of
the Republic: 1763-89*, proved to be an excellent source in dealing with the intention and
placement of the militia in Revolutionary society. His perspective is that the militia
constituted a general force by which to perform guerilla or attrition based warfare upon
invading armies. This was clearly evident in the failure of American men-at-arms to
effectively invade British territory in 1812, yet defend at places such as New Orleans
with brilliance and rigor. The American militia was a defensive unit, designed to either
dig in or perform hit and run tactics.

The most influential title for my study is *The Founders’ Second Amendment: Origins of the Right to Keep and Bear Arms*, by Stephen P. Halbrook. Halbrook provides
an easy to read blueprint to the construction of the Second Amendment. His assertion is
very much in-line with the democratic individualist ideals of general gun ownership. For
Halbrook, the Second Amendment states that the people may keep and bear arms without
infringement. He asserts that during the first century and a half of American existence,
there was no real controversy over gun rights. The founders were explicit and clear in
their intention of codifying the Second Amendment. He complains that it is only lately,
prior to the most recent of twenty-first century Supreme Court decisions, “that “keep”
does not mean to possess, that “bear” does not mean to carry, that “arms” do not include
ordinary handguns and rifles, and that “infringe” does not include prohibition.”2 His
assertions may be more one dimensional than reality holds, however many of the

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2 Stephen P. Halbrook, *The Founders’ Second Amendment* (Chicago: The Independent Institute, 2008), 337.
founders would likely have favoured gun ownership as a result of a belief in property rights, rather than an explicit right to overthrow the state. They were also concerned, as I argue, about the rights of religious minorities and slave revolts. However, the fundamental premise of Halbrook’s work is sound, namely that a general militia, made up of free citizens well versed in the use of arms, was an essential goal of the Second Amendment’s authors.

Halbrook has a great discussion on the debates that shaped the state conventions and their interest in a right to bear arms. Naturally, these debates featured many topics, but for the most part, he suggests that of prominent concern to those taking part in these conventions was the right of the states to maintain a similar level of autonomy that they enjoyed prior to the federal constitution being ratified. Insofar as the Second Amendment is concerned, he believes that the Amendment, contained in multiple state ratification demands, was intended to stop the federal government from interfering with a citizen’s right to possess arms.

In opposition to Halbrook’s work, at least philosophically, stands Saul Cornell’s recent book, *A Well-Regulated Militia: The Founding Fathers and Origins of Gun Control in America*. One should take note of the two “origins” posited by both Halbrook and Cornell to immediately see the difference in their perspectives. Cornell strongly advocates that the Second Amendment is not protection against gun control, but rather an explicit guarantee to a militia of their capacity to be armed. Cornell’s book was a foil that I used in order to gain a well-rounded view of the issue of arms in America. It was Cornell’s intention to bring forward the idea that the American founding stock created the Second Amendment right to bear arms as a civic right, i.e. a duty to the state to be armed
and to participate in militia activities. He rejects both the “collective right” view that he claims is a scare tactic by anti-Federalists, and the “individual right” theory that he says only came to prominence in the nineteenth century. Instead, he feels that the correct answer lies in a model more akin to that of Switzerland or medieval England, whereby citizens are armed as part of militias and are allowed only to carry arms as a result of said service. My thesis depicts the issue as a nuanced one to be sure, but finds fault with some of Cornell’s interpretations and lack of attention to certain liberal rights theorists such as John Locke.

Robert E. Shalhope provides the most succinct, and possibly the best tally of the issues surrounding the Second Amendment and its creation in his wonderful article, “The Ideological Origins of the Second Amendment.” Published in the *Journal of American History*, this article provides key insight into the issues that plague Americans today when debating the Second Amendment. He urges those who wish to subvert the original intent of the amendment to avoid the argument that it did not intend for Americans to possess arms on an individual basis. The reality of the issue at hand is that in a republic, there are codified ways by which people could alter or correct certain social ills. Shalhope and I must agree however, that simply claiming extra-legal authority, or rather, directly misinterpreting a law’s meaning is by no means a proper exercise of just legal restraints. I strongly feel that Shalhope’s work supports such reasoning.

In the courts, vital decisions have been made regarding the Second Amendment. A few precedents that limited the Second Amendment’s scope have been overturned. In

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their place, a new regime of gun ownership and gun rights has been ushered in. The relationship between the states and the federal government is now defined by the Fourteenth Amendment, which has in turn drastically altered the range of Second Amendment authority. The assurance that the federal government will intervene on behalf of citizens in order that their federally enshrined rights are upheld now has profound importance to the Second Amendment. The Second Amendment applies to all Americans, and as the court has provided in decisions such as *US v. Emerson, D.C. v. Heller*, and *McDonald v. Chicago*, protects the right for individuals to own arms regardless of militia involvement.

We see the courts playing a pivotal role interpreting the limitations of the Second Amendment. The federal government expanded in the twentieth century under New Deal auspices. Under new tax codes and interpretations of clauses within the Constitution, federal power has taken on many responsibilities. Naturally, this creates discrepancies and I found a very good explanation for how the courts and the government were dealing with the new paradigm in constitutional law professor Nelson Lund’s “Federalism and the Constitutional Right to Keep and Bear Arms.” In favour of some restrictions to gun ownership, Lund makes valid points about the continually changing relationship between the various levels of government and the courts in the United States. He suggests that the courts have forced themselves to remain relevant on this topic by coming to decisions that impact how states and counties regulate firearms. According to Lund, the Supreme Court has created for itself a lofty position by which it continually defines and re-defines the parameters of laws. Their prerogative post-*Marbury v Madison* and the gaining of judicial review include the issue of arms. This authority is derived from the Fourteenth
Amendment’s due process clause, by which the federal government is granted power to ensure that each state respects the rights of each of its citizens, not just as citizens of a particular state, but also as citizens of the United States. This interpretation of laws passed well after the Bill of Rights was ratified and is monumental toward coming to grips with recent Supreme Court decisions.
1. THE ANGLO-AMERICAN TRADITION OF BEARING ARMS

Whatsoever reservations of liberty the people make in their agreement, these are to be looked upon as their rights by the laws of the constitution, and essential thereunto, and consequently inviolable by any of these governors whom they set up for the administration; the very laws of the administration being void, so far as they interfere with any of these of the constitution...⁴

- Anonymous Republican pamphlet, 1689

Many laws toward restricting and limiting firearms have existed in the Anglo-American tradition. However, part of this tradition is the emphasis on individual liberty and natural law. The notion of a free human (or a free Englishperson) comes from many years of anti-authority achievements such as the Magna Carta and the Glorious Revolution. Various selfish and parochial concerns of the landed aristocracy in England have produced an extensive history of a people who have consistently strove for more freedom from their sovereign. Even sovereigns of England made forays into attaining more power for themselves in defiance of a centralized power. King Henry VIII’s split with the Roman Church, for example, displayed a disregard for traditional authority in favour of personal desires. English history is a battle between traditional forces of power: the naturally autocratic monarch and the elected parliament. The American story is one of liberation, while the English tale one of measured change. It is with this knowledge that one may perceive the distinct flavours of English and American history, the legal similarities, and shared heritage. The English citizen has had a multitude of rights and a philosophy of freedom that effected the American colonies and allowed for the creation

and passing of an American Bill of Rights that included in it a clause for public and self-defence.

1.1 Bearing Arms Prior to 1689

_No earthly power can justly call me, who am your king, in question as a delinquent._

- King Charles II of England, 1649

The American cause of 1776 cannot be understood without reference to the English Revolution of 1688. Locke, Sydney, Trenchard and Gordon strongly influence in the American rights tradition, yet these men were of English birth. So too, in some cases, were the American colonists of the revolutionary period. Independent, fierce and industrious, the Americans owe a lot to England and her history of liberal philosophy, her legal procedures and her anti-papal rhetoric for the independence they fought for and won.

When did the English acquire a right to be armed for any purpose, including self-defence? The earliest outright declaration of citizen’s right to possess weapons was the Seventh “True, Antient and Indubitable Right” in the English Bill of Rights in 1689. But this declaration occurred after many years of regulatory and legislative history in regards to private weapons. For most of the history of England there was no declaration of a right to be armed, but there was a duty. The use of the term duty is a very important one, as it

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confers upon the ownership of a weapon as a privilege, not a right; as a demand made on its citizens by their government, rather than a demand by citizens for a freedom from their government. For example, should a citizen discover a crime, it was his duty to raise a “hue and cry” and join, “ready apparelled,” in pursuit of the culprit, if necessary “from town to town, and from county to county” on pain of fine and imprisonment. The ability to arrive readily apparelled, in other words with weapon, meant there was a precondition of private ownership of a weapon. The duty was therefore to be armed, yet without a proper legislative or judicial precedent, there was no right.

There were many manipulations of laws to restrict or regulate personal weapons. The game acts of pre-1688 England, the first being passed in 1389, were also designed to stop the lower classes from revolting. Disarming the labouring class of any legitimate reason to be equipped with weaponry outside of well established and supervised causes – public safety and militia activities – was a logical way in which to prevent conspiracy and possible class warfare. In fact, this aspect of an armed citizenry is essential to understanding the development of Anglo-American militias in a post seventeenth-century world. The 1671 Game Act raised the value of land one needed to possess in order to hunt with a bow or gun from forty pounds sterling to one-hundred pounds sterling. In so doing the average Englishman, even the small land owner, was restricted from bearing his arms outside of proper societal functions such as militia service.

The tradition in England was for a local militia to dispel security threats; the militia being controlled and officered by the upper classes. This was the precedent and

the preferred mode of security or defence for post middle ages England.\textsuperscript{10} The English world was therefore a more parochial one in comparison to the European continent which, although still operating under feudal auspices, was rapidly centralizing. A central reason for many public disturbances and the Revolution in 1688 was the king's persistence in trying to disarm law-abiding citizens and organize a standing army.\textsuperscript{11} The centralized authority of the King was thereby challenged and rivalled by natural and religious rights doctrines. This was but a slice of the multitude of stresses that caused the Glorious Revolution, but it was important. To be disarmed meant to have one's ability to challenge the state dramatically undermined.

1.2 The Glorious Revolution of 1688 and the Bill of Rights

\begin{quote}
That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.\textsuperscript{12}
\end{quote}

- Right Seven of the English Bill of Rights, 1689

\begin{quote}
...Having arms for their defence, suitable to their condition and degree, and such as are allowed by law... and is, indeed, a publick 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.\textsuperscript{13}
\end{quote}

- William Blackstone, 1765

\textsuperscript{11} Malcolm, “The Creation,” 243.
\textsuperscript{12} Malcolm, “The Creation,” 226.
\textsuperscript{13} Malcolm, “The Creation,” 248.
Although England's political history is one of tumult between Crown and Parliament, and there were many a battle and dispute between the two, of most importance to the right of keeping and bearing arms is the Glorious Revolution. Issues with monarchy and parliament, standing armies and militias, Protestantism and Catholicism, the Enlightenment and absolutism all played their part in the powder keg of seventeenth-century England. The dispute about the militia and the King's Guards pertained to a philosophy of government. The seventh right in the English Bill of Rights made specific mention of Protestants being armed – a clearly discriminatory position in regards to their Catholic neighbours. A rich combination of political philosophy and religious segregation provided a fertile environment for revolt and also allowed for the first real push for mass citizenry to legally possess arms outside of military duties.

By this time in England problems between the King James II and Parliament had reached a devastating low. For years, anti-monarchy and anti-Catholic feelings had grown among the English public.\textsuperscript{14} For Charles II and James II, this was a very worrying prospect. As Charles lay dying in his bed, he converted to Catholicism after years of contemplating such a move. James II, however, was never shy about professing his loyalty to Rome. Catholic elites believed conspiracy was afoot among many in the lower classes, but such thoughts were certainly not confined to those loyal to Rome. It was equally feared by Protestants that “as under Mary, only a minority would remain steadfast to their faith,” and that any sort of power grab by Rome would be met with either mass

acceptance or paltry apathetic grumblings. A distrust of government, particularly of
monarchy, set in behind the veneer of anti-catholic rhetoric. King Charles II's court was
rife with animosity as a result of his nepotism towards certain openly Catholic ministers
and aides. Members of Parliament and nobles were all too willing to stoke the flames of
fear. Many conspiracies were fabricated or inflated by Protestant officials during the mid-
1600s. A man by the name of Titus Oates famously faked the discovery of a scheme in
which the Pope, through his Jesuit missionaries in England, planned to commit regicide
against King Charles II. The accusations were false and farfetched, yet Oates provided
pamphlets and other propaganda material to support his claims. His disciples and like-
minded friends made the matter worse. J.R. Jones describes the litany of anti-Catholic
fear mongering,

Fires were confidently attributed to Papist incendiaries unless clear proof
existed to the contrary... [Captain William] Bedlow, second only to Oates
as a discoverer, published A Narrative and Impartial Discovery of the
Horrid Popish Plot giving an account of all fires since 1666 and
describing himself as one 'lately engaged in that Horrid Design, and one of
the Popish Committee for carrying such Fires.'... The title of another
pamphlet explains itself: The Jesuits manner of consecrating both the
persons and weapons employed for the murdering of Kings and Princes.

Not only were there plenty of fierce plebeian antagonists, such as Thomas Dawks who
published playing cards depicting episodes of the plot, but high ranking British lords also
took part in the conspiracy to undermine the Crown.

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It is important to note that die-hard monarchists, as well as the King himself, dismissed the public and political outcry by explaining what the ‘Popish’ plot was: a hoax. However, many high ranking officials in the government, who knew that it was nothing but a forgery, continued to perpetuate the vilification of the Jesuit Order. The Earl of Shaftesbury was by far the most effective and powerful anti-Catholic politician at the time. He was a Whig and felt that power in government should belong to those who possessed the confidence and support of parliament and the nation.\textsuperscript{19} Shaftesbury was by all means a renaissance man, engaged in multiple levels of society including business, politics, law and philosophy (one friend being John Locke).\textsuperscript{20} King Charles and his close adviser, Lord Danby (also known as Sir Thomas Osborne), as well as his Tory supporters in parliament, tried desperately to combat the Whig majority -- going so far as to dissolve the legislative body on multiple occasions. The crisis however, carried on for close to three years only to be ended by the heavy hand of the Crown.

The Exclusion Crisis, as the bickering between 1679 and 1681 was known, derived from the decision by Charles II to maintain as heir his brother James, who had a legitimate claim to the throne. He was, however, a Catholic and the rapidly reforming Parliament preferred to see the law changed and James barred from ascending to England’s highest position. Contributing to this was Oates' \textit{Popish Plot} about the Jesuit Order's supposed blueprint to assassinate the King. Eventually it was the parliament that doomed the Whigs’ attempt to disrupt James' ascension to the throne. Shaftesbury's Exclusion Bill, named for its intention to exclude James from succeeding Charles, was killed in the House of Lords. Shaftesbury had been unable to gain a majority in the upper

\textsuperscript{19} J.R. Jones, \textit{The First Whigs}, 17.  
\textsuperscript{20} J.R. Jones, \textit{The First Whigs}, 17.
house, even as he maintained dominance in the Commons. Anxiety was high throughout society and it is without doubt that such a climate nurtured the anti-Catholic heritage of the English colonies.

The Exclusion crisis was just a precursor to the event that was to topple the government when James did eventually take the throne. “Anti-popery was the strongest, most widespread and most persistent ideology in the life and thought of seventeenth-century Britain” and the Whigs were not about the let their desire for a far less powerful monarch and a far more protestant England fade away. Also, the conspiratorial mindset prevalent at the time did not lend itself to trusting the new Catholic king. English Protestants believed that they were threatened by a “united, purposeful, efficient, authoritarian and confidently aggressive Catholicism.” Just how aggressive was this Catholicism? In 1681, Charles was freed from financial dependence on the Commons by a loan from King Louis XIV of France. He immediately dissolved Parliament, thus ending the Exclusion Crisis. Many top Whigs and philosophers fled to Holland, including Locke and Shaftesbury. It was from here that they became the plotting usurpers and, in 1688, launched their bid, with William of Orange, to take the English crown for Protestantism. Shaftesbury ended up dying in exile, but his mission to see a Protestant monarchy would go on.

The events in England rippled out to its colonies. Across the Atlantic in America, debate was widespread over which cause to support. There were those who erred on the

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side of law and order, but a sizable number preferred the more radical position of taking advantage of the Crown’s misfortune and siding with the Protestant cause. The colonists managed to find enough grievances with the status quo to allow for quite serious forms of resistance. The colonies were heavily Protestant, and so their initial support could be relied upon by William. Many actions taken by King James II also caused much furor in America. It was not his open Catholicism that was considered a nuisance because the heirs to the throne were Protestant and England could be assured a Protestant condition upon James' death. It was when his second wife produced a male child and Catholic heir that Protestants, both in England and America, turned to alternative measures. At the same time, James eviscerated the much cherished local representation of the independent colonies when he merged Massachusetts, Plymouth, New Hampshire, Rhode Island, and Connecticut under the jurisdiction of a new government, the Dominion of New England.25

The Colonies were not subject to the same religious violence and persecution as the British Isles and therefore the question of loyalty took on a more economic and political dimension in America. The charter given to the trading company in Massachusetts became vitally important as it was seen as an unshakeable legal protection against the Crown. As political and religious turmoil erupted in England for much of the seventeenth-century, New England anticipated being left to its own devices.26 The immigrants and Puritans that made up the Massachusetts colony expected the status quo to continue and, when the King abolished their charter and their independence, a widespread anger against the crown followed.

The colonists rejected the grasp for power that the Crown made and this only made matters worse for the supporters of the Monarchy in America. Edward Randolph, who in 1676 was appointed as the British Colonial Officer in charge of delivering the King's messages to the Massachusetts magistrates, had a particularly difficult time in dealing with his American brothers. In September of that year he sent back a message to the King regarding the condition of his subjects, describing a less than friendly reception to the King's new rules:

I went to visit the governour at his house, and among other discourse I told him I tooke notice of several ships that were arrived at Boston, some since my being there, from Spain, France, Streights, Canaries and other parts of Europe, contrary to your Majesties laws for encouraging navigation, and regulating the trade of the plantations. He freely declared to me that the lawes made by your majesty and your parliament obligeth them in nothing but what consists with the interest of that colony, that the legislative power is and abides in them solely to act and make lawes by virtue of a charter from your majesties royall father, and that all matters in difference are to be concluded by their finall determination, without appeal to your Majestie, and that your Majestie out not to retrench their liberties, but may enlarge them if your Majestie please...27

Rebellious? Most certainly. The rules placed upon the Dominion of New England were extensive, and to be treated much like the other colonies under the English crown's shadow was an entirely uncomfortable new position for the colonist that inhabited America.

Again the situation was made worse by James II. In 1686 he abolished representative government in New England, demanding it be “repealed, determined and made void” by the governors of the colonies.28 As a result there was a joining of the

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Protestant cause in both Europe and America. Together Americans and English were willing to depose a sovereign who had violated what they felt were their natural rights. The people of America did not wish to be ruled by a papist or a despot. The American colonists declared Protestant association with the revolutionaries in England, appealing to the new king to return their charters. In America there were many complaints of armed gangs of Catholics who captured and held innocent Protestants in their grasp.29 In some of the thirteen colonies, Catholicism was associated with hooliganism and thuggery, certainly not good government. Defence against such uncivil behaviour was seen as not only proper, but necessary on both sides of the Atlantic.

Questions over standing armies also played a decisive factor. Parliament had previously given the King a standing army, his Life Guards. However, through the run up to the ascension of William of Orange, many parties wished for the entirety of the standing army in England to be paid off and disbanded.30 The Protestant members of parliament disliked the entire concept of a standing army and especially hated the king's authority over it. The House attempted to put through a Disbanding Act, over which the then King Charles II delayed and eventually prorogued Parliament. These kinds of spats went back and forth over the issue of an army controlled by the king. Lois Schwoerer makes it clear that although the debate over a standing army, arms in society and other talking points continued, a great victory had been won in 1689 for Parliamentarians and Protestants alike. She explains that

30 Schwoerer, Standing Armies, 121.
...the Declaration of Rights, which was read to William and Mary on February 13 when they were proclaimed king and queen and was later that year given statutory form as the Bill of Rights, asserted the principle that the civilian legislature should have ultimate authority over the military in peacetime, recognized the right of Protestant subjects to bear arms, and declared that there should be no billeting of troops upon private citizens... For the first time, the army was disciplined by provisions set out in parliamentary statute.31

1689 was indeed a very important year for both England and America. The colonial legislature, greedily holding to itself sole authority of the people, provided Jefferson, Madison, Adams and Henry with a constitutional bedrock -- a kind of foundation whence to do their most prestigious work a century later.

In 1689 the first right to keep and bear arms came into being in the Anglo-liberal tradition. Protestants retained the right to possess weapons for purposes of defence. Although Catholics were allowed to participate in traditional militias like other English citizens, they were often subject to various other restrictions, such as not being allowed to keep their militia weapons at home or being subject to a search of their homes as well as possible confiscation of any weapons they may possess in times of internal strife.32 Protestants felt that, post-1688, there needed to be a further reinforcement of defence against Rome. It was with this mindset that they created the first known source of a “right” to keep arms. The law said as much with a typically English provision limiting the scope of ownership to what was suitable to one’s class and allowed by law. Therefore, the right allowed for a great deal of interpretation and still remained subject to Royal and Parliamentary approval to a large extent. Catholics were still subject to various stipulations and restrictions concerning their weapons whereas Protestants were allowed

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31 Schwoerer, *Standing Armies*, 137.
to maintain their arms in a less confined legal atmosphere. But the fundamentals of the law derived from legitimate grievances and natural rights philosophy. For example, part of the reason for the inclusion of an arms provision in the Bill of Rights was retribution against James II, who in his short tenure as king had managed to displease a great many influential men by barring them from possessing arms. The king also had taken away or at least attempted to take away the weapons of many a “good protestant.” Therefore, in order to safeguard their natural rights and liberty, England provided for itself a Bill of Rights which included a provision for arms possession which said that self defense was a right for every Protestant. The contract included many rights that the American colonies would view, and already did to a large degree, as essential to their existence as free people.

1.3 Natural and Property Rights

...That when such a single person or prince sets up his own arbitrary will in place of the laws which are the will of society, declared by the legislative, then the legislative is changed... Whoever introduces new laws, not being thereunto authorized by the fundamental appointment of the society, or subverts the old, disowns and overturns the power by which they were made... In these and the like cases, when government is dissolved, the people are at liberty to provide for themselves by erecting a new legislative, differing from the other, by the change of persons, or form, or both, as they shall find it most for their safety and good.

- John Locke

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34 Malcolm, “The Creation,” 244.
The meaning of rights was not fully developed prior to the great works of Hobbes, Grotius, and Locke in the seventeenth century. Locke's *Two Treatises* were the hallmark of modern theories regarding property and self-preservation.\(^{36}\) The declaration of natural law in Locke's work restricts the possibility of absolute monarchy. The king's (i.e. the state's) rights were thereby limited in favour of those of the public. Natural rights no longer referred to the king's rights over his subjects, but the rights of his subjects towards him. According to Locke, every man is bound to preserve himself as the first natural law.\(^{37}\) The state still holds a right to interfere as for Locke, as an individual's freedom exists in so far as he remains within the bounds of natural law.\(^{38}\) Man is free, but his freedom is determined by the restraints placed upon him when he joined civil society from the state of nature. Hobbes, an English philosopher who wrote prior to Locke, was a believer in natural rights, but differed on the nature of state power. He, along with Grotius, would not have accepted the right to revolt against one’s sovereign as Locke did. The Second Amendment and its interpreters carry a heavy burden as their conclusions determine policy and opinion about the extent that natural law endows self-preservation upon the individual. For the Second Amendment is a question about preservation – of liberty, freedom and virtue.

The talk of rights is important and the germ of this strand of political philosophy can be attributed to the works of Whig philosophers such as John Locke and Algernon Sydney. Natural right philosophy was in vogue in much of seventeenth and eighteenth-century England. Locke, in his *Two Treatises*, granted citizens the natural right to

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overthrow a corrupt or tyrannical government. However, in the early part of Whig popularity, the development of resistance, or revolution, was far from the minds of the intellectuals perpetuating natural law theory. Grotius, the renowned legal and philosophical scholar presented an argument that

By nature all men have the right of resisting in order to ward off injury. But as civil society was instituted to maintain public tranquility, the State forthwith acquires over us and our possessions a greater right, to the extent necessary to accomplish this end. The State therefore in the interest of public peace and order can limit that common right of resistance. That such was the purpose of the state we cannot doubt, since it could not in any way achieve its end.39

He was not a Whig, but Grotius was one of the first to initiate discussion about natural rights. His version of what was natural differed from Locke's, and Grotius was not as revolutionary as Locke. But the idea was there: the state is not omnipotent and it has limits that are supported by nature. However, the state has authority in civil society that allows for many restrictions that the state of nature does not have.

Thomas Hobbes also believed in a form of defence in the name of liberty and natural law. In *Leviathan* he explains that “Liberty, is understood, according to the proper signification of the word, the absence of external impediments.”40 One must, in order to have the right of self-defence, have it without impediments. For if there were barriers to this process, according to Hobbes, there would be a violation of natural law. Hobbes confirms this by saying that “A law of nature, is a precept, or a general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh

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away the means of preserving the same...” Hobbes, a natural right cannot be impeded against morally. Also, it is perfectly in line with the laws of nature for man to defend himself effectively, just as it is against the laws of nature to prohibit him to do so. Hobbes explains that “For the right men have by nature to protect themselves, when none else can protect them, can by no covenant be relinquished.” Self-defence is therefore paramount if one is to observe a healthy rights culture. In other words, the right to self-defence is a core right or a natural right. Hobbes, although far more of an authoritarian than the more liberty-minded founding fathers and Locke, still recognized that the means to defend one’s self was extremely important in order to respect natural rights. He did not, however, go so far as Locke in insisting upon the right to revolt. He instead was repulsed by the notion of revolt against the sovereign. It should also be noted that, for Hobbes, the state of nature and the various freedoms under it are curtailed by entry into civil society. But he makes it clear: no society is allowed to dissolve ones right to self-defence.

Locke perpetuated the concept that man had rights which were natural and civil. Natural rights were moral rights. Institutional rights as well as the state's rights were therefore non-moral. Natural law had to develop into a revolutionary or militant strand. Locke outlined the various revolutionary prerequisites in the end of his Second Treatise. Locke is an unmatched character to examine in the context of the American discussion on civilian firearms ownership. Locke gave the people the philosophical foundations upon which to revolt against a tyrant. Locke departed from the more authoritarian variety of

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rights theories portrayed by Hobbes and Grotius by divorcing sovereignty from any particular institution. Should the law creating the legislature be altered extra-legally or the laws previously made subverted, the people – the true sovereign – may dissolve whatever form of government exists.44

In Locke’s state of nature, the law of nature grants citizens to be subjects of God, not of any kings or despots.45 In Locke’s view, the law of nature prohibits ownership of one man over another, and proscribes that “all men be restrained from invading others rights, and from hurt to one another…”46 But to Locke, this state of nature is harsh, and provides that each man be judge jury and executioner of the law of nature. That the state of nature requires intervention in order to benefit mankind he does not doubt. Therefore, he concedes that “civil government is the proper remedy for the inconveniences of the state of nature.”47 However, civil government must be legitimized, at least in his eyes, and those who passionately read him. It is legitimized via written constitutions or a social contract. Should this be violated, the resulting revolution is perfectly justifiable. And this revolution, justified by man’s natural rights, must be carried out by a people disposed to succeed in such a clash. When combining both Locke’s ideas on self defense and his right to revolt, civilian firearms ownership becomes not just important, but necessary in order to secure liberty.

For reasons already provided, the 1689 English Bill of Rights restricted weapons to only qualified Protestants. The 1789 American version did not make any such distinction. Religious and caste provisions were also absent from state constitutions and

44 Locke, Second Treatise, 108.
45 Locke, Second Treatise, 9.
46 Locke, Second Treatise, 9.
47 Locke, Second Treatise, 12.
the ratification bill of rights sent to the federal government late in the 1700s. Naturally, the First Amendment dispels Congressional authority to create any law which prohibits any particular religion. This was the case despite a fervent anti-Catholicism present in some of the American states at the time. Locke’s provision for a right to revolt and its logical connection to firearms ownership was therefore far more universal than the British interpretation, which was biased to a particular group and was clearly made with the intent on limiting Catholic authority in the country. No such goal was put into play in the United States, and as a result, Locke’s right to self-defense and revolt applied to every citizen, not just a select group.

Natural law, innate human liberty, and right to self-defence and not to be deprived thereof – the Anglo-liberal tradition has a great deal to do with the right to keep and bear arms in America. But there are critics who feel that such a tradition may be overstated, or at least the natural law tradition is far more vibrant on American shores than in England. Many suggest that very few of the rights contained in the American Bill of Rights can be traced to England. They point out the very poor job that the English had done in rectifying conflicts between Parliament and the Crown. James Madison said of the British that they

...Have gone no farther than to raise a barrier against the power of the Crown; the power of the Legislature is left altogether too indefinite. Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question [in Parliament] the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed... those choicest

privileges of the people are unguarded in the British Constitution. But although... it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States.50

In America, the states felt it necessary to enshrine their rights in a document in order to fully check the powers of the central state. However, scholars such as Donald Lutz would claim that these freedoms came out of the various state legislatures and were included by Madison in the constitutional compromise of the Bill of Rights. The origin of American political rights thus not being the mother country of England, but rather the North American hinterland.51 Therefore, the right to keep and bear arms originated, at least in its more germane understanding, in colonies such as Virginia and New Hampshire.52

Understanding the works of Locke, Hobbes, Grotius, and the many other enlightenment geniuses, the founders constructed parameters by which their government was to function. They were, as we all are, subject to their upbringing and the culture that incubated them for much of their lives. That culture was one of mistrust towards centralized power and this belief came directly from England. Lois Schwoerer points out that in the late 1600s in England

The anti-army tracts... played a vital role in the formulation of an anti-military attitude which lived on in eighteenth-century England and was transmitted along with many other ideas in liberal seventeenth-century political thought to the American colonies. This attitude became an intellectual tradition, which in modified form still exists. At the same time, of course, the royal proposal of a small standing army in peacetime under the control of Parliament actually triumphed; it is this arrangement which

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was accepted in eighteenth-century England and in general terms has been followed since then in England and the United States.\textsuperscript{53}

Philosophically speaking, the American colonists’ feverish regard for their own rights came from England. The problem for England was as Madison described, there was no verifiable way of proving the existence of a right if it was not written down. And for the American colonist, much abused by their English relative, the prospect of trusting a central authority to safeguard a vital tradition of liberty was not acceptable.

Many other scholars agree that the Americans inherited a volatile tradition from England. England may have many centuries of fairly consistent monarchy, but Pauline Maier suggests that the Americans took from England the Lockean right to rebel. She explains that “The colonists' attitude depended in large part upon a tradition of popular uprisings,” and that the struggle with Britain was an established social force, not an “agency newly invented to serve the ends of radical leadership.”\textsuperscript{54} \ The right to rebel, it would seem, comes from England, not Virginia or Massachusetts. Samuel Adams understood the British constitution to be designed to secure natural rights, especially the right to property.\textsuperscript{55} \ The belief in natural liberty was an inherited one. He makes a point of referencing the British constitution over any colonial document by stating that “It is the glory of the British Constitution, that it has foundation in the law of God and nature. It is essentially a natural right, that a man shall quietly, and have sole disposal of his own property. This right is ingrained into the British constitution, and is familiar to the

American subjects.”56 The British Constitution provided the colonists with a resource to further expand their ideas of self-governance.

Americans were disciples of English law. England and America were united in a common legal history, and this bond proved quite powerful.57 This shared history stretched from society to law. What was popular in England the colonists' fashioned for themselves and for their society. For example, Blackstone's famous legal work *Commentaries on the Laws of England* was a massive success in America. Edmund Burke speculated that

In no country perhaps in the world is the law so general a study [as in America]. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the Deputies sent to Congress were Lawyers. But all who read, and most do read, endeavour to obtain some smattering in that science. I have been told by an eminent Bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the Law exported to the Plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England.58

A powerful connection with the past, the legal system the colonists enjoyed provided for an ample feast of libertarian sabre-rattling. American citizens of legal stature took up arms in defence of their natural rights. They had become well versed in the great Anglo-Liberal tradition, both in its philosophical routes and its more legal aspects.

The right to property, the right to a government that respects natural law and other various rights – the colonists had a very good idea of the flavour of politics they wished

to enjoy. If we accept that the right to property and the right to self-defence are vital to the Anglo-Liberal tradition, then we must also accept that a means to protect both one's self and one's property is a logical and reasonable outcome of such a line of thought.

Therefore, the Second Amendment, which states that the people would be entrusted with a right to keep and bear arms, is but an extension of the liberal tradition into America. As it would not be fair to examine the Second Amendment from a purely English perspective, it would equally be unjust to propose that the Second Amendment is merely a radical American phenomenon. Of English culture in the Americas, noted scholar Alfred Young posits that “there was retention” and a “massive carryover of popular culture” but also “innovation.” It is of course natural and proper when talking about intellectual history to begin in England, there being the genesis of American political thought. But therein lies the point, it was the genesis. There is a distinct connection with England and the Anglo-Liberal philosophers of old in the American colonial political elite. But the colonists became revolutionaries, whereas the English compromised.

The Glorious Revolution was a response to various concerns, among them religion, armies and militias, the nature of government, and the right to defend oneself. Government was re-established as a way to encourage local rather than central authority. The Revolution of 1688 was also an expression of liberal natural rights theory. It was a victory for the Whigs, the party that best embodied the enlightenment principles of Locke – a party that would generate its own branch in America. The ideals of natural law, liberty and individual property rights coalesced in the American colonies. Combined with the

60 Young, Liberty Tree, 147.
relatively unmolested context in which the American portion of the British Empire was allowed to establish itself and the various colonial charters that provided for extensive freedom, we see some of where the right to keep and bear arms originated. The Second Amendment is a natural extension of property rights and the anti-army movement of the seventeenth-century. Fear of government conspiracy, fear of excessive power in an executive or sovereign, fear of religious persecution, in other words, fear of becoming oppressed, drove the development of the right to bear arms. Free English citizens were not afraid to voice concerns and even raise arms against tyranny. The attempt to enslave one's person is enough to violate any social contract. There is no possibility of resistance to tyranny without the widespread private ownership of arms, and therefore a mandatory limb of the American body politic.

If English and American history prior to the Revolution of 1776 is one of growing independence not only for the individual but also for more direct democratic institutions such as an elected parliament, local militias, and various other types of parochial groups, then the revolution in 1776 was just as much of a step forward as 1688 was. It is my contention that the American revolution and the introduction of a very clear and concise right to keep and bear arms originates from the Anglo-liberal tradition of 1688, and gifts itself to the American colonies that were soon to be independent. America would become the torch bearer of this laissez-faire heritage, as England would not join her in the liberal transformation of the late eighteenth-century. The Second Amendment then, is a vital part of America's heritage. In a social sense America still finds itself in the chapters of Locke's book, professing liberty as a requirement for life and property as a right – property, including arms for both private and collective defence.
But there is more to the American philosophical story than just England, bands of anti-catholic preachers and enlightenment philosophers. In the United States there is more at play than just the Englishman’s political maturation. Many other forces influenced American colonial idealism, perhaps even converting many to a more practical arbitration of political differences. Republican theory, not just liberal enlightenment theory, boasted many a follower along the eastern seaboard of the American continent. Many an enlightenment figure was also a republican. Liberalism and republicanism come from two difference places and therefore assign themselves to two different pillars in American rights history, without being in competition with one another.

1.4 Republican Theory and the Right to Keep and Bear Arms

“No kingdom can be secured otherwise than by arming the people. The possession of arms is the distinction between a freeman and a slave. He, who has nothing, and who himself belongs to another, must be defended by him, whose property he is, and needs no arms. But he, who thinks he is his own master, and has what he can his own, ought to have arms to defend himself, and what he possess; else he lives precariously, and at discretion.”

- James Burgh, English libertarian and republican.

Classical liberal philosophy definitely played a monumental role in the development of armed citizens. The heritage of English revolutions and the pervasive belief in elite conspiracies provided rich history for the American colonists. However there was another line of political thought that also encouraged citizens to be armed and participate in militia activities in order to secure liberty and a form of good government.

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Classical republicanism provided a firm foundation from which strong support for militias was derived. Machiavelli and others helped guide the creation of the American state by providing a philosophical counterweight to the English liberal tradition on display. His position was not that of the Whigs of England and his writings are continental, with less concern given to individual natural rights. However, his policies were sound in regards to healthy and virile states. In short, Machiavelli was concerned with good laws and good armies, and he stressed as much in his support for militias. It is no wonder then, that Americans and other republicans took his writings to heart and included him as part of their varied intellectual base, in particular the pragmatic John Adams.

To a republican, the rule of law is essential to the existence of a free state. The American colonists made clear the various distinctions of government in forming a republic in the late eighteenth-century with the echoes of Machiavelli’s warnings whispering behind their words. Good armies, a concern directly related to the Second Amendment, were constituted of militia men. Machiavelli’s ideal was implemented by the founders in their war for independence some two hundred and fifty years later when militias and volunteer citizen soldiers took to the field against Redcoats and Hessian mercenaries. John Adams was inspired by Machiavelli, and quoted from his works on several occasions. Although Machiavelli produced a mixed response from the founders, with some of the more liberal disliking his realist and cynical positions, a strong vein of American revolutionary thought shared these hesitations but still looked toward the Florentine statesman’s writings with appreciation. In regards to an armed population, republican theory was in favor of well regulated, organized militias – a tradition very
strong in America, endorsed by the revolution and included in the constitution as an expression of republicanism.

An obsession of Machiavelli’s was the idea that the power of institutions far outlasts and outweighs any charismatic leader. In other words, good institutions would out perform any good ruler, so it would behoove a prince or president to provide for state institutions that would outlast himself. His works, therefore, would not disappear past his inevitable death. It is what Machiavelli called “laying good foundations.” Good foundations are made up of good armies and good laws. Machiavelli despised mercenaries and auxiliaries, calling them useless and dangerous. In typical Machiavellian style he gives ample historical situations in which a state has failed or come to ruin from its use of mercenaries. He mentions a few examples that were quite prescient to the American colonists and ones that they would have noted of. Machiavelli explains that “Rome and Sparta for centuries stood armed and free. The Swiss are extremely well armed and are very free.” The American founders studied the Roman Republic with fervor. The Federalist Papers were published under the pen name Publius, and the influential republican writings of Trenchard and Gordon were called Cato’s Letters in homage to Ancient Rome. Americans were fascinated with the corruption and dissolution of the Roman Republic and were steadfast in finding ways to prevent such disintegration in modernity. Machiavelli’s prescription for a Roman style collapse is a militia. Machiavelli pointed to the hiring of Gothic mercenaries as the moment when the

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64 Machiavelli, *The Prince*, 44.
Roman Empire began to collapse. Once war power was taken away from actual Romans and delegated to foreign forces, a fundamental corrupting of the spirit and functions of the state and people occurred.

For Machiavelli the most dependable protection against corruption was the economic independence of the citizen and his ability and willingness to become a warrior. Without a citizen who was armed, a republic would have to rely upon men of war, mercenaries and auxiliaries to defend the state. Upon doing so the professional soldier would inevitably lose its loyalty to the nation of its birth, finding the army proper a more reliable master. As mercenaries are but guns for hire their loyalty and prowess should be considered suspicious. Auxiliaries are men who have no loyalty to the nation they fight for and are even more likely to disrupt the functions of the state. To put it in Machiavelli’s words, “In peace time you are plundered by them, in war by your enemies.” Machiavelli talked at length about the vanity of mercenaries and their desire for greatness and loot at the expense of their employer. He references mercenaries such as Franscesco Sforza and Braccio de Montone, among others, who turned against their various supposed noble masters and dominated Italy for many of the years preceding The Prince’s writing. These events, and the bloodshed and carnage that came with them, prompted Machiavelli to ponder seriously the most effective means by which to prevent such disasters in the future.

Machiavelli’s idea to resolve the issues of bad armies was to create a militia army. A citizen should be armed and trained in a military capacity. As such he would be

65 Machiavelli, The Prince, 49.
67 Machiavelli, The Prince, 43.
unchained from permanent military duty and have economic freedom enough to tend a farm or find some other means of livelihood. Thus, through arms, the state becomes secure enough that economic liberty is achieved. And, through arms, personal liberty is achieved by resting authority in the hands of the citizen, allowing for him to feed, protect himself and guard his people.  

English thinkers took Machiavelli’s hypotheses on the citizen soldier, militias and the right to bear arms and used them as a foundation of their republican thought.

American and English intellectuals read Machiavelli and processed his thoughts in many ways. Intellectual men believed that arms played a role in society, the political question as to whom these arms belong could contribute dramatically to either the benefit or detriment of a national character. Walter Raleigh, for example, explained that one of the great deeds a tyrant can do to enhance his own powers at the expense of the people’s liberties is to take from them their weapons and “any means whereby they may resist his power.”  

Machiavelli and later writers knew “that the Sword and Sovareignty[sic] always march hand in hand, and therefore they [Nations that remained free] trained their own Citizens and the Territories about them perpetually in Arms, and their whole commonwealths by this means became so many several formed Militias.”

At stake for the philosophers and impassioned patriots of the day were far more than titles, land or the age old political question about distribution of wealth or property.

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The civic republican was concerned with mankind’s realization of the Aristotelian concept of the good life. Humans, according to the civic minded, can only achieve their nature as “political animals” through participation in self-governing communities, in other words, republics. The republican literature of the late seventeenth to early nineteenth century was concerned with issues such as freedom, political participation, civic virtue, and corruption. As a result, strictly republican thought can be viewed as distinct from the liberal tradition that so contributed to the American Revolution. Liberals tended to favor a government of the people, dedicated to protecting individual rights. The US Constitution was an exercise in such thinking. However, the true civic republican desires not to restrict access to firearms but only to provide a sustainable context for positive ownership. To a republican, paramount to the achievement of responsible government was a rejection of tyranny. However the people’s motives could be fickle and result in various forms of intrigue and rash mass movements with deleterious effects. It was therefore necessary to gather wisdom from men who restored reason and temperance into politics, such as Machiavelli.

The contributions of Niccolo Machiavelli to the republican ethos are important. His theories of mixed government, of arms, and of property helped to provide a framework by which the founders could temper the radical nature of Lockean revolution. The republican thinkers produced “a set of norms, for the attainment of stability which

reduced the totality of virtue to concrete and manageable terms.”\textsuperscript{73} The American founders were setting up a republic, via a liberal revolution, and needed to combat the excesses of the mob. This is a distinct theme in American colonial life with many variations. In his work, \textit{The Machiavellian Moment}, JGA Pocock asserts that in New England there was a strong current of disdain for the extreme aspects of liberal enlightenment philosophy. Puritans and others were concerned with the “enthusiasm” of “apocalyptic Whiggism.”\textsuperscript{74} This fear of mobocracy distances itself from the more Whiggist aspects of the American Revolution. It marks the particular republic that eventually arrived with having provided for both the egalitarian yearning for democracy and freedom, with the republican preference for a rigid structure of domestic laws and systems.

Freedom could not and would not persist in America if the fundamental laws and rights of citizens were subject to the whims of majority rule. This is not to somehow diminish the liberal aspects of the revolution, nor the political philosophy that was, in its definition, liberal. The founders then, put emphasis upon the codification of right as a means of preventing their desecration. The rule of law was fundamental to both liberalism and republicanism.\textsuperscript{75} Fully functioning autonomous citizens, corralled via obligations to obey the law seems to be a contradiction, but for the founders of the American Republic, reconciling the various problems in creating such a workable state was their goal and accomplishment. The founders knew that in order to attain civic virtue, the citizens had to have a fundamental respect for and obedience of the law. People had

\textsuperscript{74} Pocock, \textit{Machiavellian Moment}, 403.
to find themselves a place within the political order. If we look at the Second Amendment in this spirit, we see that the security of a free state was intimately linked to this philosophy. The republican idea of virtue demanded that one look at the issue communally. But rather than in a restrictive way, one should view this particular narrative as explaining that a free state is ideal for all in society. As a result, it is an armed society, well regulated by the rule of law, which ensures both virtue and freedom.

Central to the thinking behind the Second Amendment is the liberal and republican idea of the free state. What does a free state mean and why is it so important that it was included within the Second Amendment to the Bill of Rights? A free state is a republican term for the most desirous form of government, a state in which “…citizens are not subjected to the arbitrary power of a ruler.” In other words, they submitted to the rule of law – but a law that was just and moral. Therefore, a well regulated militia and the right of the people to keep and bear arms is essential to the security of a free state. The Second Amendment manifested within itself the characters of the individualistic Anglo-liberal tradition and the reasonable guidelines of republicanism. Good laws and good armies is what the Constitution preaches, its keeper being the Second Amendment and the Bill of Rights.

Both liberal philosophy and civic republicanism influenced the revolution and constitutional set up of America. It was a splendid mixture, a compromise of radicalism with republicanism, personal liberty and reasonable laws. At its heart, man’s virtuous nature achieved through military service and a willingness to protect himself, his society and polis via well organized means. The Second Amendment therefore, philosophically

76 Laborde, Maynor, “Republican Contribution,” 3.
speaking, embodies the traditions passed down to the colonists via their European heritage. Machiavelli, Hobbes, Locke – here they are, personified in a language that dedicates itself to the continuation of a virtuous people and a free society. For the American republic to continue, for this great experiment of liberty to last, Americans needed a means to defend it without sacrificing their integrity at the altar of a standing army. The Second Amendment does just that, and provides for itself an identity separate from Europe, but still very much inspired by the great philosophers who so educated the plantation elite as well as the yeoman farmers and tradesmen of New England.
2. GUNS IN AMERICA

*The frontier experience simply required that every westward migrant carry a gun. The result was a deep inward faith that... regeneration came through violence.*

- Michael A. Bellesiles quoting Richard Slotkin

What of America itself? What of the pioneers and colonists who settled the vast wilderness? They evolved their own distinct identity. This identity helped provide for the basis of the amendments introduced by James Madison in 1789. The focus therefore must shift to incorporate the various political cultures and associations that combined to not only fall in line with the republican ethos of wise European philosophers, but also to preserve their intentions in a well written and comprehensive document such as the US Constitution and Bill of Rights.

A rather important area of study for the topic of the Second Amendment is the period of unrest just prior to the Revolution. There we can see the rights, sometimes in their nascent state, that the later period of the Early Republic codified. We can also observe through the various extent of the legislation, particularly by the local administrations and councils of the general philosophical views and capacities of these great pillars of American government. In terms of the right to bear arms, we can see quite clearly how this principle was both upheld and tested during the pre-revolutionary period in America. The principle was not as concrete as in later years, but the right to keep and bears arms existed in the colonies to the extent that it complied with English colonial

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laws. This was aided by the fact that the various parochial administrations were quite limited in their own right. The argument to include firearms as a specific right, as well as the ability for a state to muster its own militia for purposes of defense, were seen as vital to the success of the revolution as well as the republic post revolution.

Militias are what faced the redcoats at Lexington and Concord; militias are what fought on Bunker Hill. Many used guns of their own fashioning and joined the revolutionary cause readily trained and equipped to do battle with one of the world’s premiere fighting forces. The militia and their supporters believed in the success of the revolution. This belief did not end in 1783, but continued on into the era of the early national period. The elites of the American colonies were very much in favor of the philosophy that the people be armed and they, in turn, pressed for such a statement to be included in the Bills of Rights (both 1689 and 1789) and the Constitution – not to mention the various local and state legislatures.

Of no better source to determine just what the Second Amendment meant to the American colonies and states are the writings and thoughts of the men who wrote and supported the Bill of Rights. Although sometimes not specific to the topic of bearing arms, their words and indications can propel one to certain conclusions about this aspect of the Bill of Rights. Jefferson, Madison, Washington and many others should be examined and their hypotheses taken seriously. The American character and the character of the elites who guided the revolution both literally as leading men in the army, and figuratively as men who provided the intellectual fodder for the masses must also be taken into account. The character and soul of the American colonists, independent,
industrious, moral and pugnacious, lent itself perfectly to the institution and freedom to bear arms.

2.1 The American Character and its Conduciveness to Bearing Arms

Reports have been circulated, and messages delivered to us, importing that we are to be disarmed... We call upon every man who values himself upon the inheritance of an Englishman, to say what he would do in such a case. Would he suffer himself to be disarmed, and tamely confess himself an abject slave? Certainly no...  

- Declaration of the Inhabitants of Queens County, NY, Dec. 6, 1776

In the mid 1700s, James Otis was appalled at the state of the English colonies in America. He was shocked at how aggressive they were towards one another and how willing they were to use the legal system to gain an upper hand. The American colonists were a quarrelsome, litigious, divisive lot who, if left to their own devices according to Otis in 1765, would leave their homesteads “a mere shambles of blood and confusion.”

Although many adjectives can be used to describe any group of people, Americans have many qualities that mark them as different or unique. For one, an American desires a level of equality socially as well as before the law. Although most American colonists were patriotic Britons prior to the Stamp Act, the pugnaciousness and rebelliousness that defined their character undermined the extent to which the Crown could enforce its authority. Americans also request, like no other nation, a system that enables them freedom to voice discontent, or to find a redress of grievances.

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Central to the Second Amendment is the idea of community defense and some sort of state security. And although the American character is noted for its fierce independent streak, there is a more subtle side to this image. Independence to an American was not necessarily independence from his or her neighbors or community. After all, the militia system was one based on community participation and involvement. Americans were in fact, despite their individual liberty loving ways, far more involved locally than those under an aristocratic or hierarchical system. When Alexis de Tocqueville travelled to the American Republic he took note of just how the American perceived his place within the republican framework: “Since no one among them is strong enough to struggle alone and win [against the onslaughts of power and tyranny], only the combined strength of all can guarantee freedom.”80 Americans knew that, as a result of basic equality, they needed to cooperate in order to maintain the social fabric of their culture. It was this bargain that caused de Tocqueville to say that the American held equality as a primary virtue, not liberty.81 Nevertheless, one was definitely a means to the other. Properly understood, autonomy and civic virtue turn out to be related concepts that can and should complement one another.82 Thomas Paine, one of heavy handed government’s most ardent critics, also expressed a similar sentiment. He combined the Lockean notion of individual autonomy “…with a deep commitment to the modern republican notion of political liberty as popular control of government.”83 The American colonists then, while professing a love of individuality, recognized the importance of the community. In fact, the Constitution itself is a document that attempts to deter the

82 Richard Dagger, *Civic Virtues*, 16.
fractioning of American society. Many of the *Federalist Papers* are dedicated to the argument that such a constitution would, in effect, prevent the “tendency to break” and control the “violence of faction.”84 They did not exhibit a readiness to cast their fellow citizens asunder, as they viewed community togetherness an essential part of their own freedom. The American directed his or her thoughts of unrest towards higher powers.

Noted political scientist Samuel Huntington argued that American political culture consists of strong anti-authority ethics.85 He believed that “all of the tenets of the American Creed – equality, liberty, individualism, constitutionalism, democracy – are basically anti-government and antiauthority in character.” Each of these values places “limits on power and on the institutions of government.” The American creed is “a much more fruitful source of reasons for questioning and resisting government than for obedience to government.”86 American political culture demands a worldview that espouses the belief in a certain level of conspiracy. This exists in order to jealously preserve liberty as best as possible. During the constitutional convention in Philadelphia, anti-federalist George Mason made the various state representatives stay late into one balmy evening while he explained why he did not trust the makeup of the proposed constitution. It allowed for the executive branch to “accomplish any usurpations they please upon the rights and liberties of the people.”87 The lingering conspiracy culture of late 1600s England is evident and pervasive in such critiques. Most of the objections to a reformatted constitution lay within this mindset of anti-authoritarianism. The Protestants

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in the New World had never truly gotten over the battles with the Crown and, armed with Lockean politics, they believed their rights trumped those perceived to be Royal by any Monarch. That is not to say that such an ethos could not be rectified, especially since Mason’s main objection to the Constitution was its lack of bill of rights guaranteeing certain freedoms for the states and to citizens.  

2.2 The Right to Arms and State Ratification

“But whatever may be the form which the States have adopted in making declarations in favour of particular rights, the great object in view is to limit and qualify powers of Government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode.”

- James Madison speaking on the proposals to Congress by the states

American federalism did not settle in overnight. It is, to an extent, in its very nature for federal and anti-federal supporters to do battle in the political arena. This fight is still ongoing. However, there was a particularly trying period of uncertainty in the United States during 1780s. Arguments between anti-Federalists, who favoured a loose association between the states and the federal government, and Federalists, who favoured a strong central government, took place at numerous state conventions throughout the thirteen states and Congress before the approval of the Constitution and, eventually, the Bill of Rights. The debates that took place in state and federal legislatures are of interest to the topic of original intent. The leading state representatives wished to see the powers of their states enshrined as a means to deter federal encroachments upon their powers.

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89 Halbrook, Founders’ Second Amendment, 255.
sovereignty. At heart of the issue were republican philosophies and the freedom of the US citizen.

The debate in the Congress over the Second Amendment is quite telling in regards to its original intent. At first, the Amendment included a clause that restricted the right to form a militia and bear arms for anyone who was “religiously scrupulous.”\textsuperscript{90} This clause was meant to ensure that those to whom killing, even in a military situation, violated their religious beliefs would not be forced into any kind of service. However, it was immediately objected to by several representatives for the potential issues this could create by barring religious groups from defending themselves. Rep. Eldridge Gerry from Massachusetts astutely commented that the proposed amendment was intended “to secure the people against the mal-administration of the Government.” He then added that if the religious requisite be passed, it would be possible for those with evil intent to construe such a provision to prohibit certain religious denominations from carrying arms. “They can declare who are those religiously scrupulous, and prevent them from bearing arms.”\textsuperscript{91} Clearly Rep. Gerry was enthralled with the idea of an armed citizenry, never to be dispossessed of their weapons.

Several other representatives were, however, perturbed that men such as Quakers or Mennonites would not partake in what they viewed as the civic responsibility of militia service. Should the representatives desire that a militia be present and not a standing army, it would be peculiar to allow for some citizens to abstain from the turmoil of the battlefield as others were forced to fight for their lives and liberty. They would receive

\textsuperscript{91} A Second Federalist Congress, 276-277.
the benefit from protection by the militia, but not contribute to it. Was not the militia a forced civic duty? No, answered Rep. Boudinot from New Jersey, who argued that it would be ultimately immoral to force any one so principled against killing into an armed service for the state. There would be no justice in a system which forced one to commit another to the grave.92 The Congress did exercise negative wording in the Second Amendment. It ultimately provided that the militia be general and voluntary, but states were left to regulate the involvement of their own citizens within them.

When the Constitution was adopted in the summer of 1787, there was an outcry that no bill of rights was included. Jefferson, although in favour of its ratification, had initial hesitations towards the Constitution for this very reason.93 Rep. John Smilie of Pennsylvania put it this way

A Bill of Rights [is] necessary as the instrument of original compact and to mention the rights reserved… There must be a people before there is a king; and the people, in their first instance, have inherent and inalienable rights. We ought to know what rights we surrender, and what we retain.94 Smilie’s concern was with an outright declaration of rights in order for the citizen to be able to fully understand his freedoms. To this end, the various state legislatures began crafting their own versions of a Bill of Rights, including the provision for arms and the militia. These lists were intended to be submitted to the Congress for inclusion in a national bill.

92 A Second Federalist Congress, 279.
94 Halbrook, Founders’ Second Amendment, 193.
Initially, the states of Virginia, New York and North Carolina submitted proposals to the federal government that included the people’s right to keep and bear arms.\(^{95}\) The states themselves would eventually all agree to ratify the Constitution, but only if a Bill of Rights were to be processed afterward. It was upon this promise that the states pushed forward with recommendations for such a document. Virginia took up the charge, and made several demands of the federal government and its constitution. Virginia required that each state control its own militia, that a general militia be recognized as the natural defensive body of a free state, that the people have a right to keep and bear arms, and a right to property.\(^ {96}\)

Virginians like Henry, Mason and others were not alone in their concern over a lack of a Bill of Rights. In New York, “Brutus” (often thought to be Robert Yates), wrote in the *Journal* on November 1, 1787: “In the bills of rights of the states it is declared that a well regulated militia is the proper and natural defense of a free government… the same security is as necessary in this constitution, and much more so…”\(^ {97}\) “Brutus” was urging the state convention to demand a bill of rights which included a militia compact. Thomas Tredwell, a New York State Senator and delegate to the state constitutional convention, bemoaned

In this Constitution, sir, we have departed widely from the principles and political faith of ’76, when the spirit of liberty ran high, and the danger put a curb on ambition. Here we find no security for the existence of our state governments; here is no bill of rights, no proper restriction of power; our

\(^{95}\) Halbrook, *Founders’ Second Amendment*, 253.

\(^{96}\) Halbrook, *Founders’ Second Amendment*, 231-232.

\(^{97}\) Halbrook, *Founders’ Second Amendment*, 235.
lives, our property, and our consciences, are left wholly at the mercy of the legislature.98

This was as unacceptable in New York as it was in North Carolina, where even further steps were taken to undermine the US Congress’ potential powers. In particular there was concern over standing armies and war making. For instance, the North Carolina convention declared that Congress “shall not introduce foreign troops into the United States” without a two-thirds vote.99 It would seem then, that the states who took part in the ratification process were definitively concerned with the question of regular troops and state militias. That is not to say the Congress was void of such limiting sentiments themselves. It was James Madison who introduced the phrase “shall not be infringed,” to the tail of the finalized Second Amendment.100 The rest of the states eventually followed suit by submitting similar ratification agreements to the federal government, many of which were based on these sound principles of human freedom.101

2.3 The Militia

*We are all in arms, exercising and training old and young to the use of the gun. No person goes abroad without his sword, or gun, or pistols… Every plain is full of armed men, who all wear a hunting shirt, on the left breast of which are sewed, in very legible letters, “Liberty or Death.”*102

- Letter from a Virginian to a Scottish acquaintance, 1775

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100 Halbrook, *Founders’ Second Amendment*, 253.
The American Revolution was an armed struggle. It involved two very determined combatants, one attempting to hold onto one of its primary colonial possessions and the other succeeding at gaining its freedom from an imperial master. Especially at the start of the conflict, American revolutionaries were made up of irregulars, guerilla units and militias. The incidents at the north bridge in Concord, Lexington Green and the battle of Bunker Hill featured the militia of Massachusetts prominently. Bunker Hill in particular showed just what a militia could do to ward off a foreign power and a threat to the state. It is important to determine what the militia was at the time of the revolution and just after. In 1789, the founders had a vision of just what a militia force consisted of in order to place such text in the Bill of Rights. Not only was the reality of what a militia was important in the federal context, it was also extremely important to the states who had dominion over such entities in times of peace, and whose responsibility it would be to provide for specific legislation in order to effectively regulate and provide for various militias troops within their borders.

Militias were of vital importance to the colonies and then states of the American experiment. Militias allowed for defense against possible slave rebellions in the south, as well as Indian raids on the frontier and general civil unrest. But above all the militia was the bulwark of liberty. Its constitution is a very clear indicator of just how militias were perceived at the time. A militia, as it was favored in the American colonies, consisted of every free, able bodied white male capable of bearing arms, rather than a “select militia consisting of a selective group, which bordered on a standing army, the bane of liberty.” Militias were seen as safeguards of the people, not their keepers. As a result,
the ability to join and participate in a militia was widespread. It would have to be to avoid becoming nothing more than a standing army, as a standing army is simply a specialized, dedicated fighting force. Most of the founders did not want a standing army. So they made the militia general and directly connected to the community.

The community and a continuous association with it was an essential part of the militia. The community itself in colonial America, as well as the Early Republic, supported the keeping and bearing of arms. An event that caused much distrust and violence against the British took place in Boston. General Gage had declared martial law and laid siege to the town. However, the infamous general knew that an armed population, as one could most assuredly call the citizens of Boston at that time, would be far too dangerous to leave unmolested. And so, he offered the inhabitants an ability to “procure their dismissal” from the city by giving the authorities their firearms.104 Despite a large part of the citizenry abiding by Gage’s wishes and giving local magistrates their arms, Gage then refused to let them leave the city. Both the British and Americans knew that an armed population could easily form a militia and pose a serious threat to the reigning hierarchy. The Second Continental Congress cited this incident of disarmament as a key factor in why they, as freemen, had to take up arms against the government at the time. Again we see that the founders viewed it essential that the majority of the citizenry be armed in order to resist tyranny. They also found it appropriate to declare that when firearms were prohibited to the citizen, such an action stood as government abuse.

The militia of New England was a very popular calling. The Boston Evening Post in 1768 boasted that “The total number of the Militia, in the large province of New-England, is upwards of 150,000 men, who all have and can use arms, not only in a regular, but in so particular a manner, as to be capable of shooting a Pimple off a man’s nose without hurting him.”

Although the prowess of the militia may have been exaggerated, it is unmistakable that the militia was an integral part of New England life. The militarism that was required to maintain public virtue was enshrined in the Americans of this time. Historian Edmund Morgan explains

> Americans generally owned guns and knew how to use them. A century and a half of defending themselves against French and Indians, the reliance many placed on guns to protect their crops from animals and to provide themselves with meat – these had given them a familiarity with firearms that common people of the Old World lacked. It was this experience that told at Concord and at Bunker Hill. And it would tell again whenever a British army attempted to sweep through the country. Men would gather from the farms, snipe at the troops, ambush them, raid them, until the victory parade turned into a hasty retreat.

The widespread ownership, on an individual level, of firearms and the proficiency to use them was a hallmark of the American revolutionary and early national periods. The Republic was founded upon such a martial character and the revolution was won as a result of the impressive showings of militias during the campaigns. Legislatures and the American founding elite most certainly would not ignore this aspect of their society and lifestyles to not only ensure perpetual liberty, but to throw off the yoke of tyranny.

### 2.4 Legislating the Right of Arms in America

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The Second Amendment was, no one doubts, a response to anti-Federalist fears that the states had ceded a dangerously excessive amount of military power to the new federal government.\textsuperscript{107}

- Nelson Lund

As with English common law, many everyday conventions were not codified. To an extent this is true of bearing arms, where it was widespread in the colonial environment. Citizens could buy and sell firearms, own, possess and, when need be, bear them for the defense of the state as well as themselves. The eventual codification of the right, in the 1789 Bill of Rights, was an attempt to solidify this means of trade and existence. Various colonial charters as well as the many state attempts at constitutions previous to the Bill of Rights included a right to keep and bear arms, as well as a militia clause. The Articles of Confederation provided for strong militias along state lines for example, without guaranteeing a widespread individual right to arms. There are schools of thought on the exclusion, something that will be touched on later, but suffice it to say that many of the conventions determined that perhaps it was not necessary to include a personal right to arms, no more than it would be necessary to include a right to various other specific properties. A right to property may have been enough for the founding generation of Americans, given the widespread acceptance and use of firearms for purposes other than communal defense. Many early attempts at rights codification in the United States such as colonial charters and parochial laws, the Articles of Confederation, and the many early state constitutions enacted after the Revolution attempted to ensure a right of the people to keep and bear arms. They also laid out the exact parameters of militia organization.

\textsuperscript{107} Nelson Lund, “Federalism and the Constitutional Rights to Keep and Bear Arms,” In \textit{Publius}, Vol. 33, No. 3 (Summer., 2003), 67.
The laws allowed for firearm freedoms, even under a monarchical administration that was not responsible to the colonists. Most areas did have elected assemblies who acted under colonial charters, but whose sovereign was still the king. Under local ordinances, many aspects of weapons maintenance were communalized. This is not to say that weapons themselves were looked upon as community property, nor were small quantities of powder, flints and other associated items. For example, because of the volatility of black powder at the time and the primitive means by which to fight fire, many towns and communities set up powder houses; houses in which the town’s black powder supplies would be stored. A citizen could easily go to such a house and take his allotment of powder. It did not take long for the British to attempt to seize these stores and halt distribution shortly before the war.108 Such restrictions only applied to towns where the locality deemed it necessary, where population density forced such considerations to exist, which was in line with the parochial concerns of late eighteenth century America.

The absence of actual law in regards to firearms in colonial America can be contributed to the rather impractical nature of regulating them. The state did not seem to have the ability to regulate or the legal prerogative to do so. The focus was on whether or not to actually assure the right to keep and bear arms in the various bourgeoning legislative histories. In Pennsylvania, for example, the state’s Declaration of Rights included a right for citizens to “bear arms in defense of themselves and the state.”109 But Pennsylvania did not provide pioneers, settlers or citizens any means by which to acquire

108 Halbrook, *Founders’ Second Amendment*, 32.
weapons, nor did it codify that homesteaders had to be armed.\textsuperscript{110} It was a freedom left up to them, and therefore did not require the state’s intervention.

After the Revolution, however, the members of Congress and various intellectuals believed that, in order to sustain liberty and maintain their new found independence, not only did the state legislatures have to become involved in securing their new republic from foreign or domestic tyranny, but the federal powers also had to act. The Articles of Confederation, now considered an anti-Federalist attempt at a constitution but nonetheless an important step in American constitutional history, forgoes any mention of an individual right to arms. It does, however, detail a widespread militia.

The Articles of Confederation and Perpetual Union were first drafted in 1776 and served throughout the war as a basic guideline to what the US Constitution was meant to be. In such articles the detailing of what a militia would consist of was a top priority and its makeup is provided for. The Articles purported to exclude inter-state involvement on a military level, to the extent that men from a certain state would only fight under officers from that state. Each state would be required to provide the appropriate amount of junior officers, but this anti-federalist position was eventually seen as disadvantageous in regards to military cohesion and efficiency. However, this rule only applied to land forces, the navy was national and exempt from the particular constraints applied on the militia forces.

Permanent land forces were, in general, not allowed. Only those which the state required in order to maintain the necessary equipment, ammunition and fortresses were to

\textsuperscript{110} Saul Cornell, \textit{Well Regulated}, 22.
be constant. Other than that, a militia would be the sole defense of the states. Each state was required to maintain a well-regulated militia “sufficiently armed and accoutered.” Under the Articles of Confederation, the militia went from being essential for the security of a free state in theory, to a legislated, codified fact. States were obligated to keep up a useful militia force. It is hard to imagine a functioning republic without a general militia according to the processes and legislation clearly passed during the early years of the American Republic. As not only an indicator of how the founders thought, but a strident step towards formulating a cohesive government, the Articles serve to illustrate two things. First, a militia was considered to be very different from standing armies, which were restricted to skeleton forces used for maintenance. The militia was to be solely cared for by the individual state with all costs incurred by the states respectively. They were mandated to coordinate such a force for the benefit of the state, as well as the central government’s defense. Second, that peace time was different than war time. Although differences between the states were respected in regards to the officers who were most likely to directly interact with the volunteers, during a conflict the costs of such military campaigns would be paid for by the federal government. This reflected the long tradition of fearing standing armies, especially in peacetime where their influence was deemed a corrupt one. The Articles therefore illuminate the cohesion between government and militias, or at least the planned interaction. It explains just what the founders had in mind when they were conceiving of life after King George. What their federal republic would look like and how it would be defended are explained in the Articles. Naturally, these were amended with the Bill of Rights and Constitution. Despite

112 Article VIII, *Articles of Confederation*, 64.
the Articles never really mentioning a direct individual right to keep and bear arms, although it does imply it, the Bill of Rights ended up reaffirming or strengthening this reality rather than curtailing it.

The Articles of Confederation are not the official constitution of the United States. These measures serve as only an indicator of intent. They were made legally obsolete by the implementation of the Constitution in 1788, but many of the ideas that had created the distances between state and federal governments in the Articles reappeared in the Bill of Rights. It is for that reason that the Articles are important. The American founders provided a clear blue print to their initial interests in government. The eventual amended constitution involved altering a system in order to improve its functioning, but the philosophical foundations remained the same.

2.5 The Founders’ Visions

“Who are the militia? Are they not ourselves? Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American...(T)he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.”

- Tench Coxe, Member of the Continental Congress

“If Congress neglect our militia we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into hand of her militia-men?”

- John Marshall, during the Virginia Ratification Convention

The United States’ founding generation managed to realize a social contract, giving the American people a republic to replace an imperial regime. This American Republic was a free state – a republic, therefore, guarded by a codified legal will. The Second Amendment appears in the Bill of Rights, not the original Constitution which outlined the structure of government. Nevertheless, the men at Philadelphia had much to do with and say about the Bill of Rights and the Second Amendment itself. Although not the most written about or debated of the ten original amendments during the later eighteenth and early nineteenth centuries, the nuanced positions of the founders allow us a better understanding of not only their positions directly relating to civilian militias and arms, but also their philosophy of government. The study of such a subject provides a powerful framework that can be used to interpret the Bill of Rights. Some were Federalists, such as Washington and Hamilton, and some were anti-Federalists such as Mason and Jefferson, but all were opponents of arbitrary rule and tyranny.

Historian Neal Riemer writes of the founders’ particular place in the American psyche, "Folk Heroes emerge best when they can be clearly identified. Washington: Revolutionary War general and first President of the new nation; Jefferson: author of the Declaration of Independence and towering Republican leader... Madison, a judicious political scientist..." He added "These identifications, of course, belie the complexity of the man and his times. Nonetheless, they provide myths to feed our ideological hunger."115 Each founder’s philosophy will help illuminate the issue at hand: the right to

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keep and bears arms and the right to a militia. George Washington, Alexander Hamilton, John Adams, George Mason, Patrick Henry, Samuel Adams, Thomas Jefferson and James Madison's writings and thoughts help provide a powerful insight into the minds of the pillars of revolution in America, and add to the rhetoric surrounding the Second Amendment.

2.6 Men of the First Administrations

_In spite of the bitter fights that preceded ratification, the differences between Federalists and anti-Federalist were primarily differences of opinion about means, not fundamental differences of principle._

- Edmund S. Morgan, American Historian

George Washington was a military man. He embodied the virtuous citizen that republicans so admired. He was a man of principle. At the beginning of his first presidential term he wrote to James Madison that since “the first of everything… will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles.”

He dedicated his life to the preservation of the principles of the Revolution. He strived so that civic virtue may have been embodied in him – believing no less that God would hold him accountable for how American independence was interpreted.

These principles are often simplified by historians to union, liberty, and self-government under the Constitution, and were to be administered with virtue as an example to the world. According to Washington this was to occur under the

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116 Morgan, _Birth of the Republic_, 155
superintendence of a benevolent providence as well.\textsuperscript{119} The republican ethos of civic virtue and individual liberty runs powerfully through Washington’s beliefs.

His first political outing was in the Virginia House of Burgesses after taking his father’s place as head of the family estate. George Washington, when called upon by John Adams and other members of Congress to assume command of the continental militias fighting the British in New England, was already a decorated soldier and well respected politician and planter. As a veteran of the French and Indian War, he believed whole heartedly in the militia. His personal belief was that the British Crown had attempted to impose tyranny upon the colonies with excessive taxation, impressments and writs of assistance. The situation required an armed resistence. He therefore utilized militias during the Revolution, and recognized the important role that such institutions could have.

He was an Enlightenment liberal, a reader of Locke and a believer in individual freedom. He saw that he could have a role in perfecting an immature union.\textsuperscript{120} He influenced the Philadelphia convention in favor of a stronger executive, a position that would have him at odds with anti-Federalists, but one that did not cross horns with his planter, militia supporting pedigree. He believed first and foremost that the presidency was a position that “exists to enforce the will of the people, expressed through their representative legislature, in the service of a federal government created to secure their rights to life, liberty and property.”\textsuperscript{121} He ensured that the presidency, although arguing for a powerful executive, did not turn into a kingship. It was of great concern to him that

\begin{footnotesize}
\textsuperscript{119} Morrison, \textit{Philosophy of George Washington}, 16.
\textsuperscript{120} Morrison, \textit{Philosophy of George Washington}, 50.
\textsuperscript{121} Morrison, \textit{Philosophy of George Washington}, 50.
\end{footnotesize}
the United States be left free of the arbitrary will of a ruler, and the people should have not only the means but the express philosophical authority to replace such a government.122

Washington contributed to the philosophical understanding of the Second Amendment in many ways. He ensured that there was a correct precedent as to how an American executive should approach not only the people, but also the role of government. The people’s liberties were enshrined and inviolable under a constitution and, rather than paddock such rights, the government was meant to protect them from transgressions. Washington was a believer in resistance theory; the people had a right to defend themselves from a strong-arm government. He once said in 1790 that “a free people ought not only be armed, but disciplined.”123 His morality was one of establishing and promoting individual liberty and a rule of law. Thus, being a classical republican and an English liberal, arms were a necessity for the population. Nevertheless, he was responsible for strong tactics in response to various civic battles that took place under his administration. The Shays’ Rebellion and Whiskey Rebellion both shook the revolutionary establishment and caused dissention amongst the founders. Washington viewed these insurrections not as an expression of moral resistance, but of mob rule and precursors to anarchy. It was thus very much in line with his staunch, yet somewhat aristocratic republican ethics, to use the militia to help put down such plebeian actions. For this stand, he won both animosity and admiration.

122 Ward, Politics of Liberty, 262-265.
123 Halbrook, Founders’ Second Amendment, 298.
Alexander Hamilton was General Washington’s aide-du-camp during the revolutionary war. He was a major player in the writing of the constitution and a provocative advocate for a strong executive. Hamilton expressed great concern at poorly functioning government. He articulated these concerns in the *Federalist Papers*, published under the pseudonym *Publius* which he co-wrote with Madison and John Jay. He argued against the imposition of a bill of rights on the grounds that it was stating the negative. The federal government was already restricted to what it was delegated in the Constitution, after all. He was, however, an advocate for the people being armed and supporter of strong militias. His most profound contribution to the topic at hand is without a doubt *Federalist Paper #29*, “Concerning the Militia,” in which he states his preference for federal control over the militias. He was primarily objecting to the stipulation in the Articles of Confederation that the militia be controlled by parochial interest and be parceled out among the states’ various officer corps. He claims that not having any defensive force at all would be far more beneficial than having one with “a thousand prohibitions.” But Hamilton, in coming to this determination of national control of militias, concedes two positions which show not only the tradition of resistance to tyranny inherited by the founding generation in America, but also explains the republican ethos of militias. Hamilton argues that a well-regulated militia is the most natural form of defense for a free country and that standing armies are a threat to liberty. His determination that the federal government should control the militias, however, is precisely based on the assumption that there would be an emergency situation

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which compels the use of organized force in order to properly defend the republic.\footnote{Hamilton, “Federalist Papers #29,” 178-179.}

Hamilton dismisses the more conspiratorial hesitations that the federal government would use the militia in a perverse way, such as imposing martial law, and he does so by illustrating that in a militia system the government, should it desire to initiate such tyrannies, would first have to, at great expense and time, train and seclude vast numbers of eager citizens in order to form them into a large enough body by which to execute its despotic intentions.\footnote{Hamilton, “Federalist Papers #29,” 180.} Such fears are unfounded, so Hamilton suspects, leaving open just what he believes the militia should look like in America.

Hamilton describes precisely what he thinks of arms and militarism in society. He decides that

\begin{quote}
It is a matter of utmost importance that a well-digested plan should, as soon as possible, be adopted for the proper establishment of the militia. The attention of the government ought particularly to be directed to the formation of a select corps of moderate size, upon such principles as will really fit it for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia ready to take the field whenever the defense of the State shall require it. This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be too formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens. This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.\footnote{Hamilton, “Federalist Papers #29,” 180-181.}
\end{quote}

Hamilton argues for a well-trained militia, ready to be mustered, but never in perpetual standing. He believes that such a force could only be used for the good of the people’s liberties, as that force would only be able to serve effectively against other standing
armies. For the rest of society, he feels that “Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped.” The people then, in a general sense, would have military training. The government should then simply “assemble them once or twice in the course of a year,” for any further training and general sharpening of already acquired skills.129

Hamilton provides his opinion in regards to the militia and the people bearing arms. He firmly supports the idea of the people being both knowledgeable and rich in arms and with the equipment for war. It is in fact essential to his thesis, the people must be a force to be reckoned with, or else his “select corps” of militia would be able to possibly terrorize the common man. His proposal assumes a reasoned balance of power. If only smaller militia units exist, then they would be no match against an entire population of armed, free people. Such a scenario is far beyond Hamilton’s reasoning, as he does not believe the government under the then proposed constitution capable of such a feat without a total disregard for the rule of law and utter sloth and ignorance on the part of the people at large.

The Commonwealth of Massachusetts is the heart of New England. This colony was where the War of Independence began and where a large portion of the pre-conflict disputes took place between Crown and people. Boston native and well known intellectual Samuel Adams contributed his own beliefs and understandings of the law to his fellow British subjects when writing that it was impossible for free people to be disarmed. He believed during various disputes with the Crown, that a Bostonian had the right to possess on their person weapons for defense. That “it is certainly beyond human

art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip’d with arms, &c., are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs…”  

For Samuel Adams, not only was the British administration breaking its own laws in attempting to charge members of the Boston public with distributing arms, but it was also breaking Massachusetts law, and as a result, ruling by arbitrary power. In fact, Adams had been influential in getting the resolution passed in Massachusetts that he himself cites, that each citizen be armed as part of their duty of citizenship. He reiterated his belief that a citizen had the right to be armed for defense, even as much right as a soldier did during the Boston Massacre when he emphatically declared that one of those killed, a Mr. Attucks, who had been leaning on his stick, had a right to have such an instrument for his own defense or that of a neighbors’. Samuel Adams was an ardent advocate for a person’s right of self-defense, be it using a stick or musket.

Samuel Adams’ second cousin, a Boston lawyer by the name of John Adams, concurred with his relative. John Adams found himself on the other side of popular opinion during the Boston Massacre, however, tasked with defending the British soldiers in question of shooting citizens. He conceded that “every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arms themselves…” So strong was Adams’ belief in the right to arms and self-defense, that he declared the soldiers had the right of “Self Defense, the primary Canon

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131 Halbrook, *Founders’ Second Amendment*, 18.
of the Law of Nature.” Both the people and the agents of the state had a right to self-defense, as all humans do. It would thereby follow that any attempt to infringe upon such a right would meet an unkindly reception at John Adams’ table and his spirited condemnation of such a violation can only urge one to conclude that man has a right to be armed for the security of himself and the state.

2.7 The Virginia Dynasty and Arms

“I feel myself distressed, because the necessity of securing our personal rights seems not to have pervaded the minds of men...”

- Patrick Henry, criticizing the acceptance of the 1788 Constitution

The anti-Federalist wing of American politics at the time also had something to say about the Second Amendment. The people who were opposed to the constitution drafted at the Philadelphia convention preached a similar line when it came to the people’s authority to possess arms and form militias as their Federalist opponents. Mason, Henry, and Jefferson spoke of an ironclad ideological position on arms, demanding that they be recognized as an individual right. Madison, although clearly in favor of the constitution he helped write, eventually parted political ways with the more northern founders and put his lot in with his fellow planters. Madison himself mentions sentiments that express a reverence for an armed, morally strong population that can hold firm the security of a republic. The people bearing arms are a phalanx against tyranny, both external and internal.

133 Halbrook, *Founders’ Second Amendment*, 25.
134 Halbrook, *Founders’ Second Amendment*, 227
George Mason was a tobacco and wheat planter from a well-known Virginian elite family. Like his compatriots, he was immensely concerned about public and civic virtue. Yet he was also very aware of individualism running amok and the dangers of mass democracy. Mason attended the constitutional convention in Philadelphia on behalf of his native state Virginia, but was of ill-health throughout the proceedings. Nevertheless, with the aid of another Virginian, Edmund Randolph, he was able to put up a spirited resistance to a constitution that he believed greatly enhanced the powers of the executive beyond an extent justifiable in a free state.

Among notable oppositions to the proposed constitution, Mason complained of a lack of bill of rights, which would solidify freedoms for the various states. He was very conscious of the fact that each state of the proposed Union would have very different requirements in terms of economy, labor, produce, industry, and government. Specifically, Mason pointed out that the constitution did not distinguish between the states of the northeast and the southern states, whose economies required completely different trade policies - a prediction that would become all too prophetic in the 1850s and 60s. But what stands out in the writings of Mason is his legalistic mind. He was a planter, but he demanded that federal restrictions be codified, not left up to either Congress or the executive to decide where the line between federal power and state sovereignty was to be drawn. This is important to note, as Mason then declares that one of his concerns is that the Constitution does not prohibit a standing army from being

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formed. Rather, as the finished version of the Constitution states in Article I, Section VIII, the US government has the right to raise and equip an army as well as a navy. George Mason was very concerned about a standing army and the people’s right to a militia as well as their ability to equip themselves appropriately in a climate where the federal government had the authority for military procurements.

Patrick Henry was a prominent politician, planter and statesman in Virginia and colonial America. He led the colonial opposition to the Stamp Act in 1764-65. He eventually was Governor of the Commonwealth and took a dramatic part in the debate over the Constitution in Virginia as well as urging for the creation of the Bill of Rights. He argued effectively in favor of revolution and independence for the American colonies. Famously speaking to his fellow Virginians that he would either have liberty or death, Henry has become a beacon of liberty to anti-Federalist historians. He was incredibly vocal during the ratifying debates in Virginia over the proposed federal Constitution to replace the Articles of Confederation in 1788. Many times during such discussions, the Virginia assembly would call to impose upon the Constitution a Bill of Rights that included a right of the people to keep and bear arms.

Henry, for his part, tended to agree with the sentiment that the people should be armed. He claimed that one of his objectives was to ensure that “…every man be armed…” and that, “Everyone who is able may have a gun.” That this be secured and codified in the founding document of government was essential to Henry. He valued the public welfare and the public’s virtue. He also knew that republics and civilizations are

137 Mason, “Objections,” 175.
138 US Constitution, pursuant to Article 1, Section 8.
under constant threat of being overthrown from within by both a general degradation of the people’s spirit and a top-down coup d’état. He gave this warning to future Americans to hold onto their arms: “Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.” Here was his guiding principle; the people needed a means by which to secure their liberties and the best way to defend their birthright was by the use of arms. In fact he said as much, griping that his main objection to the proposed Constitution was a lack of guaranteed means for the people to defend themselves.

Another Virginian, Thomas Jefferson, was an avid gun collector. Although in France at the time of the convention, he still was a leading thinker and American founding father given his authorship of the Declaration of Independence and prominent friends and compatriots. He believed that the people should be armed outright and that the protection of arms under the Constitution was the only meaningful defense against tyranny. He declared that “no free man shall ever be debarred the use of arms.”

When queried on the proposed constitution, Jefferson was gravely concerned by the lack of a Bill of Rights. Jefferson knew full well that the powers that turn republics into tyrannies would not be held back by negative wording, in others words, the lack of actual text to support villainous intentions. He once said to a friend about a liberal rights theory principle, that “I have a right to nothing which another has a right to take

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140 Debates, 3:45.
A right is not a duty or privilege, it cannot be curtailed, nor can it be taken away. He was well aware that a basic Bill of Rights expounded this principle, but demanded that not only should the right to bear arms be in the Bill of Rights, but that very explicit language be used to reinforce this particular right. Jefferson made it very clear as to why he felt the people should bear arms, and it was not simply so that he could continue to collect and sell privately one of his favorite recreational instruments. Arms were to be the levy against the forces of tyranny. It was a passion of his to ensure that the great American experiment of liberty did not fall prey to a would-be demagogue as a result of the people’s inability to defend themselves. To Jefferson, the federal government could potentially be a menace to the states which would squash freedom in America. It was the people’s responsibility, therefore, to defend their liberties. The founders were to give them but the means to do so, not compel or force them out of a complacent lull.

James Madison was the primary architect of the Constitution and, arguably, the mediating force between the Federalist and anti-Federalist divide. He was at the center of American politics and a powerful figure. Madison was an ardent advocate of the system of checks and balances. He provided Americans with a philosophical foundation for their particular republican form of government. The power of the state would and could be checked at almost all levels by retaliatory forces predisposed to stand against usurpations by the other. In Federalist #46, Madison argues that under the system of federalism as he sees it, should the constitution be ratified, any attempts at despotism would be met by

144 Jefferson, Papers, 334.
organized forces within society which would rally and protect the republican framework.145

What would constitute such a rebellion of free people against the forces of slavery? A general militia was one of his solutions. In Federalist #46, Madison creates a hypothetical situation whereby a large standing army, the largest supported by the United States at that time of around one out of every twenty-five men capable of bearing arms, is to be used to impose despotism. The army would be of approximately twenty-five to thirty thousand fully equipped men and would be used for nefarious purposes against the interest of the public’s liberty. He says not to fear such an abomination, because

To these would be opposed a militia amounting to near half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops… Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.146

The militia was there to back up the interests of the states in expelling any threat from a federal standing army. Thereby the liberties of the people were secured from both foreign and domestic enemies due to the existence of a national navy and army, as well as a state militia. To Madison, the free American citizen was not of the same ilk as the European serf, long beaten down by the oppressive regimes of old world privilege. The American Madison describes was a militiaman, both moral and zealous in defense of himself, his

family, his property and liberty. Madison’s theory differs from Hamilton’s in a few respects as Hamilton was far more pessimistic concerning the states’ ability to properly administer the war making capabilities of the country indefinitely. But where they do not disagree is on what constitutes the last bastion of freedom. The final and insurmountable defense against tyranny is a general militia, a population knowledgeable in arms, and prepared to use them to defend their liberties.

Although there were many more philosophies that were expounded upon by the founders, it is clear that the main political and intellectual pillars of the American revolutionary period were in favor of a general militia. A militia that was active in the community, a militia that consisted of men of appropriate age and condition who were capable of bearing arms. Washington, Hamilton, Samuel Adams, John Adams, Mason, Henry, Jefferson and Madison considered it essential to the American republic that a militia exist and that its power to deflect offences by standing armies be perceived as supreme. Both Hamilton and Madison include specific references to a militia, comprising a large portion of the adult male population, well versed in the trade of war. They cite it as essential in order to serve as a counterweight to the military establishments both wished to see constructed to guard the new American Republic from outside interference. Jefferson, Henry, Mason and others made it very clear that they desired a Bill of Rights, including within it the specific codified right to bear arms and assemble militias under the states. That such a right would not, and could not be interfered with by the federal government was a priority.

147 Madison, “Federalist Papers #46,” 296.
2.8 The Militia in Action

“The States are anxious for an effective militia, to them belong the power, and to them too belong the means of rendering the militia truly our bulwark in war, and our safeguard in peace.”

- Select Committee on the Militia, US Senate, 1810

During the period of the Early Republic the militia system was put into practical use a number of times. Domestically, the Shays’ and Whiskey Rebellion highlighted certain faults inherent in a system so decentralized. The militia in western Massachusetts ended up failing local authorities at a crucial time and served to undermine public order in that province. However, during the Whiskey Rebellion in Pennsylvania, it took George Washington himself at the head of an army of fifteen thousand militiamen gathered from various governors and locations around the unstable region to halt the advances of disunity. This was a successful showing for the militia, but exposed how reliant the federal government was on states to maintain basic order. An order, it should be noted, that promoted freedom rather than curtailed it according to the republican ideals to which Washington adhered. But the greatest test of the militia system, as set up in the ideal of republican lore of the early American experiment, was the War of 1812. This was a poor outing for the militias and could be perceived as a condemnation of the parochial system of American men at arms. However this need not be the case. The Militia was put into a situation that was difficult to win even for a professional army. It was opposite a highly trained, skilled and experienced British regular force and impassioned Indian irregulars.

They still managed to find successes, but American military blunders took their tole during the war.

It is important to take a look at the militia system at work. Various enlightenment thinkers and English republicans had for years been advocating a strong and well regulated militia system, and it is a fair assessment to call the American system just that. It was not the greatest and most well oiled fighting machine, nor was it an overly impressive armed force, but did it serve the purposes set out by the Constitution and enlightenment philosophy? Did the militia fulfill its obligation to the American people and to its founding generation? The militias that were functional between 1792 and 1814 are now defunct. The militia of the Early Republic took part in three distinct episodes of American dysfunction and, despite a period of initial unreliability, proved useful in both the Shays’ Rebellion and the Whiskey Rebellion, but showed its intentional limitations in conventional warfare during the War of 1812.

At the time of Shays’ Rebellion in Massachusetts in 1786, the United States had taken drastic steps to demobilize from the Revolutionary War. The Navy and the Marine Corps had been all but disbanded, the continental army was no more than veterans’ associations and the regular army was left with a company of artillery consisting of one officer and eight enlisted men.149 The state militias were virtually the only force capable of maintaining law and order in the confederation. At the time of the rebellion, it must also be noted, the American states were governed not by a federal constitution, but rather by the Articles of Confederation which permitted each state to provide for its own militia

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This was a slightly different situation than when the Whiskey Rebellion broke out in Pennsylvania in 1789 and the militia was under the general purview of the new federal government. The reaction to the disruption in Massachusetts therefore was far less efficient than in Pennsylvania. The Militia was, naturally, still intact being only a few years after the victory over King George. The states were able to govern and supply their militia forces as they saw fit. The militias enjoyed prominence as being the only true military organizations in the entire grouping of states south of the border with British North America.

Shays’ Rebellion took place in Western Massachusetts in late 1786 as a result of a poor economic turn for the state. Particularly hard hit were farmers, who ended up spiraling into debt and often had their land seized by the local magistrate as a result. The rebellion began when an armed mob, lead by a farmer named Daniel Shays, shut down a local courthouse in order to stop land seizures from occurring. At the outset the governor of Massachusetts, James Bowdoin, was unable to truly deal with the issue effectively. It required federal intervention in order to stamp out the rebellion. The inefficiencies of the militia system under The Articles of Confederation were very apparent. For example, when the rebellion began, many of the local militia were farmers who joined the rebellion and the ones who remained failed to halt the rebels’ progress in shutting down the courthouse in Springfield, Massachusetts. Governor Bowdoin requested aid from the central government and received it, with a few thousand

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150 *The Articles of Confederation*, Article VI
151 *The United States Constitution*, Article I, Section 8 and Article II, Section 2.
militiamen being mustered and marched out to Massachusetts under the command of General Shepard. Lucky enough for the Federalists, most of these men were veterans of the Revolutionary campaigns and were able to successfully rally to the cause of law and order. But the failings of the Articles of Confederation in their treatment of the militia, or any American armed service, were evident.

Partly as a result of the rebellion in Massachusetts, the founders attempted to reconsider the idea of a written constitution in America, which, in 1787, they did in Philadelphia. But before a Militia Act could be formulated in Congress, another tumultuous happening occurred in the agricultural sector of another American state, this time in Pennsylvania. And once again, the war debt was the true culprit. Superficially it was a tax imposed on wheat farmers, forcing them to pay a vice duty on a separate consumer good. It was a tax on the distillation of whiskey, a product which used ample amounts of the earth’s wheat bounty to produce. The uprising took place mostly in Pennsylvania, but all along the western frontier it was difficult to collect the tax. It was mainly a simple tax protest until 1794, when farmers burnt down the house of a tax collector and took part in other mischief.155 In 1792, George Washington, incredibly vexed by the situation, spent a great deal of time in conversation with Hamilton, the treasury secretary, Thomas Jefferson, his secretary of state, and the governors of Pennsylvania, North and South Carolina. He was primarily concerned with restoring the rule of law in a demanding, yet peaceful way.156 However, this was not to be and Washington was forced to intervene at the head of an army of around fifteen-thousand

mustered militiamen from several different states. The rebellion was defeated and the militia was successful in restoring order.

These two examples, the Shays’ and Whiskey Rebellions, are enlightening about the state of firearms ownership in the Early Republic. The rebels themselves had a wide variety of weapons at their disposal in both Massachusetts and Pennsylvania. They had these weapons at the outset of their actions, without raiding stock houses or armories. This can only be because they were armed to some degree or another and were freely able to buy and sell weapons. During the initial outrages against government authority, a replica of George Washington’s head was shot at repeatedly by a group of rowdy protestors directly after they tarred and feathered a local tax man.\textsuperscript{157} Also, the militiamen mustered by Washington were armed primarily by themselves. In other words, just as in feudal Britain, the men appeared readily equipped in order to meet the threat of lawlessness. They could only do so if they were armed beforehand and in complete and total possession of those arms. These two examples highlight the republican spirit of the militia, that they be used to maintain the law so long as it was legitimate.

The third and most decisive issue that involved the American militia was the War of 1812. The War occurred in the early nineteenth century under the administration of successive republican regimes. This particular clash of arms was instrumental in sizing up the militia’s capabilities. It has, for the most part, been looked upon as a nearly complete failure from an American perspective in regards to the ability of militia to serve as the sole or primary armed force. Tasked with protecting American independence, the militia needed to show whether or not it could handle changed responsibility of

intervening abroad. President Madison was being forced into war by a hawkish and patriotic Congress and the continued violations of American sovereignty on the high seas by British frigates. As a result, he launched an offensive campaign into British North America.¹⁵⁸

There was seemingly no answer to the dismal failures of the initial American campaigns other than an inferior military system founded upon a general militia. But this was not entirely the case. Although the British historian Brigadier J.W. Forescue expressed the consensus view that the quality of American troops during the War of 1812 was “beneath contempt,” there were in fact victories and outstanding hard fought achievements by the militia.¹⁵⁹ The defensive victories at Plattsburg and Baltimore were won by militia. Fort Erie was taken by the militia and the British, along with Tecumseh, were routed and chased into Ontario by brigades of militiamen. The most famous battle of the war, which took place after peace had been agreed upon, the Battle of New Orleans, was won by American militia. There are scores of other such engagements where the British redcoats were beaten by the American citizen soldier.¹⁶⁰ Nevertheless, these victories were generally moments of either luck, daring or sheer brilliance – not the norm by any means and the general contempt for the initial efforts displayed by American forces should be viewed as correct.¹⁶¹ But this may not have been the militia’s fault.

The militia was constructed around the parameters of the Militia Act, which served to make efficient what was deemed far too parochial for its intended task. The

¹⁵⁸ Kerby, “State Militias,” 106.
¹⁵⁹ Kerby, “State Militias,” 105.
¹⁶⁰ Kerby, “State Militias,” 105.
¹⁶¹ Kerby, “State Militias,” 105.
militia’s mandate was to be able to provide adequate security for the newly formed union of free states in America. The militia was therefore out of its primary role in offensive maneuvers. It was a defensive force, designed to pick apart standard armies should they invade or attempt to subjugate the American people. It was an irregular institution, derived out of a long colonial and estate tradition from England. Therefore, when employed as a regular land force, the deficits in discipline, logistics, maneuverability, and efficiency in comparison to professional soldiers became evident. But this should not be held against the militia in terms of their reason for being. The militia showed during the Revolutionary campaigns, to the benefit of Washington, that they can in a patriotic war defeat a vastly superior professional force. The militia also showed in the Shays’ and Whiskey Rebellions that when, properly organized, it could effectively maintain public order. It would seem then, that in a more guerilla-style, defensive war and in the role of keeping the peace, the militia served their purpose. They failed in a role they were never suited for, an aggressive war against an experienced army. It can hardly then be said that such an organization needed drastic overhauls or rather, that the enlightenment philosophies and English traditions that vested importance upon it were wrong. The defensive value of the militia was the reason for its adoption as a war tool by civic republicans. In fact, the Militia Act of 1792 lays out the role of the militia declaring that the Militia was to “execute the laws of the Union, suppress insurrections and Repel invasions.”162 The militia, as Madison said, should be a national concern, and with the

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Militia Act and the federal Constitution, it was ensured to be a under broader federal mandate.\textsuperscript{163}

There were problems with the law of course. It mandated national controls yet did not provide the infrastructure for the militia to implement them. There was no real funding allocated for the purpose of ensuring that the general militia became an effective reserve force, nor were there any associations between the states. It was not until 1879 that a national militia organization was created, leaving doubt that the Militia Act of 1792 managed to contribute to any sort of meaningful coordination between the state agencies.\textsuperscript{164} The militia through the period of 1792 to 1812 was not made ready for a full scale conflict. True, it did become almost the sole military force of the American experiment, but the militia suffered under maintenance issues. The defenders of public virtue and freedom could only do just that, defend it, and any sort of imperial designs could only serve to corrupt the institution and thus make it defunct.\textsuperscript{165} The federal government did not provide the states with the funds nor the weapons to effectively pursue war, nor did the states - jealous of their independence - coordinate in order to make the militia a proper reserve force. The flaws that became so apparent during the short war with Britain in 1812-1814 are therefore not necessarily inherent within the Second Amendment and within the militia, as they are in the federal government’s management capabilities.

The militias were the defenders of the Republic, the compulsory organization that protects the public will and virtue from threats such as tyrants, standing armies,

\textsuperscript{163} Reinders, “Militia and Public Order,” 84.
\textsuperscript{164} Reinders, “Militia and Public Order,” 82.
bureaucracy, and invasion. They served to defend those values during the overthrow of the rule of law in situations such as the Shays’ and Whiskey Rebellion. There were traditional and legal forms of redressing ones grievances towards the government in those cases, yet the citizens of rural Massachusetts and Pennsylvania chose to use violence. Although it may have been a close affair in putting down Shays’ Rebellion, certain corrections had taken place by the time unrest raised its ugly head in Pennsylvania and other small territories in the early 1790s. The government was more cohesive and secure as a whole, and had addressed the issue of such a decentralized militia system as was in place before the Constitution and the Bill of Rights. It was not enough however, to make it a regular force. But it is important to note that in republican theory, it is not meant to be. When Madison thus called upon the militia to fulfill the role of an expeditionary force, it was woefully inadequate and rightfully so. It was the intention for it not to be, after all. The militia was not discredited in its role as public defender, or rather, as a powerful check against tyranny. It was shown, after the rebellions and wars of the Early Republic, how limited the militia could be, yet how well conditioned it was for domestic policing.
3. THE SECOND AMENDMENT, THE COURTS AND MODERNITY

Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the Heller Court held that individual self-defense is “the central component” of the Second Amendment right.166

- Macdonald v Chicago (2010)

The majority of this research project has contended with the reality, philosophies and conceptions concerning the historical background to the Bill of Rights and the Second Amendment. The regime in England after 1688 was one that professed greater freedom for corporate and individual interests than the one before. But it was limited as it was not a complete emancipation of previous controls and manipulations by the state, particularly the monarchical power structure in Britain. The new constitutional administration did increase the role played by Parliament and, to a degree, ended royal privilege. The 1688 revolution added the right of all good Protestants to bear arms explicitly within the purview of relevant legislation. The victors of 1688 pushed for this right in order to enhance the security of the person and the state against despotism and papal usurpations.

The establishment of a republic on American shores, very much in the tradition of Lockean liberalism and classical republicanism, provided the opportunity to codify and expand firearms ownership and legalization. Together, although with some tension, these two powerful ideological forces created a position in regards to arms and society that

166 McDonald v. Chicago, 561 U.S. 3025 (2010).
gave increased value to the individual without sacrificing the public good. Gone were the restrictions of the Early Republic and the various constitutional debates and conventions. As well, the implementation of hunting laws and ratifying events helped establish a sound basis of law.

As time goes by, old ways can be forgotten or simply not addressed at all. New generations have different values based upon their immediate surroundings that both change or solidify previously held beliefs. Justice, or what is good, is not the same thing as it was in the year 1776 for the majority of the people, or even for the various experts and scholars who today dedicate themselves to English Common Law or such principles as deemed important by conventional wisdom and political realizations. Bearing this in mind, the Courts in the United States, for various reasons, have became central in the kind of contemplations that happen over kitchen tables all over America. They are where the various inconsistencies of the law are worked out and, supposedly, fixed. As a result, any sort of dispute between rival political and social factions can be aided in their struggles for cultural and political acceptance by the court system. The individual right and collective right groups debating the meaning of the Second Amendment have now realized the power of the courts and openly quarrel in their halls. In other words, the courts can have an important normative effect on firearms legislation in America. As a result, it is important to look at the Second Amendment in modernity, the laws that have shaped some of the pivotal disputes involving it, and what exactly happened when the Second Amendment went to the courts.
3.1 The Second Amendment on Trial

Because its decisions about the limits of government power apply to the federal and state governments alike, the [Supreme] Court now engages in an endless process of adjusting and readjusting the permitted bounds of liberty in a variety of sensitive contexts.\(^{167}\)

- Nelson Lund, Constitutional Law Scholar

There have been only a few times when the Supreme Court has decided cases which dealt directly with the Second Amendment. These decisions have tended not to have an overly dramatic effect on an American’s ability to own firearms; various gun control and gun lobbies prefer instead to spend time in legislatures in order to do what they feel is in the common good. Most precedents for gun control have come from law making bodies at the county, state and federal level. This is how the US Constitution is set up: that law should come from the people’s political representatives. In today’s climate of litigation and political consciousness, people view the Supreme Court as a decision-making body with the capacity for either outright judicial review, or a more limited power to nullify laws or statutes. Five important cases that the courts have made decisions on regarding the Second Amendment are *US v Cruikshank*, *US v Miller*, *US v Emerson*, *DC v Heller*, and *Chicago v MacDonald*.

It is rather striking that the Supreme Court never heard a single case directly involving the various intricacies of the Second Amendment until the late 1930s, as most

\(^{167}\) Lund, “Federalism,” 77.
cases dealt with the state and federal relationship with arms as a backdrop. Either there was an outright consensus prior to the twentieth century or this was one of the greatest unresolved legal dilemmas in the United States. The Second Amendment could have been an issue so broad and a precedent so life altering that it was deemed too laborious, or simply too politically dangerous, to clearly resolve it. To believe such a line of reasoning is to believe that Americans were very willing to tranquilize various outstanding concerns throughout the hundred and fifty odd years they maintained constitutional continuity, just not that of arms. Slavery, taxation, welfare, prohibition were all issue that were mostly resolved by the time the Supreme Court accepted a case that directly involved guns. The courts had, in the past, tended to side with the more communal and militia-based interpretations, whereas today have consistently judged in favour of the individual right to keep and bear arms.

3.2 Late Nineteenth and Early Twentieth Century Cases

“The first [principle] is a declaration that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent.
The corollary, from the first position is, that the right of the people to keep and bear arms shall not be infringed.
The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.”168

- William Rawle, Prominent Pennsylvania Lawyer, 1829

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Legal precedents have helped both clarify and establish the full scope of the right to bear arms throughout the United States’ history. For example, *US v Cruikshank* (1875), which stemmed from a particularly nasty incident in Louisiana during the Reconstruction period called the Colfax Massacre, laid the groundwork for how the Fourteenth Amendment would be applied to the state-federal relationship. In Grant Parish north of New Orleans, in a newly gerrymandered district designed to give blacks a majority, a literal battle ensued between whites and blacks. The election of 1872 caused a stir in the region, and the Democratic candidate for sheriff had informed the Republicans’ candidate that he intended to seize the courthouse of the Parish’s capital, named after Grant’s vice president Colfax, with the aid of a white posse. In response, the Republicans mustered a large contingent of blacks, some of whom had already formed into a militia-like group, and proceeded to defend the courthouse. The black militia was unsuccessful, and nearly two-hundred of them were killed. As a result, a case was initiated by federal authorities against the various white persons involved, which eventually broke down to multiple trials and re-trials. Charges were filed against ninety-eight men at which point the crux of the defense was whether or not they had violated the Enforcement Acts – a series of laws that allowed for the federal government to ensure constitutional rights were being respected.

The prosecution accused the defendants of having engaged in conspiracy to deprive citizens of “the free exercise and enjoyment of a right or privilege granted or

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secured by the constitution, including the right to bear arms.” 172 The defense took issue with this, saying that they could not be in violation of federal laws as firearms fell under state control exclusively. That it was a matter of state militia activity and a regulation of the state there upon and, as a result, the federal regulations held within the Enforcement Acts did not apply. Several briefs submitted on behalf of the defense argued this point and also made mention of the newly ratified Fourteenth Amendment by suggesting that the Fourteenth Amendment limited federal involvement to simply ensuring that states enforced gun laws in a non-discriminatory fashion between races. 173

The Supreme Court ended up taking on the case and decided against the prosecution, coming to the conclusion that the right to keep and bear arms in the Constitution was different and distinct for the purposes of the militia than bearing arms as an individual in a lawful manner. 174 Therefore, the Second Amendment only applied to members of a militia, rather than citizens of the United States as a whole, which put the issue under state jurisdiction. The state of Louisiana was then free to prosecute the men involved in the Colfax Massacre, without federal molestation, much to the chagrin of the reconstruction forces in the South. This decision allowed for later gun control advocates to argue that states or counties could restrict weapons without the Second Amendment even applying.

_Cruikshank_ was an influential decision, albeit, one which has subsequently been undermined and overturned by later decisions. Cruikshank was a product of the times, as it seemed to be influenced by racial orders that were dominant during the late nineteenth

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century. The only way for the court to avoid punishing the guilty party was to construe them to be part of a militia and to designate that militia outside the federal government’s control. This was bad law, as the mob that attacked to courthouse could in no way be construed as a well-regulated militia. The Second Amendment does not protect mob rule. Indeed, as was seen during the Shays’ and Whiskey Rebellions, it opposes such disharmony.

The Cruikshank decision has been seen by some to be a vital precedent in Supreme Court decisions on the Second Amendment. It is true that the court did interpret the meaning of the Second Amendment to be exclusive to one’s role in a militia. However, upon reflection this decision was only in line with one other case, *US v Miller* (1939), where the New Deal era court observed that Jack Miller, having transported a shotgun from Oklahoma to Arkansas had taken part in interstate commerce and was therefore under the jurisdiction of the Department of the Treasury. The entire foundation for federal involvement in this case was due to recently acquired powers of the Narcotics Act, the National Firearms Act and several other laws regarding prohibition and other such legislation. It was because of this crackdown on both drugs, which had previously been legal and, alcohol, which was recently made legal once again with the ratification of the Twenty-First Amendment, that the federal government was able to intervene and halt Miller from transporting his shotgun across state borders. The issue with this particular weapon, which would become central to the decision rendered, was that Miller had altered it to a federally illegal length, with a barrel less than eighteen inches. In common vernacular this type of weapon is known as a sawed-off shotgun, designed for close range

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combat where the spread of the shot is exaggerated so as to cover more of an area. It is also made concealable by its lack of barrel and has traditionally been used for home defense and by various criminal and undesirable elements. With the murder of Miller before, the Supreme Court could even review the case, the reasons for his having this particular type of shotgun remain mysterious. Nevertheless, the case went ahead and the Court determined that a firearm, in order to be protected by the Second Amendment, had to have a legitimate militia function. Since Miller did not belong to a militia, and the weapon in question was not to be used for that purpose, he was subject to federal controls as he brought it across state lines.176

Gun control advocates have for years used the precedents in *Miller* and *Cruikshank* to argue for the legitimacy of gun control laws. Working with these Supreme Court precedents, it is suggested by the highest court in the land that an American’s right to a firearm rested solely upon state and local laws, not a federal mandate that defends individual rights from being infringed. This places the right solely as a state responsibility and allows for various laws that can have a restrictive quality. Under a more democratic interpretation of the Second Amendment, in conjunction with the Ninth and Tenth Amendments, the states would still retain some powers to regulate weapons. Outright bans or ways of inhibiting firearm ownership would be impossible for local authorities. This is the main thrust of more recent decisions, with the Supreme Court making a direct note of this in *DC v Heller* (2008). For a law restricting arms to be illegal, under the broad more modern interpretation by the courts, the law must have an undue restriction

on an individual right to be armed. This has been the more modern resolution of the Second Amendment debate.

3.3 Late Twentieth and Early Twenty-First Century in the Courts

Finally, we agree with the district court that firearms ownership is not inherently evil or suspect and that thus a certain mens rea is required [in order to disarm a citizen].

- Fifth Circuit Court of Appeals, US v Emerson (2001)

In 2001, a man in Texas was deemed by the Fifth Circuit Court to have been deprived of his Second Amendment rights by the Federal government. He had committed no crime, but a civil court had presented a restraining order against him, a common procedure by Texan state courts at the time, at the request of his estranged wife with whom he was currently going through a divorce. The importance of the case is actually quite simple: it was a watershed moment in the history of the Second Amendment. It was in this case that the federal courts set up the precedent by which later key decisions were based. Timothy Emerson, like a lot of Texans, possessed multiple firearms. However, there was a federal law at the time that required anyone with a restraining order against them to be disarmed. As a result, the Texas state precedent of issuing a restraining order in cases of marital distress actually put into motion a federal scheme by which Emerson’s lawfully possessed property was taken from him. As a result, he sued the federal government for violating his Second Amendment right to keep and bear arms as he was not convicted of any crime nor was he considered a risk for violence by the Texas courts.

Should Emerson have won the case, it would assure that the individual has a right to keep and bear arms and cannot be barred from such even when a court has issued a restraining order or other kinds of meaningful lawful orders against him. This was to be the case. The Court’s decision made very clear that the Second Amendment does protect an individual’s right to keep and bear arms and that interstate transportation of such possessions cannot be restricted – contradicting the Miller decision. Emerson was allowed to transport and keep possession of his weapons. The court found that he indeed did have an individual right, under the Second Amendment, to arms. Although the Supreme Court refused to review the case, this decision has stood and did so even at a time where it was politically popular to increase gun control.

Of the modern decisions, District of Columbia v Heller was probably the least effective in regards to actually setting a broad precedent about individual ownership of firearms. DC v Heller was a case that decided a very specific debate: whether or not the Second Amendment applied to federal enclaves such as the District of Columbia. As it turns out, in a five to four decision, it does. By that it is meant “The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” The DC v Heller decision also lays out that the District of Columbia ban on handguns, a type of arm that Americans overwhelmingly choose for the core constitutional purpose of self-defense, as well as the mandate for a trigger lock, as unconstitutional.178 The Supreme Court ruled that at least federally, the government cannot restrict your right to own firearms, regardless of militia involvement. The Supreme Court also held, again at

the federal level, that the concept of self-defense is integral to owning firearms and to the intention of the Second Amendment.

The court also split along what appears to be ideological lines when it decided the next high profile case regarding the Second Amendment, *Chicago et al v. MacDonald* (2010). This particular case has broader implications as it was to decide the relationship of the Second Amendment to the various states and counties. Could a city, such as Chicago in this case, effectively install what was called a gun ban? The ban was, in reality, a combination of excessive restrictions and regulatory burdens placed on the individual as to ensure that very few people actually could or would possess firearms. Not only did *Chicago v MacDonald* make a decision on whether or not counties and municipalities could restrict weapons, but whether or not states could as well. The court gained the power to decide this through the “Due Process of Law” clause in the Fourteenth Amendment which had a dramatic effect on the interpretation of the Bill of Rights. Traditionally the Bill of Rights was seen as a protection by the states against a hyper-expanding federal government. However, due to the wording of the Fourteenth Amendment, which explains that no citizen will be denied the due process and protection of the law, the courts have been forced to reconsider how the Bill of Rights is to be used in legal cases. In *Chicago v. MacDonald*, Otis MacDonald was a retiree who had been denied the right to keep a handgun at his home, as Chicago’s gun registration program prohibited such weapons. Although states and counties before the *MacDonald* decision were allowed to regulate arms in relatively unmolested ways, Chicago was deemed to be performing an illegal act by the Supreme Court in denying Otis MacDonald the ability to register his handgun (and thus legally own it).
The MacDonald case deals with many questions surrounding the real status of the Bill of Rights. Up until recently, as a result of what were called the *Slaughterhouse Cases* in 1873 – a series of appeals by butchers north of New Orleans to maintain their trade at a location deemed detrimental to the city of New Orleans and the state of Louisiana – it was believed that the Fourteenth Amendment applied to US citizenship, not to state citizenship and as a result, the Fourteenth Amendment was considered not to apply to the states and cities. However, what the National Rifle Association lawyers argued in *Chicago v. MacDonald* was for the overturning of the *Slaughterhouse* precedent, thus forcing municipalities and states to conform to the Bill of Rights. The 1873 decisions had opened the door for abuse by states towards its citizens that would not be legal on a federal level. Under the federal Constitution, all US citizens are supplied with various rights and such rights cannot be denied them simply on the grounds that an individual state has decided they should not exist. This precedent has played itself out over many issues and scenarios in American history and each time the universal principle has won over the parochial.

The current state of the Second Amendment in the courts is less a more lenient bend towards favoring firearms ownership than it is a broadening of the powers of the federal courts. By contradicting the *Slaughterhouse* decisions and firmly encompassing the right of citizens to keep and bear arms into the Second Amendment, the Supreme Court is playing a duel role. They are both correcting a possible misinterpretation of the Amendment by denying state and local jurisdictions the ability to restrict arms, while at the same time further interfering with and eroding state powers. The courts have set the precedent with the contemporary decisions of the *Emerson, Heller* and *MacDonald* cases.
that the Second Amendment does stand for an individual right to bear arms. The federal
government therefore is restricted in what it can do to infringe upon that right, as are the
states. Section One of the Fourteenth Amendment, interpreted contrary to the Cruikshank
and Slaughterhouse cases, allows for the federal government to ensure the proper process
of law to be enforced within the states. As a result, the Supreme Court is not ultra vires
when it comes to ruling gun bans in cities and states as unconstitutional.

3.4 Modern Legislation Regarding the Second Amendment

“Our complex society requires a rethinking of the proper role of
firearms in modern America. Our forefathers used firearms as an integral
part of their struggle for survival. But today firearms are not appropriate
for daily life in the United States.”179

- The late US Senator Edward Kennedy, D-MA

Despite the Supreme Court making recent rulings demanding that states and cities
comply with the individual right to keep and bear arms within the Second Amendment,
states still engage in the main regulatory actions regarding firearms that tend to generate
hard questions under the Bill of Rights.180 Over the course of history, it has been state and
local legislatures that have pioneered and established the real limits and freedoms of the
Second Amendment. By their actions towards a citizen’s right to keep and bear arms,
legislatures have established the boundaries of what rights an American truly possesses.
Various states have worked out their own problems and pushed through legislation within
the confines of their respective state constitutions. In fact, according to Nelson Lund, the

Court has begun “an endless process of adjusting and readjusting the permitted bounds of liberty in a variety of sensitive contexts.”\textsuperscript{181} Therefore, by stripping the states of the ability to wholly define the issue of the right to bears arms, the courts have given themselves ample amounts of work for the future. The courts have now become the final say in the various and inevitable contradictions and arguments that arise from a free society. Essentially, this is the structure of English Common Law, but the deciding power has been taken away from the states and the people. Originally this was not the case, as states were able to implement laws that restricted weapons with rather suspect impunity.

One of the first sweeping gun control laws to be passed and enforced was New York’s \textit{Sullivan Act} in 1911. The law pioneered the concept of issuing permits in order to limit the number of legal firearms held by private citizens. The \textit{Sullivan Act} is still law in New York State, now going the name of \textit{Section 400.00 of the New York Penal Law}.\textsuperscript{182} Spurred by the murder of a “muck-raking” journalist by the name of David Graham Phillips by a mentally disturbed violinist, the law was passed by the New York legislature. It was named after its proponent, Timothy Sullivan, who was a Tammany Hall political boss.\textsuperscript{183} Although cloaked in the usual language of protecting the public from mentally unwell people, in effect the legislation eliminated the ownership of concealable handguns in New York State. The law’s intention, in the end, was not to restrict handgun ownership to only the most intellectually fit, but rather to make it punishable with a severe prison sentence for a man to have on his person a revolver.

\textsuperscript{181} Lund, “Federalism,” 77.
“either concealed or displayed.” Even the New York City coroner became involved, explaining the true meaning behind the *Sullivan Act*. It was meant to stop the availability of handguns to the public, not to restrict their sale to the mentally unreliable. The coroner, a man by the name of George Petit le Brun, expressed that a revolver should be treated like straight poisons, such as carbolic acid, that gun sellers should be required to pay a high licensing fee, and that anyone looking to purchase a revolver would have to request a permit from the police. The permit would require basic information but, importantly, would also require the requester show what legitimate use they would have for the weapon, thereby undermining the principle of self-defense within the Second Amendment. The New York police would not issue a permit for an undisclosed reason; one had to produce proof of an active hobby associated with that weapon. It was therefore the express purpose of the law to restrict weapons to those to whom the state believed had a legitimate reason for such ownership. The Sullivan Act has been mimicked all over the United States, being seen as a model to expand the powers of government over the sale and distribution of firearms to the public. The real legal question was not over public safety, but rather the expansion or contraction of state authority over firearms.

The militia has also been transformed since the early days of the American republic. During the latter half of the nineteenth century the popularity of the militia waned and their professionalism ebbed. As a result of America’s entrance onto the stage of great power politics with the Spanish-American War, Congress realized that the previous reality of a skeleton army overshadowed by a large voluntary militia was not acceptable. For reasons previously discussed, a militia force is best suited for a defensive

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role, rather than an imperialistic one. In order to properly take part in expeditionary missions on behalf of world interests, the United States required a reformation of its military service. This reformation was partly accomplished with the passing of the 1903 Militia Act, also known as the Dick Act after Senator Charles Dick who championed it. The Act was a reshaping of the balance of power in regards to militias in America. To a degree, the militia was federalized. The law had three major reforms,

First: A great improvement in the efficiency of the National Guard, which will result as a consequence of governmental supervision and aid, better arms and equipment, and more thorough training;

Second: The placing of the National Guard, in an emergency, at the disposal of the general Government, whereby the President, in time of war, will be able to muster the whole of that force into the United States service, at twenty-four hours' notice, if necessary, to serve until the Volunteers are ready to take the field;

Third: The formation of a Corps of Reserve Officers, derived from sources outside of the Regular Army, but tested by examinations prescribed by the War Department, whose function in time of war will be to command our Volunteers.\(^{186}\)

The twentieth and twenty-first centuries National Guard is therefore a step up in professionalism from the older National Guard/militia model. The federal government took it upon itself to organize and equip the reserve military force. The National Guard therefore became an appendage of what today is called the Department of Defense.\(^ {187}\)

The Act, as well as the Constitution, leaves room for what would have been known as the general state militia previously. Since the National Guard is the officially recognize militia, organized under a federal scheme, it perceives itself to be the carrier of the militia tradition, rather than the modern parochial militias units of various states. The National


Guard was considered to be the part-time military force with a reserve militia constituting the rest of the semi-organized forces. These two institutions compliment the professional military to this day. In 1903, the National Guard totaled at 118,000 men and officers, with over 2,300 companies quartered in around 1,200 different towns.\textsuperscript{188} Today, the number has reached close to 700,000 members, making the modern American National Guard the largest active militia force in the world.

The modern militia has been organized as to provide for the defense of the United States, rather than for the individual states exclusively. This is a departure from the past and a clear break with the intent of the more anti-Federalist founders. The 1903 Act still intended the National Guard units to belong to the individual states but just be under federal aid and organization; however in 1933 the National Guard Mobilization Act was passed. This was the great fissure with the past that has created the current well known National Guard paradigm. It was in this bill that the National Guard, which had been previously made accessible to the president in times of distress, was officially incorporated into the federal system as a branch of the Army.

The modern developments in regards to firearms ownership and militia organization, namely the expansion of government and federal control over each, presents unique problems that the revolutionaries of the eighteenth century could not have foreseen. Nevertheless the current federal umbrella does not negate nor erase the importance of the original intent of the founding generation towards the scope of the Second Amendment. If anything it highlights the need for eternal vigilance in order to preserve liberty.

\textsuperscript{188} Parker, “Militia Act of 1903,” 280.
CONCLUSION

Arms and society: a dynamic and powerful topic that is perfectly reflected within the Second Amendment. The inheritance that the American colonists received from Europe provided for a strong and undeniable right to possess arms. Old England provided the backdrop for the American parochial system of arms. English landowners, determined to protect their local authority and protected by their militias, set up a system by which the central government and the monarch relied upon decentralized interests in order to effectively govern. This system was the fundamental structure that allowed for the development of various laws and freedoms that developed into the Enlightenment ideal that professed a right to arms. The English experience of rejecting absolutism in 1688 and the free Englishperson’s perceived notions of liberty greatly aided the creation of a codified right to arms.

But a right to arms could not exist without rights talk to begin with. The Enlightenment provides for the philosophical background for resistance to tyranny. What Locke and others managed to do was instill within the elites of society or anyone literate a passion for liberty. The Enlightenment gave philosophical credence and words to the very human longing for autonomy. This was in development prior to the 1600s, but in England it was especially prevalent. So much so that the conspiratorial and anti-Catholic segments of power, mostly vested in Parliament, managed to wrangle control not once, but twice, from the sitting monarch during the seventeenth century. The fortunes of the Netherlands and England were entwined, as we can see with the usurpation by the House of Orange of the English crown. Both countries managed to reject the autocracy that always threatened to swamp their borders and reduce their elites to the mere vassals of an
overwhelmingly powerful tyrant. The perceived freedom of the English in relation to their European kin and the hatred of oppressive foreign elites toward any form of liberalism left republicans feeling permanently threatened. Self-interest demanded they harness society to produce a militia culture. The people would then perform a kind of guerilla total war capable of harassing and dismaying any sort of foreign invasion. This would necessitate the creation of a general militia force to ensure that the totality of society could be harnessed should attempts at coercion by foreign powers occur. True, nothing really replaces a professional army in the field, but a militia can be a great deterrent to invasion.

The bloodless revolution of 1688 marked the creation of the right to what was hitherto a duty. To be armed was to exercise the full extent of one’s rights as an English citizen. Conspiracy theories, fears and securing a new Protestant regime had just as much to do with the right being included in the English Bill of Rights as did its rather dubious claim of being ancient and indubitable. But the legal reality of the situation is the same. After 1688, as Samuel Adams pointed out during the fallout from the Boston Massacre, the English citizen had a right to be armed. This would have huge consequences for the British on the American continent. As we know during the crisis with the Catholic kings Charles and James mid-seventeenth century, the American colonies began to demand accommodations beyond English law at the time. They believed in freedom of trade and the right to an unmolested democratic government – all of which were being impeded by the British Crown. Eventually, the situation began to deteriorate to such a point that General Gage devised his plan to disarm the people of Boston, a sore point for the
American patriots and among the reasons for revolution as claimed by the Continental Congress.

The militia, as predicted and recommended by Machiavelli, played an important role in the American Republic’s story. The American was will, in time of war, drop the plow and pick up the sword. This was, at least, the republican ideal. What the American continent saw of this was limited, but the conception was there in the founding generation. Many of the founders believed that the people of the land held a sort of moral superiority to those of the city. In this telling, the militia was a moral force, as well as military one. It secured the freedom of the people from both tyrant and invader. The American founding generation was therefore extremely interested in providing for their posterity an institution capable of protecting the rights of the people at large, as well as maintaining a kind of good government that defended the rights of the law abiding from the mob.

Arms and society is the fundamental relationship to observe when discussing the Second Amendment. Eventually, the American experiment determined that it required a constitution which further bound the states together in a common union. But this constitution was amended almost immediately after its adoption. Among these amendments is a specific right to a militia as well as to arms. The militia can only operate under the auspices that the people effectively use the weapons of war. In a time of immediate need the people could be relied upon to intervene on behalf of the state in order to defend the rights of the people – this was essential for the success of the American experiment in republican government. Madison, Jefferson, Washington, the Adams cousins, Hamilton, Mason, Henry and many others knew the importance of arms
in society. The militaristic spirit of the American settler was a core component of civic virtue. To be proficient in arms is of drastic importance to a free people. Should such a relationship disappear in favour of sloth and commerce, the republic would be vitally threatened.

Throughout the nineteenth century various cases resulted with the precedent being set that a state’s rights actually allowed for the curtailment of the right to arms of the people. In the modern era this has been reversed to a degree. *US v. Cruikshank* exploited the racist attitudes at the time in order to subvert the intent of law; this was void of any real philosophical underpinnings. *Cruikshank* combined with the *Slaughterhouse cases* and suggested that states were somehow not obligated to follow the same rules as the federal government. *US v. Miller* did not necessarily continue this trend, but simply expanded federal control by suggesting that arms fell under interstate commerce. This was a decision based in its time as one that fell in line with overall New Deal expansion of federal controls and authority.

It has only been the recent federal and Supreme Court decisions of *US v. Emerson*, *DC v. Heller*, and *Macdonald v. Chicago* that have seemed interested in the philosophical and historical origins of the Second Amendment. In these three cases the courts have declared their agreement with the belief that an American has a right to arms founded upon the wording and intent of the Second Amendment. The Supreme Court now understands that a free citizen is entitled to defend themselves and a free state. This is what the founders intended the Second Amendment to secure. The Second Amendment, and for that matter all amendments in the Bill of Rights, apply to the states as a result of the Fourteenth Amendment’s due process clause. The long term
ramifications of this legal interpretation cannot be determined or predicted here; the gun lobby has successfully caught on to this constitutional anomaly. If a state or the federal government cannot restrict speech to an undue degree, then any other level of government cannot restrict arms. The philosophical passion in America has thus come full circle.

Over the years, such institutions as the militia and the bearing of arms by the people have come under scrutiny. Although the militia seems to have morphed into a kind of federal military appendage in the National Guard, the right to bear arms for the individual has been taken up by the courts. The expanded role of the federal government that most Americans have to come to expect has diminished the cries for anti-Federalist style decentralization. And although the many sides of this debate may have figures and statistics which point to a perceived superior policy position, the Second Amendment remains unaltered.

The American citizen has a right to bear arms by which they may, if they so desire, join a militia for the defense of their free state from the force of tyranny. This right, so hallowed an institution, shall not be infringed. To do so would open the door to oppression via a tyrant and his army, sacrificing civic virtue upon the altar of uninhibited ambition.
BIBLIOGRAPHY


