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## BOOK REVIEW

### Is the True Meaning of the Second Amendment Really Such a Riddle? Tracing the Historical "Origins of an Anglo-American Right"

JOYCE LEE MALCOLM, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Harvard University Press) (1994).

REVIEWED BY T. MARKUS FUNK\*

"The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."<sup>1</sup>

"The right of his majesty's ... subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a right, but as a duty ...."<sup>2</sup>

"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."<sup>3</sup> (pg.412)

#### I. INTRODUCTION

Few topics of contemporary social, moral, and political debate can provoke as much raw emotion and open hostility as the Second Amendment, particularly in relation to the topic of gun

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<sup>1</sup> *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925).

<sup>2</sup> WILLIAM BLIZARD, *DESULTORY REFLECTION ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS* 59-60 (1785).

<sup>3</sup> U.S. CONST. amend. II.

prohibition.<sup>4</sup> This subject routinely causes many well-intentioned people of whatever view to give up all pretense of courtesy and reason in favor of ad hominem attacks on those with whom they disagree.<sup>5</sup>

Readers of history professor Joyce Lee Malcolm's *To Keep and Bear Arms: The Origins of an Anglo-American Right* will find these ugly by-products of the contemporary conflict refreshingly absent. Malcolm clearly keeps her distance from any broad normative judgments about the social utilities or costs of civilian firearms possession, offering instead a sober, scholarly, historical discussion of the Amendment's origins. Meticulously tracing the British history of regulations on firearms ownership from the Middle Ages on, she provides a detailed and illuminating history that includes the English Bill of Rights and, a century later, the American one.<sup>6</sup> Because it is only in this historical context that the Second Amendment's meaning can be fully understood and appreciated, Malcolm's book is essential reading for anyone interested in this complex and controversial subject.

## II. CAVEATS

While this review will be very positive, it is appropriate to begin by noting that it has what might be called the faults of its virtues. (pg.413) First, though Professor Malcolm's prose style is more than adequate, she is no Thomas Babington Macauley (the well-known Whig historian). Nor, of course, would she (or any other late twentieth-century professional historian) want to be. The simplicitude and un-self-conscious partisanship that lend Macauley's prose such verve and force are antithetical to the nuanced complexity and disinterest that are fundamental to everything the modern professional historian is trained to bring to her subject. Readers who are not predisposed to an interest in the subject, however, will find this book a great deal less entertaining than nineteenth-century Englishmen and Americans found Macauley's writings.

A more important deficiency for those deeply interested in the Second Amendment and gun laws is a serious neglect of the Amendment's background in both the philosophy of natural rights and that of civic republicanism. The reason for this neglect is not hard to find: indispensable though it will be to persons with those interests, this is *not* a study of the Second Amendment, nor is it a study of the modern gun debate. This is a study of the legal and political history of the English right to arms, with appropriate attention to the right's development in American colonial history leading to the Second Amendment. Though Professor Malcolm does not shrink from drawing appropriate

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<sup>4</sup> I purposefully choose the term "gun prohibition," rather than "gun control," as most accurately reflecting the ultimate issues in the debate. By self-definition, the objective of the National Coalition to Ban Handguns is to ban handguns, although the organization has renamed itself the Coalition to Stop Gun Violence, in deference to its wider goal of banning all firearms that are designed for, or readily adapted to, self-defense. The legislative agenda of the Coalition's major national rival, Handgun Control, Inc. ("HCI"), is somewhat different, though driven by the same anti-self-defense rationale. In the words of HCI chairwoman Sarah Brady, "[T]he only reason for guns in civilian hands is for sporting purposes." Tom Jackson, *Keeping the Battle Alive*, TAMPA TRIB., Oct. 21, 1993, at 6. Accordingly, HCI's ultimate goal is national gun licensing under which self-defense would not be accepted as a ground for gun ownership. Only sportsmen would be allowed to own guns. For a detailed discussion of these and other "gun control" groups, see Don B. Kates, Jr., *Bigotry, Symbolism, and Ideology in the Battle Over Gun Control*, 1992 PUB. INT. L. REV. 31, 33, and Don B. Kates, Jr. & Henry E. Schaffer, *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda*, 62 TENN. L. REV. 513, 514-16 (1995).

<sup>5</sup> See, e.g., Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995).

<sup>6</sup> See generally STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 44 (1984) [hereinafter HALBROOK, EVOLUTION OF A CONSTITUTIONAL RIGHT] ("The provisions of this English Bill of Rights were to be reflected a century later in the first ten amendments of the U.S. Constitution.").

conclusions as to the purpose and meaning of the Second Amendment, that is not an issue of particular interest to her. When her narrative reaches the eighteenth century, she offers a chapter on the American experience, though it focuses as much on the colonial legal history of arms laws and the militia as on the Second Amendment per se. She follows this with a concluding chapter on the post-eighteenth-century English laws. There is no similar coverage of post-eighteenth-century American arms law and policy.

Professor Malcolm barely mentions the natural rights and civic republicanism philosophers because, although their contribution to the American view of arms was crucial, their influence on the English common law tradition that preceded it was virtually nil. Malcolm's lack of interest in these philosophers is mitigated by her focus on the common law and the consequent discussion of Blackstone's views on arms. Blackstone's *Commentaries*, which were so influential on the American founding fathers, enunciated both the natural rights and the civic republicanism precepts. Thus, Blackstone taught the founders that: (a) the cardinal and inalienable natural right was the right to self-defense; (b) the right of each person to have arms for personal (pg.414) defense is an indispensable, inalienable ingredient in the right to self-defense; and (c) the three cornerstones of constitutional liberty were the right to petition for redress of grievance, the right to arms, and due process.<sup>7</sup>

Malcolm recognizes that these precepts were strongly avowed by the founding fathers and form the basis of the Second Amendment, but she says little about the philosophers who developed and espoused them. Leafing through the index discloses no reference to Locke, Burgh, Nedham, or Montesquieu, while the only reference to Sidney is for his execution, not his philosophy.<sup>8</sup> Readers interested in the Amendment's natural rights and civic republicanism background will have to look elsewhere for full exposition of these vital philosophies.<sup>9</sup>

### III. THE OPPOSING POSITIONS IN THE SECOND AMENDMENT DEBATE

To provide context for the following discussion, a cursory description of the opposing theories of the Second Amendment is useful. The Amendment has aptly been described as "one of the worst drafted of all [constitutional] provisions."<sup>10</sup> Those who interpret the Amendment as offering no protection to individual gun ownership focus on the textual reference to a "well regulated

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<sup>7</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*121, \*143-44; *see generally* 3 WILLIAM BLACKSTONE, COMMENTARIES \*4 (explaining the concept of how man developed his own property and his subsequent right to protect that property).

<sup>8</sup> JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 92 (1994). Montesquieu actually is mentioned in the text, though so briefly and tangentially that the indexer presumably felt it would be needless to note his name. A study of eighteenth-century American references to foreign writers finds Blackstone "was the most cited English writer, [and was] second only to Montesquieu [in] overall" American citations. *Id.* at 142.

<sup>9</sup> *See, e.g.*, HALBROOK, EVOLUTION OF A CONSTITUTIONAL RIGHT, *supra* note 6, ch. 1; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) [hereinafter Kates, *The Second Amendment*]; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

<sup>10</sup> Levinson, *supra* note 9, at 644; *see also* William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994) ("Perhaps no provision in the Constitution causes one to stumble quite so much on a first reading, or second, or third reading, as the short provision in the Second Amendment of the Bill of Rights.").

Militia."<sup>11</sup> They view the militia clause as a preamble that serves to restrict the Amendment's (pg.415) purpose and applicability,<sup>12</sup> and this interpretation "deprives the Amendment of any application to existing or proposed forms of gun control legislation."<sup>13</sup> Depending on how one views the costs and social utility of firearms in contemporary America, this effect of the so-called collective right approach can be either a good or a bad thing. But any serious examination reveals that an attempt to so minimize the Amendment produces a result-oriented oxymoron. Distinguishing it from another anti-individual right view—that the Amendment only protects the states' right to form armed militias—the leading law review commentary explains:

What [will] here[after be] denominated the "exclusively state's right" position is sometimes also described as the "collective right" theory. [But the latter must be differentiated from claims that the right to arms is] ... only a "collective right" of the entire people, by which is apparently meant a right that cannot be invoked by anyone either in his own behalf or on behalf of the people as a whole. It will be unnecessary to consider [this] at length ... because it is patently wrong. If the amendment was intended to guarantee a right to the people (and not the states), it is self-contradictory to say that because that right was conferred on everyone, no single person may assert it, or indeed, to describe something that guarantees nothing to any specific person or entity as a "right" at all. [This version of a] "collective right" theory fails to meet Chief Justice Marshall's elementary test for constitutional construction: "It cannot be presumed that any clause in the Constitution is intended to be without effect."<sup>14</sup>

In contrast, the alternative argument that gun prohibition advocates offer, the "states' right" view, cannot be dismissed out of hand. They portray the Amendment as intended to protect not the arms of the citizenry, but the states' "right" against federal disarmament of their militias. The states' right theory sees the Amendment as embodying the anti-federalists' objections to the military-militia provisions of Art. I, Section 8 of the Constitution, and "demand[ing] that the states (pg.416) [be allowed to] maintain control over the existing state militias as a counterweight to the expanding federal power."<sup>15</sup>

Standing against both the collective right and the states' right views is the position that the Second Amendment guarantees an individual right to law-abiding, responsible adults to choose to

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<sup>11</sup> See, e.g., George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631 (1992); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); Herz, *supra* note 5, at 64.

<sup>12</sup> See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (1988); Peter B. Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46 (1966).

<sup>13</sup> Lund, *supra* note 9, at 105; see also Levinson, *supra* note 9, at 644 ("The consequence of this reading is obvious: the national government has the power to regulate—to the point of prohibition—private ownership of guns, since that has, by stipulation, nothing to do with preserving state militias.").

<sup>14</sup> Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 211-12 n.31 (1983) [hereinafter Kates, *Handgun Prohibition*].

<sup>15</sup> Herz, *supra* note 5, at 64; see also Anastaplo, *supra* note 11, at 690 ("Some read the Second Amendment as protecting citizen-soldiers and the local militia against the depredations of the National Government, something which the state governments are supposed to resist."); Henigan, *supra* note 11, at 116-17 ("[T]he Antifederalists feared that the Militia Clauses of the Constitution had given the central government excessive control over the state militia, which was regarded as the guardian of the states' integrity.").

own firearms.<sup>16</sup> Generally described as the "*individual right*" interpretation, this position has been so uniformly endorsed in the scholarly literature<sup>17</sup> that both proponents and opponents have recently begun (pg.417) describing it as the "Standard Model" view of the Second Amendment.<sup>18</sup>

#### IV. HISTORICAL PARALLELS

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<sup>16</sup> For purposes of full and fair disclosure, I must admit that I was inclined to accept the states' right approach when I first examined the issue. I have since been persuaded by the cogency of the historical evidence showing that the Second Amendment provides protection for the individual's right to own and use a firearm for purposes of self-preservation, however. See generally T. Markus Funk, Comment, *Gun Control and Economic Discrimination: The Melting-Point Case-In-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 776-79 (1995) (arguing that those who favor the collective right and the states' right views, which contends "that the right to keep and bear arms is restricted to officially recognized military units," ignore the historical context of the Second Amendment's enactment).

<sup>17</sup> Over the past 15 years, support for the states' right and collective right positions has been largely confined to articles by paid officers or employees of anti-gun groups. Articles supporting the states' right and collective right positions are: Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417 (1995) (HCI's president); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993) (official of the Center to Prevent Handgun Violence); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982) (non-lawyer lobbyist for the National Coalition to Ban Handguns); Henigan, *supra* note 11.

Over the same period, the "individual right" Standard Model has been accepted by three preeminent figures in modern constitutional jurisprudence: Akhil Reed Amar, Sanford Levinson, and William Van Alstyne. For other sources accepting the "individual right" Standard Model, see ERIC FONER & JOHN A. GARRITY, SOCIETY OF AMERICAN HISTORIANS, THE READER'S COMPANION TO AMERICAN HISTORY 477-78 (1991); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-11, 1261-62 (1992); Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS (David J. Bodenhamer & James W. Ely, Jr. eds., 1993) [hereinafter Cottrol & Diamond, *Public Safety*]; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) [hereinafter Cottrol & Diamond, *The Second Amendment*]; Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s, Richard Aborn*, 22 FORDHAM URB. L.J. 441 (1995); Kates, *The Second Amendment*, *supra* note 9; Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986) [hereinafter Kates, *A Dialogue*]; David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995) [hereinafter Kopel, *Duck Hunting*]; Stephanie A. Levin, *GrassRoots Voices: Local Action and National Military Policy*, 40 BUFF. L. REV. 321, 346-47 (1992) (entry on "Guns and Gun Control"); Lund, *supra* note 9; Joyce Lee Malcolm, *That Every Man Be Armed: The Evolution of a Constitutional Right*, 54 GEO. WASH. L. REV. 452 (1986) [hereinafter Malcolm, *That Every Man Be Armed*]; Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983) [hereinafter Malcolm, *The Right of the People*]; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 328 (1990); Glenn H. Reynolds & Don B. Kates, Jr., *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) [hereinafter Reynolds & Kates, *The Second Amendment*]; Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994); Williams, *supra* note 9; Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) [hereinafter Cottrol & Diamond, *Auxiliary Right*] (reviewing JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)); F. Smith Fussner, *That Every Man Be Armed: The Evolution of a Constitutional Right*, 3 CONST. COMMENTARY 582 (1986) (book review).

For additional material on the individual right Standard Model, see MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 156 (1988); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (1988); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 84, 98 (1993); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991).

It bears emphasis that none of the scholars cited in the last two paragraphs were financed or employed by the gun lobby. If articles by persons so financed or employed were included, the list would be far longer.

<sup>18</sup> Compare Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (stating the Standard Model thesis) with Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62 (discussing views on both sides of the individual gun ownership debate).

In general, it is this Standard Model interpretation of the Second Amendment that receives the most support from the Amendment's historical lineage, as revealed in Professor Malcolm's book. While space limitations preclude recapitulating a work as fact-intensive as Professor Malcolm's, I shall concentrate on what I deem the most powerful historical evidence that sheds light upon the true meaning of the Second Amendment.

First, however, I want to emphasize some contemporary parallels for readers who might otherwise be inclined to dismiss this enterprise as having only historical interest. The historical episodes and events Professor Malcolm describes are laden with modern significance and contemporary parallels. Consider the following: as Blackstone observed, attempts to keep firearms out of the hands of the poor were regularly conducted under the guise of neutral laws, such as laws preserving game for hunting in seventeenth century England.<sup>19</sup> Throughout (pg.418) recent American history, laws motivated by a desire to disarm the poor—and particularly racial or ethnic minorities—have been presented as neutral efforts to ban "Saturday Night Specials" ("SNS"),<sup>20</sup> impose gun taxes,<sup>21</sup> impose licensure requirements for carrying firearms,<sup>22</sup> impose licensure requirements for owning firearms,<sup>23</sup> (pg.419) and so forth.<sup>24</sup> In medieval England, firearms could easily

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<sup>19</sup> "Prevention of popular insurrections and resistance to the government, by disarming the bulk of the people ... is a reason [more] often meant than avowed...." 2 WILLIAM BLACKSTONE, COMMENTARIES \*412. See generally Cottrol & Diamond, *Public Safety*, *supra* note 17, at 74. ("Game laws had long been a tool used to limit the arms of the common people.").

<sup>20</sup> "It is difficult to escape the conclusion that the 'Saturday night special' is emphasized because it is cheap and is being sold to a particular class of people. The name is sufficient evidence—the reference is to 'nigger-town Saturday Night.'" B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 50 (1976). Compare the observation of journalist and gun control advocate Robert Sherrill, that "[t]he Gun Control Act of 1968 was passed not to control guns, but to control blacks.... The fear of 'armed niggers' ran deep; the flood tide rose steadily up Capitol Hill...." ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL 280, 289 (1973). See generally Funk, *supra* note 16, at 776-79 (discussing how some states have adopted laws to remove the "so-called Saturday Night Specials from the market.").

The first federal SNS ban was proposed in the 1920s by a Southern Senator John H. Shields, who expressly invoked the duty of the "superior" race to disarm the inferior one. See Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. U. L. REV. 597, 601 (1995) [hereinafter Halbrook, *Congress Interprets*]. For an example of nineteenth century Southern use of SNS and gun tax laws to disarm the black population, thereby rendering them helpless against the white supremacist group, the Ku Klux Klan, see Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in RESTRICTING HANDGUNS 7 (Don B. Kates, Jr. ed., 1979) [hereinafter Kates, *Toward a History*].

<sup>21</sup> Halbrook, *Congress Interprets*, *supra* note 20, at 601.

<sup>22</sup> Robert J. Cottrol & Raymond T. Diamond, *'Never Intended to be Applied to the White Population': Firearms Regulation and Racial Disparity, The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995) [hereinafter Cottrol & Diamond, *Never Intended*]. The reference is to a Florida Supreme Court opinion reversing the conviction of a white man for carrying a concealed handgun. The concurring opinion frankly avows that the law's purpose was to disarm African Americans—it was "never intended to be applied to the white population." *Watson v. Florida*, 148 Fla. 516 (1941) (Buford, J., concurring).

<sup>23</sup> New York, one of the few states to have such a law, imposed it for the purpose of preventing Jews, Italians, and other immigrants from possessing handguns. See Kates, *Toward a History*, *supra* note 20, at 19; see, e.g., LEE KENNETT & JAMES L. ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* (1975); Don B. Kates, Jr., *The Battle Over Gun Control*, 84 THE PUB. INTEREST 42, 44-45 (1986) [hereinafter Kates, *The Battle*]. Since its enactment in 1911, the administrative process in New York City has become much more restrictive toward ordinary people so that it is difficult or impossible for them to obtain a license simply to own a handgun, even for the protection of their home or business. In contrast, licenses to actually carry a concealed handgun have readily been granted to members of the Rockefeller, DuPont, Cabot and Lodge families and other prominent and influential persons including William Buckley, Donald Trump, Lyman Bloomingdale, Uri Geller, Robert Goulet, Michael Korda and Art Linkletter. Perhaps surprisingly, licensure lists have included former Mayor John Lindsay, whose public position is one of opposition to gun ownership, and New York Times publisher Arthur Ochs Sulzberger, whose newspaper constantly editorializes that no one, rich or poor, needs a gun for self-defense. Kates, *The Battle*, *supra*, at 45; see also Kates, *Handgun Prohibition*, *supra* note 14, at 204 n.16 (citing *The Real Politics of Guns*, N.Y. TIMES, May 6, 1983, at A30, col. 1); see also *Taming the White Panthers*,

be self-manufactured, making total prohibition virtually impossible. Now, one-in-five handguns confiscated by the Washington, D.C. police is handmade; and during the wars in Southeast and Southwest Asia, local artisans were able to produce functioning AK-47 replicas in their backyard foundries.<sup>25</sup> In medieval England, criminals always had access to firearms through "illegal" means. Today, expansive surveys show that only about seven percent of handguns owned by violent felons were obtained through legitimate channels.<sup>26</sup> In medieval England, attempts to confiscate weapons almost always involve pervasive intrusions into the personal liberties of law-abiding citizens, such as house-to-house searches. Today, some advocates of gun prohibition suggest confiscating weapons through the use of "major weapon sweeps" in high crime areas.<sup>27</sup> This could be accomplished, they say, by making a "military attack" on high crime areas, that is, "mak[ing] a sweep through *those* neighborhoods, tak[ing] all the weapons.... [,]"<sup>28</sup> and they contend that seizing guns justifies that "some constitutional rights of citizens should be suspended."<sup>29</sup> (pg.420)

Indeed, few, if any, of the problems—be they empirical, philosophical, or moral—associated with contemporary attempts to outlaw guns are really that unique to the modern participants in the debate. Tracing just some of the English history that led up to our American Second Amendment serves to underscore this point.

## V. TENSION BETWEEN THE LIBERTIES OF THE CITIZENRY AND THE ABSOLUTE POWER OF THE MONARCH

Due to widespread hatred of permanent armies and mercenaries during the Middle Ages, the English Crown was forced to rely on the citizen soldier to defend the realm against outside (and

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N.Y. TIMES, Feb. 16, 1983, at A30, col. 1 (asserting that handgun prohibition would not discriminate against the poor because the average citizen, regardless of income level, lacks the necessary training and alertness to handle a gun).

Far from deploring the discrimination involved in granting of gun licenses, gun control advocates have endorsed them, holding out New York gun prohibition as a model for the nation. *See* Kates, *The Battle*, *supra*, at 46-47.

<sup>24</sup> *See generally* Cottrol & Diamond, *The Second Amendment*, *supra* note 17, at 309 (discussing Afro-American experiences with the Anglo-American right to bear arms and how it affects racial oppression and deprivations of liberty); Raymond G. Kessler, *Gun Control and Political Power*, 5 LAW & POL'Y Q. 381, 391-97 (1983) (explaining the five political functions of firearm control laws); William R. Tonso, *Gun Control: White Man's Law*, 17 REASON MAG. 22 (1985) (analyzing gun control as a means of race control).

<sup>25</sup> Funk, *supra* note 16, at 774.

<sup>26</sup> JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 186 (1986).

<sup>27</sup> President Bill Clinton, Remarks by the President during a Sacramento, California Town Hall Meeting (Oct. 3, 1993) (transcript available in the Executive Office of the President at the White House) (proposing the confiscation and destruction of householders' firearms).

<sup>28</sup> Paul Cotton, *CDC Investigators Explore New Territory in Aftermath of Unrest in Los Angeles*, 267 JAMA 3001, 3002 (1992) (quoting the president of the Los Angeles Medical Association) (emphasis added).

<sup>29</sup> Lauren Ina, *To Fight Crime, Official Would Suspend Rights: Head of Chicago Police Sparks Controversy*, WASH. POST, July 13, 1991, at A6 (quoting the superintendent of the Chicago Police Department); *cf.* David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 321 (1993) [hereinafter Kopel, *Peril or Protection*] ("One cannot comply with the Fourth Amendment—which requires that searches be based upon probable cause—and also effectively enforce gun prohibition."). *See also* David T. Hardy & Kenneth L. Chotiner, *The Potential for Civil Liberties Violation in the Enforcement of Handgun Prohibition*, in RESTRICTING HANDGUNS 194 (Don B. Kates, Jr. ed., 1979) (citing various gun control advocates' admissions (or urging) that gun bans are enforceable only through abandonment of protections against unreasonable search and seizure).

inside) aggressors. With no police force as we know it today, and without a standing army, the male English civilian was personally responsible for performing these and other civic duties.<sup>30</sup> Of particular relevance to our present discussion, Englishmen, bearing their own arms, were required to serve their sovereign in the militia, and as a result they considered themselves "the freest subject under Heaven ...."<sup>31</sup> As Professor Malcolm points out, historically speaking, the major issue that the English worried about was not how or whether to disarm the citizenry, but who was supposed to pay for their arms, and where they were obliged to go into battle.<sup>32</sup>

Unlike their seventeenth-century Continental counterparts, the English kings were unable to establish a permanent army and discharge the militia of their duty, primarily because the English were very cognizant of the fact that giving the sovereign such power was a sure way to lose any control over the king's actions.<sup>33</sup> Of course, one (pg.421) reason that the English were able to do without a standing army was that they were an island nation and commanded a strong fleet.

This intuitive distrust of a sovereign who possessed exclusive rights to the sword was emphasized in the writings of a number of prominent commentators. Machiavelli, for example, a consistent champion of the militia and opponent of standing armies, was widely read by educated Englishmen from the reign of Elizabeth onward. Proponents of the militia considered a professional army under the sovereigns' command a great threat to their liberties and felt that the militia, composed of citizen-soldiers, was a means of preventing the dangerous centralization of governmental power.<sup>34</sup>

But along with this increase in liberty also came an increase in the burden on average English subjects who were not only required to provide their own arms, but were also expected to spend several days or more on mandatory practice sessions and musters. Although a basic familiarity with firearms was thus common among the male English citizenry, the Crown, eager to become unchallengable by gaining the monopoly on the use of force, started its version of "gun control" by the sixteenth century.

In a partial attempt to curb the use of the ever more popular handgun to commit robberies, Henry VIII, in 1541, restricted the ability to own such a handgun, or a crossbow, to persons who earned at least £100 from land.<sup>35</sup> In many ways, it appears that Henry VIII was philosophically allied

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<sup>30</sup> In fact, the citizen soldier was held legally blameless for any harm he inflicted upon an assailant or a thief. MALCOLM, *supra* note 8, at 2.

<sup>31</sup> *The Security of Englishmen's Lives ...*, in STATE TRACTS: BEING A FURTHER COLLECTION OF SEVERAL CHOICE TREATISES RELATING TO GOVERNMENT FROM THE YEAR 1660 TO 1689, at 225 (1692), *cited in* MALCOLM, *supra* note 8, at 3.

<sup>32</sup> MALCOLM, *supra* note 8, at 4.

<sup>33</sup> Thomas M. Cooley, in his highly influential nineteenth-century treatise on constitutional law, said: The [Second] [A]mendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease.... The Right is General.... The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270-71 (1880), *reprinted in* Van Alstyne, *supra* note 10, at 1247.

<sup>34</sup> MALCOLM, *supra* note 8, at 5.

<sup>35</sup> *Id.* at 10. This restriction did not apply, however, to times of war or to those carrying the weapon to or from musters. *Id.*; *see also* HALBROOK, EVOLUTION OF A CONSTITUTIONAL RIGHT, *supra* note 6, at 42 ("Persons not meeting the property qualification of £100 could not carry or have, in his or their journey going or riding in the King's highway or elsewhere, any Crossbow or Gun charged or furnished with powder, fire or touche for the same....").



with those contemporary law-makers who used the lack of financial means as a method of keeping firearms out of the hands of the "undesirables" (that is, out of the hands of the poor).<sup>36</sup> Of course, that is not to say that today's politicians would be so obvious in their methods, since blatant attempts to reach this objective would appropriately be deemed unacceptable (and of course illegal) in today's political climate. Instead, more discrete mechanisms such (pg.422) as bullet taxes and melting-point laws are employed to reach the same outcome without incurring the attendant political costs.<sup>37</sup>

But not only the poor were subject to disarmament in ancient England—Catholics were also often considered to be potentially dangerous and subversive, and were therefore subjected to periodic selective disarmament. In the words of Professor Malcolm, "What is significant and ominous in the arms restrictions imposed on Catholics is not that they put a large group at a disadvantage, but that they set a precedent by singling out a section of the community as *potentially* dangerous and legally disarming them."<sup>38</sup> Efforts to keep the "common folk" from infringing on rights that the upper classes wished to reserve for themselves, such as hunting, were supported by the passage of "game acts" that employed minimum levels of property ownership as a crucible by which to measure one's fitness to keep a firearm. In fact, the passage of the 1671 Game Act, which again restricted firearms ownership to those who owned land worth £100 rental value—fifty times the property requirement to vote<sup>39</sup>—was the first attempt to remove the privilege of possessing a firearm from a majority of Englishmen in English history.<sup>40</sup>

Professor Malcolm, discussing the relatively low prices of firearms, points out that the comparatively low gun prices of the time had the positive effect of allowing ordinary citizens to protect themselves from predatory criminals (the wide-spread operations of "highwaymen" made the carrying of a firearm for self-defense a necessity), and that wealthy travelers were accompanied, in addition to their own firearms, by servants carrying arms.<sup>41</sup> Today, too, firearms provide a (pg.423) means of security for the average citizen against pervasive criminality—a means of defense that many wealthier citizens may be able to do without, given their ability to move to safe and well-policed areas, to "harden" their dwellings and businesses with security guards and systems, and to access responsive police officers. As in the seventeenth century, it is easy today for those who can afford to "buy" security to overlook the interests of those who cannot and instead must rely on a

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<sup>36</sup> Commenting on later game acts, Professor Malcolm observed that "[t]he use of an act for the preservation of game was a customary means to curb lower-class violence." MALCOLM, *supra* note 8, at 75; *see also* Cottrol & Diamond, *Public Safety*, *supra* note 17, at 74 ("Although English law recognized a duty and a right to be armed, both were highly circumscribed by English class structure.").

<sup>37</sup> *See* Funk, *supra* note 16, at 794 (noting the historical concept in the United States that the poor, especially the non-white poor, cannot be trusted with guns—thus melting-point laws have really been imposed to remove the least expensive guns from the market); *see also* Kopel, *Duck Hunting*, *supra* note 17, at 1338 n.29 ("Similar issues arise in the current American gun control debate with proposals to outlaw inexpensive handguns owned mainly by poor people—so-called Saturday-night specials—current prohibitions on gun ownership in many public housing projects, and proposals to impose extremely heavy taxes on ammunition."); T. Markus Funk, *Are Gun Control Laws Discriminatory?: Creating Economic Barriers to Gun Ownership Isn't the Solution*, 3 MIGHT MAG. 59 (1995) [hereinafter, Funk, *Gun Control Laws*] (chronicling the adoption of racially discriminatory gun control laws in America).

<sup>38</sup> MALCOLM, *supra* note 8, at 11.

<sup>39</sup> DAVID T. HARDY, *ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT* 32 (1986).

<sup>40</sup> MALCOLM, *supra* note 8, at 12; *see also* Cottrol & Diamond, *Public Safety*, *supra* note 17, at 74 ("The law regarded the common people as participants in community defense, but it also regarded them as a dangerous class, useful perhaps in defending shire and realm but also capable of mischief with their weapons, mischief toward each other, their betters, and their betters' game.").

<sup>41</sup> MALCOLM, *supra* note 8, at 84-85.

firearm to protect their families and belongings from predatory individuals. Indeed, academics who write on this subject sometimes project an elitist myopia that may well reflect their own safe and privileged position in society.

King Charles I, unhappy with what he considered the unreliability of the militiamen when it came time to fight for "unpopular causes," established his own field army.<sup>42</sup> Charles I's ultimately failed attempt to disarm English civilians provides another valuable lesson to those who today wish to ban the private possession of firearms. The lesson is that firearms prohibition, or rather prohibition in general, is nearly impossible to implement effectively without the jettisoning of personal liberties.<sup>43</sup> For contemporary examples, consider that commentators such as Harvard Professor James Q. Wilson suggest hand-held magnometers and walk-through metal detectors to locate illegal guns, and that the Berkeley, California city attorney has suggested that "weapons checkpoints" be set up to search all cars passing (pg.424) through "dangerous neighborhoods."<sup>44</sup> Such proposals are rejected by Americans who value their liberties and resent such suggested intrusions upon them.

Nevertheless, Americans living in cities such as Chicago, Washington, D.C., Los Angeles, and New York, where the private possession of firearms is strictly prohibited, apparently find the need to protect themselves and their families grave enough to force them into the uncomfortable position of violating these laws. Likewise, English civilians stubbornly clung to their firearms throughout the civil war and resisted attempts at popular disarmament.<sup>45</sup> It was only after years of ignoring the civil liberties of Englishmen, conducting house-to-house searches for weapons<sup>46</sup> (often based on the excuse of an impending plot),<sup>47</sup> and creating a substantial level of resentment among

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<sup>42</sup> *Id.* at 17; see also Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, reprinted in GUNS: WHO SHOULD HAVE THEM 127, 129 [ed: originally published at 310, 321] (David B. Kopel ed., 1995) [hereinafter Cottrol & Diamond, *The Second Amendment in GUNS: WHO SHOULD HAVE THEM*] (stating the general practice in the sixteenth century of relying on an intensively trained militia, rather than the male population as a whole in an attempt to remedy the indifferent proficiency and motivation that often occurred when the entire population was relied on).

<sup>43</sup> This is a reality that Professor Malcolm points out in various chapters of her book, but of particular interest is Chapter 5: "Enforcement of Arms Restrictions." See MALCOLM, *supra* note 8, at 77-93; see also HOWARD ABADINSKY, DRUG ABUSE: AN INTRODUCTION 232 (1989) ("The greater the pressure to 'do something about drugs' that is placed on the enforcers of the law, the greater is the temptation to avoid the significant constraints of due process in favor of unlawful (but often effective) shortcuts."); Auberon Herbert, *Salvation by Force*, in THE RIGHT AND WRONG OF COMPULSION BY THE STATE AND OTHER ESSAYS BY AUBERON HERBERT 227, 234 (Eric Mack ed., 1978) (suggesting that even when one possesses a great amount of force, it is not an easy task to compel people to do what they do not want to); Ethan A. Nadelman, *The Case for Legalization*, in THE DRUG LEGALIZATION DEBATE 17, 26 (James A. Incardi ed., 1991) ("[A few years into alcohol prohibition Americans] saw that more laws and police seemed to generate more violence and corruption, more crowded courts and jails, wider disrespect for government and the law, and more power and profit for the gangsters...."); see generally Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC MONTHLY, Mar. 1994, at 63 (arguing that it is not any easier for law enforcement to repress the illegal firearm trade in smaller cities versus the United States as a whole).

<sup>44</sup> Kopel, *supra* note 29, at 321 ("One cannot comply with the Fourth Amendment—which requires that searches be based upon probable cause—and also effectively enforce gun prohibition."); see also Polsby, *supra* note 43, at 64 ("No doubt it would be possible, though it would probably not be easy, to make weapons-free zones of shopping centers, department stores, movie theaters, ball parks. But it is not obvious how one would cordon off the whole of an open society.").

<sup>45</sup> Polsby, *supra* note 43, at 21.

<sup>46</sup> Professor Malcolm notes that "[t]he greatest weapon in the keeper's arsenal was the right to search." MALCOLM, *supra* note 8, at 88. "Charles had ordered general sweeps of households of forest residents several times before the Game Act was passed ...." *Id.* at 89; see also MALCOLM, at 96 ("In England, rebellion afforded the excuse to embark upon an expansion of royal power through a redistribution of firearms ....").

<sup>47</sup> Examples of these are: the "Popish Plot," which began in the autumn of 1678, causing Charles II to issue a proclamation requiring all Catholics to either swear an oath of allegiance or have their arms taken from them, and the "Rye House Plot" of 1683, during which the Crown attempted to disarm the more visible members of the Protestant opposition. *Id.* at 92.

the populace, that England became, under Charles II, subject to a permanent army, loyal only to the King, and that the Englishmen were viewed as being disarmed to the point that they no longer posed a credible threat to the Monarch.<sup>48</sup> "Charles II regarded armed subjects as a danger to be contained by 'successive steps' and through a 'train of enterprizes.'"<sup>49</sup> In order to reach this result, the "Privy Council" first demanded that gunsmiths provide a list of all guns produced and the names of all gun purchasers within the preceding six months;<sup>50</sup> then the King ordered warrantless searches of homes in an attempt to find stockpiles of arms.<sup>51</sup> Charles II then began to assemble the first (pg.425) peacetime standing army in English history—an army that would be loyal only to the Monarch.<sup>52</sup>

The attempt to disarm the populace, or at least certain segments or members thereof, and to transfer the power to the Crown continued, though more cautiously, when James Stuart ("James II") succeeded to the throne in 1685.<sup>53</sup> Given the oppressive means employed by Charles II, one might assume that the Englishmen were completely disarmed by the time of James II's reign; but in fact it appears that firearms were still easily available, from legal, illegal, and quasi-illegal sources.<sup>54</sup> Once again, this result should strike a familiar chord with modern-day students of the issue. Looking back at the multitude of devices employed by the English monarchs—most of which would be violations of contemporary American law—one must wonder how modern-day advocates of gun prohibition can hope to prevent people from acquiring firearms, given that even in prisons where inmates have few rights and privileges, guns, alcohol, and drugs are in no short supply.

James II, in an attempt to disarm those who could not reasonably be described as "suspicious persons" and who lived outside the range of the royal forests, tried unsuccessfully to revive Edward III's 1328 law restricting the carriage of arms.<sup>55</sup> After the Court of the Kings Bench showed an unwillingness to enforce this ancient law, James II turned to the Game Act of 1671—once again unsuccessfully—due to the practical difficulties of enforcing such a law against a populace unwilling to endure house-to-house searches for weapons (and enforcers unwilling to put the heavy-handed legislation into effect).<sup>56</sup>

In part as a reaction to regulations such as the oppressive Game Act of 1671, and in part because James II tried to rely solely upon a standing army, William of Orange, the Dutch prince who was "invited" to invade by a secret committee, had an easy time defeating James II and sailing his fleet into Torbay.<sup>57</sup> "It was the stubborn attachment of Englishmen to their faith and their liberty that

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<sup>48</sup> *Id.* at 52; HANNIS TAYLOR, THE ORIGINS AND GROWTH OF THE ENGLISH CONSTITUTION 371 (4th ed. 1896).

<sup>49</sup> MALCOLM, *supra* note 8, at 54 (quotations omitted).

<sup>50</sup> *Id.* at 42-43.

<sup>51</sup> *Id.* at 43.

<sup>52</sup> *Id.* at 52.

<sup>53</sup> *Id.* at 94.

<sup>54</sup> *Id.* at 92. Because of fear for their safety against Catholics, who were arming themselves, Protestants began to look for additional weapons during the "Popish Plot." *Id.*

<sup>55</sup> *Id.* at 104.

<sup>56</sup> *Id.* at 105.

<sup>57</sup> *Id.* at 111.

had caused their king's strength, 'like a spider's web,' to be 'broken with a (pg.426) touch.'"<sup>58</sup> Thus, the "Glorious Revolution" had occurred with barely a shot having been fired.<sup>59</sup>

## VI. THE ENGLISH BILL OF "TRUE, ANCIENT, AND INDUBITABLE" RIGHTS

As a direct result of James II's perceived subversion of the constitution of the realm, an ad hoc "Convention Parliament" was summoned in January of 1689 that presented William and Mary with a list of thirteen rights and liberties—the "Declaration of Rights"—that were viewed as embodying the "true, ancient, and indubitable" rights of Englishmen.<sup>60</sup> The reasoning underlying this presentation was that Parliament was weary of absolute Monarchs and was unwilling to merely substitute one for another. Consequently, Parliament required William and Mary to swear to uphold the rights contained in the Declaration before they were permitted to assume the throne.<sup>61</sup> Although the possession of arms was among those rights considered "true, ancient, and indubitable," Professor Malcolm points out, and the history discussed so far makes clear, that the right to bear arms was not in fact as long-standing as the Convention participants indicated.<sup>62</sup>

The debates over, and changes to, the Declaration of Rights, described as the "immortal bill" by Edmund Burke, provide a particularly useful insight into the intended meaning of the right. The final version of the bill provided that "the Subjects[,] which are Protestants[,] may have Arms for their defence[,] suitable to their Conditions[,] [ ] as allowed by Law," and the change in the bill's language from "*should* provide and keep arms" to "*may* provide and keep arms" "shifted the emphasis away from the public duty to be armed and toward the keeping of arms solely as an individual right."<sup>63</sup> The last-minute change of the phrase "may provide and keep arms for their *common* Defence" to "may have arms for *their* Defence" merely serves to fortify the implication that this right was considered to be a right of the individual to have a firearm to be used for his personal defense. Professor Malcolm correctly emphasizes the importance of these purposeful and meaningful linguistic alterations:(pg.427)

In light of this shift, it is particularly ironic that some modern American lawyers have misread the English right to have arms as merely a 'collective' right inextricably tied to the need for a militia. In actual fact, the Convention retreated steadily from such a position and finally came down squarely, and exclusively, in favor of an individual right to have arms for self-defence. Not only was the militia left out of the Declaration of Rights, but even the notion that private arms were necessary for common, as opposed to individual, defence was excluded.<sup>64</sup>

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<sup>58</sup> *Id.* at 112 (quotations omitted).

<sup>59</sup> *Id.* at 111-12.

<sup>60</sup> *Id.* at 115; TAYLOR, *supra* note 48, at 415-17.

<sup>61</sup> HARDY, *supra* note 39, at 35.

<sup>62</sup> *Id.*; MALCOLM, *supra* note 8, at 121-22.

<sup>63</sup> MALCOLM, *supra* note 8, at 118.

<sup>64</sup> *Id.* at 119. However, Professor Malcolm concedes that the addition of the phrase "suitable to their Conditions and as allowed by Law," the result of a compromise forced upon the Whigs, allowed later legislators to continue imposing some restrictions on handgun ownership. *Id.* "But though the right could be circumscribed, it had been affirmed." *Id.* at 121.

Whatever one may say about the wording of the English Bill of Rights, subsequent court cases and contemporary commentators make clear that the ownership of a firearm for both self-defense and as a mechanism to prevent tyranny was well-accepted.<sup>65</sup> Indeed, William Blackstone,<sup>66</sup> in his classic *Commentaries*, considered the right to bear arms the "natural right of resistance and self preservation" and viewed the right as necessary "to restrain the violence of oppression."<sup>67</sup> And while the right of individuals to keep and bear arms, like the declaration against standing armies, may not have been an "ancient and indubitable" right when the English Bill of Rights was drafted, there can be no doubt that by the late eighteenth and early nineteenth centuries it had become viewed as such. It is this heritage of considering the right to bear arms for self-defense as an unquestionable concomitant of citizenship that the Englishmen carried on their long voyage to the American colonies.(pg.428)

## VII. THE SECOND AMENDMENT: THE CONTINUATION OF A HISTORICALLY PRECEDENTED DEVELOPMENT

As noted in *Ex parte Grossman*,<sup>68</sup> the meaning of the American Bill of Rights can only be found by reference to the British institutions and the British common law upon which it was based. Those Englishmen who were adventurous enough to make the incommensurable journey into an uncertain future in the colonies were assured that they would continue to have "all the rights of natural subjects, as if born and abiding in England;" and this promise was actually incorporated into the charters of Virginia, Massachusetts, and Connecticut.<sup>69</sup> As Professors Cottrol and Diamond stated:

Like other sections of the Bill of Rights, the Second Amendment was an attempt to secure an existing right. The framers of the Bill of Rights did not believe they were creating new rights. Instead, they were attempting to prevent the newly formed federal government from encroaching on rights already considered part of the English constitutional heritage.<sup>70</sup>

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<sup>65</sup> See generally Lund, *supra* note 9, at 104 ("[E]ven if it is assumed that the Framers were exclusively concerned with the danger of federal despotism, overwhelming textual and historical evidence indicates that they chose to guard against that danger by securing the people's private right to arms.").

<sup>66</sup> Between 1760 and 1805, William Blackstone was cited by American political writers more than any other English writer. MALCOLM, *supra* note 8, at 142.

<sup>67</sup> 1 BLACKSTONE, *supra* note 7, at \*139, cited in MALCOLM, *supra* note 8, at 130; see also Van Alstyne, *supra* note 10, at 1247-48 (discussing Blackstone's distinction between "primary" and "auxiliary" rights. The former being those natural rights primary to each person intrinsically and the latter those inseparable from their protection, which really are themselves indispensable, "auxiliary" personal rights).

<sup>68</sup> *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925).

<sup>69</sup> See MALCOLM, *supra* note 8, at 138.

<sup>70</sup> Cottrol & Diamond, *Public Safety*, *supra* note 17, at 73; see also HARDY, *supra* note 39, at 35 ("The similarity between the 1688 Declaration of Rights and our own Bill of Rights is no coincidence: no founder of our own nation would have claimed fewer rights than those allowed an Englishman a century before."); TAYLOR, *supra* note 48, at 77 ("[T]he English colonies in America, which were finally transformed into independent commonwealths through their severance from the mother country, were in a legal and constitutional sense involuntary and unconscious reproductions of the English kingdom,—inevitable products of a natural process of political evolution.").

Of course, the English laws were only adopted by the colonists to the extent that they were suited to life in the colonies. For example, the English Game Laws clearly served no purpose in America, as game was plentiful, and no monarchs' hunting privileges needed to be protected. Likewise, there was no "handgun ban," because the need for firearms both for hunting and for protection was ever-present. The common-law right to arms incorporated in the Second Amendment was the law of the colonies that had virtually no restrictions on arms, and not the law of England, of which they were largely ignorant.

Not surprisingly then, the Second Amendment is written much more broadly<sup>71</sup> than the English Bill of Rights. The Second Amendment omitted the British language that allowed the Protestants to (pg.429) have firearms so long as they were "suitable to their condition and as allowed by law;" rather, the Amendment reserves the right for "the people."<sup>72</sup> Given the challenges faced by those living on the American frontier, it should not come as a surprise that the right to bear arms was expanded<sup>73</sup> to the extent that a number of colonies required that the inhabitants (that is, non-slaves and non-native Americans)<sup>74</sup> carry weapons.<sup>75</sup> "Seventeenth-century American experience considerably strengthened the colonies' transplanted English tradition of an armed population."<sup>76</sup> Professor Malcolm convincingly cites numerous passages from the various colonial Bills and Declarations of Rights enacted during the American Revolution that make it clear that the right of individuals to possess a firearm was widely considered one of the basic liberties guaranteed to a free people.<sup>77</sup>

Turning to the section of Professor Malcolm's book concerning the drafting and subsequent ratification of the Second Amendment, one prominent commentator has already pointed out that the arguments made here are ones with which students of the subject are likely already familiar and are consistent with the overwhelming bulk of scholarly work dedicated to the topic over the past fifteen years.<sup>78</sup> While this may be true, most readers of the book are not likely to be equipped with such a wealth of knowledge that they will be bored with this section, and it therefore provides insights and arguments that are probably novel to many.(pg.430)

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<sup>71</sup> See MALCOLM, *supra* note 8, at 138 ("[C]ircumstances in the colonies ensured that both the right and the duty to be armed were broader than the English original.").

<sup>72</sup> *Id.* at 136-37.

<sup>73</sup> See HARDY, *supra* note 39, at 41 ("In the American colonies, there was no need to debate the ownership of arms as a right: it had long since become a fact of life."); Cottrol & Diamond, *Public Safety*, *supra* note 17, at 75 ("The right and duty to be armed broadened in colonial America. If English law qualified the right to own arms by religion and class, those considerations were significantly less important in the often insecure colonies.").

<sup>74</sup> Cottrol & Diamond, *Public Safety*, *supra* note 17, at 75. ("[A]n armed white population was essential to maintain social control over blacks and Native Americans who toiled unwillingly as slave and servants in English settlements."); see also Cottrol & Diamond, *Auxiliary Right*, *supra* note 17, at 1012 ("The entire white population had to be enlisted to counter threats posed by the Indian population, the enslaved black population, as well as hostile European powers.").

<sup>75</sup> MALCOLM, *supra* note 8, at 139; see also Cottrol & Diamond, *Public Safety*, *supra* note 17, at 73 ("The maintenance of law and order was a community affair, a duty of all citizens."); Kopel, *Duck Hunting*, *supra* note 17, at 1337 ("Professional police forces did not exist during the Middle Ages; the government did not create them until the mid-nineteenth century in England—and in the United States. Civil defense was the responsibility of the people."); Levinson, *supra* note 9, at 646 (arguing that the Second Amendment could reasonably have meant to give people the individual right to possess arms for their personal defense given that a professional police force was still at least half a century away).

<sup>76</sup> Cottrol & Diamond, *Auxiliary Right*, *supra* note 17, at 1012.

<sup>77</sup> See generally MALCOLM, *supra* note 8, at 146-49.

<sup>78</sup> Kopel, *Duck Hunting*, *supra* note 17, at 1353-54.

The significance of guaranteeing the right to keep and bear arms to "the people" becomes clear when one reads the Second Amendment in context with the entire document. The Supreme Court, in *United States v. Verdugo-Urquidez*,<sup>79</sup> has recently pointed out what should be obvious after even the most cursory reading of the Constitution—that the phrase "the people" occurs several times in the Bill of Rights. The phrase appears in the Second Amendment's "right of the people to keep and bear Arms,"<sup>80</sup> the First Amendment's "right of the people to peaceably assemble,"<sup>81</sup> and the Fourth Amendment's "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."<sup>82</sup> The Court noted that the phrase "the people" is used as a "term of art" in those select parts of the Constitution that referred to individual Americans,<sup>83</sup> and the fact that the Second Amendment, unlike the English right, was written in an atomistic manner that embodied the free American form of government was used by Tucker, Story, and Rawle to disparage the more restrictive European governments.<sup>84</sup>

Indeed, the right of American citizens to keep and bear arms was made "*doubly* secure,"<sup>85</sup> given the historical context in which Madison drafted the Bill of Rights. Even though Madison was one of the original opponents of an enumerated bill of rights, he reached a compromise with the anti-federalists and simply chose nineteen of the roughly two hundred rights listed in a pamphlet that set out the demands raised in the state conventions,<sup>86</sup> adding the Ninth Amendment as a recognition that the enumeration of these nineteen rights did not imply that others were ruled out.<sup>87</sup> Whatever one may think about the wisdom of including a Bill of Rights in the Constitution which creates an artificial hierarchy of what otherwise would be co-equal liberties, one cannot doubt that those rights listed were included because they (pg.431) were considered the most fundamental, and therefore deserving of the greatest protection from government intrusion.

When the first Congress convened in March of 1789, it was James Madison who, on June 8, produced a first draft of the Bill of Rights. Madison's first draft of the Second Amendment read as follows: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."<sup>88</sup> This version was then altered and shortened by the senators to read as it does today:<sup>89</sup> "A well regulated Militia being

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<sup>79</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

<sup>80</sup> U.S. CONST. AMEND. II.

<sup>81</sup> U.S. CONST. AMEND. I.

<sup>82</sup> U.S. CONST. AMEND. IV.

<sup>83</sup> *Verdugo-Urquidez*, 494 U.S. at 265.

<sup>84</sup> Kopel, *Duck Hunting*, *supra* note 17, at 1334.

<sup>85</sup> Van Alstyne, *supra* note 10, at 1247.

<sup>86</sup> However, other authors have said that Madison selected the rights from a "scrapbook of newspaper clippings from around the country of proposed amendments, including those from the state conventions." Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, reprinted in 6 J. FIREARMS & PUB. POL'Y, 69, 108 [ed: originally published as 131, 169] (1994) [hereinafter Halbrook, *The Right of the People*].

<sup>87</sup> HARDY, *supra* note 39, at 71; RANDY E. BARNETT, THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 429 (1989).

<sup>88</sup> MALCOLM, *SUPRA* note 8, at 159 (citing Madison's version of a Bill of Rights).

<sup>89</sup> Professor Malcolm points out that this "streamlining" of the language was due in part to the framer's common understanding of the Amendment's historical and philosophical origins, thus feeling that explanatory phrases were unnecessary. *Id.* at 161.

necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>90</sup>

Throwing light on the intended meaning of the Amendment are some of the rejected motions. For example, a suggestion to insert "for the common defence" after "to keep and bear arms" was not accepted because the American Bill of Rights, like the English Bill of Rights, interpreted the possession of weapons as an individual, rather than a states' right.<sup>91</sup> Madison himself, discussing the benefits of the proposed constitution, compared the "advantage ... the Americans possess" with the circumstances in "several kingdoms of Europe ... [where] the governments are afraid to trust the people with arms."<sup>92</sup>

Unlike the English Bill of Rights, which restricted the right to bear arms to Protestants, and which allowed for restrictions upon the quality and type of weapon an individual could have, the American (pg.432) Bill of Rights "swept aside these limitations and forbade any 'infringement' upon the right of the people to keep and bear arms."<sup>93</sup> In addition to this direct evidence of the framers' intentions in drafting the Second Amendment, there are numerous statements by contemporaries such as Thomas Jefferson, James Madison, Richard Henry Lee, George Mason, and Patrick Henry that serve to emphasize this point. George Mason, who was unwilling to sign a Constitution that did not include a Bill of Rights, phrased it this way: "Who are the Militia? They consist now of the whole people."<sup>94</sup>

Not only does the legacy of the English Bill of Rights and the historical evidence concerning the drafting of the Second Amendment stand counter to arguments that the Amendment is applicable solely to today's National Guardsmen, but simple logic likewise makes such a conclusion untenable. Why, after all, would the founders have felt compelled to ensure that governmentally organized troops have weapons, given that it would be hard indeed for any military unit to perform its function in the absence of arms.<sup>95</sup> Article I, section 8 of the Constitution already grants the federal government the power to organize, train, and maintain the military and allows for the establishment, disciplining, calling out, and arming of state militias. Reading the Second Amendment as guaranteeing the right of the army to have arms is also simply impermissible because Madison grouped the right to bear arms along with freedom of speech and like rights. The Second

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<sup>90</sup> U.S. CONST. AMEND. II.

<sup>91</sup> MALCOLM, *supra* note 8, at 161. But *see* Kates, *A Dialogue*, *supra* note 17 (suggesting that the "common defense" language has been misunderstood). Kates argues that the common law strictly differentiated between "affrays," fights between families of otherwise good people, and the use of deadly force in defense of self and community against felons, outlaws and other enemies of the community. As to an affray, the common law imposed a duty that a person assailed in a quarrel between good people could not kill unless he had retreated as far as he could—and, even then, the killing was only an "excusable homicide" which would be pardoned as to the death penalty, but punished by forfeiture of the killer's estate. In contrast, the killing of a felon, outlaw or other invader was affirmatively sanctioned: classified as "justifiable homicide," it did not require any retreat, being viewed as defense at once of the victim and of the community. According to this interpretation then, a guarantee of arms possession "for the common defense" was not limited to joint action in the militia or posse comitatus. The common defense corresponded to justifiable homicide, but did not include the possession of arms for inter-family feuds and similar kinds of "affrays" between otherwise law-abiding people. *See Id.*

<sup>92</sup> THE FEDERALIST No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

<sup>93</sup> MALCOLM, *supra* note 8, at 162 (emphasis added).

<sup>94</sup> 3 J. ELLIOT, DEBATES IN THE GENERAL STATE CONVENTIONS 425 (3d ed. 1937) (statement by George Mason, June 14, 1788), *quoted in* Levinson, *supra* note 9, at 647.

<sup>95</sup> MALCOLM, *supra* note 8, at 163.



Amendment would be wholly unnecessary if it was in fact designed to ensure the military preparedness of the United States. To quote author Stephen Halbrook on this issue:

On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national army and also to organize 'the Militia.'<sup>96</sup> (pg.433)

There can be no doubt that, although scholars on both sides of the Second Amendment debate earnestly believe in the correctness of the arguments they are advancing, the weight of the research done on the topic heavily favors the Standard Model interpretation. Although hearing the popular media's Second Amendment analysis may convince one otherwise, a recent review of the approximately fifty published law review articles discussing the Second Amendment since 1980 points up a relatively significant fact: only eight of those articles support the states' rights interpretation of the Second Amendment, and of these eight articles, only one was written by a law professor.<sup>97</sup> While the vast preponderance of the scholarly work to date clearly supports the Standard Model interpretation,<sup>98</sup> those writing on the topic before the publication of Professor Malcolm's book were left somewhat wanting for a comprehensive historical analysis of the Amendment's English roots.

Even gun prohibitionists concede that the English tradition regarding gun ownership and the English Bill of Rights are the historical precursors to the United States Bill of Rights and, in particular, the Second Amendment,<sup>99</sup> but the conclusions drawn from this historical lineage differ quite dramatically. At bottom, the appearance of Professor Malcolm's book does not provide much joy to those who view the Second Amendment as existing only to ensure that those in the military will not have their guns taken away by the government (a rather odd scenario in itself), and the work provides damning historical evidence against the states' rights approach. The book should provide a great deal of joy to those who seek an honest and thorough account of the origin, and therewith the meaning, of the Second Amendment, however. As anyone who has ever studied this contentious issue knows all too well, it is easy to simply assert that the Second Amendment supports only a states' right to keep and bear arms, but it is much more difficult to prove this point; with the appearance (pg.434) of Professor Malcolm's book, this task can well be described as herculean.

### VIII. BUT WHAT IF MALCOLM'S INTERPRETATION OF THE SECOND AMENDMENT YIELDS UNACCEPTABLE NORMATIVE RESULTS?

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<sup>96</sup> Halbrook, *The Right of the People*, *supra* note 86, at 73 [ed: originally published as 133]; *see also* MALCOLM, *supra* note 8, at 163-64 ("The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army.").

<sup>97</sup> Three articles were written by paid employees of anti-gun organizations, one by a politician, and three by law students. *See* Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 353 J. CONTEMP. L. 359 (1994) [hereinafter Kates, *Gun Control*] ("True, both the American Bar Association and the ACLU endorse [the] frivolous states' right claim. But scholarly research over the past fifteen years has destroyed what scant historical support it ever had."). Andrew Herz's recent article changes these statistics slightly. *See* Herz, *supra* note 5, at 57.

<sup>98</sup> *See supra* note 17.

<sup>99</sup> *See, e.g.*, FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 141 (1987).

The historical evidence of the Second Amendment's true meaning notwithstanding, it may be argued that firearms are somehow inherently bad and that their mere presence in an individual's home has a crime-eliciting effect (to wit they turn an otherwise law-abiding person into a criminal in a moment of ungovernable anger). Even assuming that this is true (a rather large assumption in light of the current state of the research),<sup>100</sup> this argument could at most support a call to repeal the Second Amendment, not a call to misinterpret it.<sup>(pg.435)</sup>

Whatever merits the various evaluations of firearms' social utility may have, they are absolutely irrelevant for purposes of constitutional analysis (a point that cannot possibly be overstated). Empirical evaluations of this sort play no part in constitutional interpretation. Whether firearms are "good" or "bad" for society may someday affect the legislators' choice to amend the U.S. Constitution, but it does not change the nature, the existence, or the fundamental character of the guarantees made in the Bill of Rights.

## IX. CONCLUSION

Let there be no doubt that we have a very real problem with handgun violence in the United States. But let there likewise be no doubt that prohibiting the possession of firearms by law-abiding citizens is not the convenient and quick cure for this complex and troubling societal problem. Both gun prohibitionists and gun-control advocates (that is, those who want to enforce laws such as those

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<sup>100</sup> For an example of the characteristics of individuals who intentionally shoot someone, see BRENDAN F.J. FURNISH & DWIGHT H. SMALL, *THE MOUNTING THREAT OF HOME INTRUDERS: WEIGHING THE MORAL OPTION OF ARMED SELF-DEFENSE* 53 (1993) ("The typical murderer has a prior criminal history extending over at least six years."); JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 137 (1983) (comparing the "average" gun owner to the "average" criminal, indicating that the two have very different backgrounds, social outlooks and economic circumstances); Mark Benenson & Don B. Kates, Jr., *Handgun Prohibition and Homicide: A Plausible Theory Meets the Intractable Facts*, in *RESTRICTING HANDGUNS* 104 (Don B. Kates, Jr. ed., 1979) (stating that the average handgun owner probably has no felony record, whereas the average murderer likely has a lengthy criminal history); for a variety of studies, see *id.* at 226; Kates, *Gun Control*, *supra* note 97, at 378 ("FBI national data for an earlier five year period showed that arrested murderers who had an adult criminal record had an average prior criminal career of at least six years duration, including four major felony arrests."); Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 *J.L. & CONTEMP. PROBS.* 35, 40-41 (1986) [hereinafter Kleck, *Policy Lessons*] (showing study that about seventy to seventy-five percent of domestic homicide offenders have had previous arrests and about half have been previously convicted); Kopel, *Peril or Protection*, *supra* note 29, at 324-35 ("[T]wo-thirds to four-fifths of homicide offenders have arrest records, frequently for violent felonies .... The murderers without felony records are mostly persons with records of prior arrests ....").

For an example of the characteristics of those who "accidentally" shoots someone, see DAVID B. KOPEL, JR., *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES* 415-16 (1992) [hereinafter KOPEL, *THE SAMURAI*] ("Most of the 1,700 people involved in a typical year's fatal gun accidents are not normal gun owners but self-destructive individuals who are also disproportionately involved in other accidents, violent crime and heavy drinking...."); Julian A. Waller & Elbert B. Whorton, *Unintentional Shootings, Highway Crashes and Acts of Violence*, 5 *ACCIDENT ANALYSIS & PREVENTION: INT'L J.* 351-56 (1973) (discussing Vermont study which revealed that accidental shooters were significantly more likely to have been arrested—arrested for a violent act, arrested in connection with alcohol, involved in highway crashes, given traffic citations, and to have had their driver's licenses suspended or revoked). See also GARY KLECK, *POINT BLANK GUNS AND VIOLENCE IN AMERICA* 285-95 (1993) [hereinafter KLECK, *POINT BLANK*] (examining common factors associated with gun accidents); Philip J. Cook, *The Role of Firearms in Violent Crime: An Interpretative Review of the Literature*, in MARVIN E. WOLFGANG & NEIL WEILER, *CRIMINAL VIOLENCE* 269 (1982) (discussing the effects of changes in gun availability on the rates and incidents of violent crime); Kleck, *Policy Lessons*, *supra*, at 40-41.

For a discussion of firearms and self-defense, see Gary Kleck & Marc Gertz, *Armed Resistance to Crime: the Prevalence and Nature of Self Defense With a Gun*, 86 *J. CRIM. L. & CRIMINOLOGY* 150 (1995) [hereinafter Kleck & Gertz, *Armed Resistance to Crime*]; Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 *J. CRIM. & CRIMINOLOGY* 188 (1995); see also JOHN STUART MILL, *ON LIBERTY* 80 (1978) ("If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational considerations of distant motives, society has itself to blame for the consequences.").

which prevent felons and the insane from possessing firearms) share a common concern about the criminal misuse of firearms. Dividing these two groups are the hard-to-resolve empirical, moral, and philosophical questions over how to best control criminal misuse of firearms. Instead of heeding the siren's call for the wholesale legislative prohibition of all firearms, we must fortify and, when necessary, *incrementally* modify the volumes of laws relating to gun use (or, more appropriately, misuse) already "on the books."<sup>101</sup> The current debate over gun-prohibition—carried on with equal vigor in this nation's universities, (pg.436) as it is in its bars, in its coffee shops, and on its computer networks—is not likely to be resolved with any finality in our lifetimes. One can only hope that individuals on both sides of the argument bear in mind that the debate over gun prohibition is not unique to contemporary America, that it has an instructive historical pedigree, and that it would be folly to suggest that the problem of violent crime in contemporary society is amenable to being solved by implementing quick-fix legislation or by turning a blind eye towards the wholesale diminution of our individual liberties. This was understood all too well by the founding fathers, and it should be kept in mind by us as well.

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<sup>101</sup> See generally FRIEDRICH A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (1988) (recognizing the insuperable limits on human knowledge and suggesting that these limits should serve as a lesson in humility to those students of society who attempt to control society by creating teleocratic and speculative metaphysical systems instead of more appropriately recognizing the limits of reason in a nomocratic, or purpose-neutral, fashion); Karl Popper, *Piecemeal Social Engineering*, in POPPER SELECTION 40-41 (David Miller ed., 1984) (stating that the "piecemeal social engineer" proceeds carefully, comparing the results he expects with the unwanted consequences of any reform, and avoids undertaking complex reforms which make it impossible for him to separate causes and effects and to know what he is really doing); THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* 21 (1980) ("Despite the fashionable practice of personifying 'society' as a decider and actor, decision making in the real world can be understood only in the context of the actual decision-making units that exist, and the specific, respective sets of constraints and incentives within which each operates....").