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HISTORICAL BASES OF THE RIGHT TO KEEP AND BEAR ARMS

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In analyzing the right to keep and bear arms, we must constantly keep in mind that it is one of the few rights in the Constitution which can claim any considerable antiquity. Freedom of the press, for instance, had little ancestry at common law: statutes requiring a government license to publish any works on political or religious matters were in effect in England until 1695, when they were allowed to expire for economic, not libertarian, reasons.[1] Long after that date, prosecutions after-the-fact for seditious libel were common. In the Colonies, these and similar statutes were likewise enforced and offending religious material was burned in Massachusetts as late as 1723.[2] Protests against general search warrants did not become common until after 1760, and the invalidity of such warrants at common law was not recognized until the eve of the American Revolution.[3]

In contrast to these rights, the right to keep and bear arms can claim an ancestry stretching for well over a millennium. The antiquity of the right is so great that it is all but impossible to document its actual beginning. It is fairly clear that its origin lay in the customs of Germanic tribes, under which arms bearing was a right and a duty of free men; in fact, the ceremony for giving freedom to a slave required that the former slave be presented with the armament of a free man.[4] He then acquired the duty to serve in an equivalent of a citizen army. These customs were brought into England by the earliest Saxons. The first mention of the citizen army, or the "fyrd" is found in documents dating to 690 A.D., but scholars have concluded that the duty to serve in such with personal armament "is older than our oldest records." (Not knowing of the earlier records, 18th century legal historians including the great Blackstone attributed the origin of the English system to Alfred the Great, who ruled in the late 9th century A.D.)[5]

This viewpoint of individual armament and duty differed greatly from the feudal system which were coming into existence in Europe. The feudal system presupposed that the vast bulk of fighting duties would fall to a small warrior caste, composed primarily of the mounted knight. These individuals held the primary political and military power. Thus peasant armament was a threat to the political status quo. In England, on the other hand, a system evolved whereby peasant armament became the great underpinning of the status quo and individual armament became viewed as a right rather than a threat.

This in turn significantly changed the evolution of political systems in Britain. Since so much military power lay with the private citizen, the traditional monarchy was necessarily much more a limited monarchy than an absolute one. Even after the Norman (pg.46) Conquest of 1066, which brought feudal systems into Britain, kings regularly appealed to the people for assistance. William Rufus, second Norman king of England, was driven to appeal to the citizenry to put down a rebellion of feudal barons. To obtain the assistance of the individual armed citizen, he promised the people of England to provide better laws then had ever been made, to rescind all new taxes instituted during his reign, and to annul the hated forest laws which imposed draconian punishments; inspired by his promises, the citizenry rose with their arms and defended his government against the rebels.[6] After his death, his brother, Henry I, often drilled the citizen units in person, seeking to appeal to the

individual members. In short, kingship in Britain became a far more democratic affair than it would ever become on the Continent, due in major part to the individual armament of the British citizen.

The Angevin monarchs expanded this still farther. Henry II, who is considered the father of the common law, promulgated the Assize of Arms in 1181. This required all British citizens between 15 and 40 to purchase and keep arms. The type of arms required varied with wealth; the wealthiest had to provide themselves with full armor, sword, dagger, and war horse, while even the poorest citizens, "the whole community of freemen", must have leather armor, helmet and a lance.[7] Twice a year all citizens were to be inspected by the king's officials to insure that they possessed the necessary arms. Conversely, the English made it quite clear that the king was to be expected to depend exclusively upon his armed freemen. When rebellious barons forced John I to sign the Magna Carta in 1215, they inserted in its prohibitions a requirement that he "expel from the kingdom all foreign knights, crossbowmen, sergeants, and mercenaries, who have come with horses and weapons to the harm of the realm."

Henry III continued this tradition. In his 1253 Assize of Arms he expanded the age categories to include everyone between 15 and 60 years of age, and made a further modification which bordered on the revolutionary. Now, not only were freemen to be armed, but even villeins, who were little more than serfs and were bound to the land. Now all "citizens, burgesses, free tenants, villeins and others from 15 to 60 years of age" were legally required to be armed.[8] Even the poorest classes of these were required to have a halberd (a pole arm with an axe and spike head) and a knife, plus a bow if they owned lands worth over two pounds sterling.

The role of the armed citizen expanded under the rule of the four Edwards. During civil wars in Wales, Edward I discovered the utility of the Welsh longbow, an extremely potent bow (its pull was estimated to have been between 100-200 pounds, whereas today a 60-pound bow is considered extremely powerful) which could penetrate the heaviest armor. Unlike the crossbow (and to an even greater extent, the armor and horse of the mounted knight) the longbow could be made cheaply enough and maintained easily enough to become the universal armament of all citizens. While on the Continent so deadly a weapon was considered a threat to the rule of the armored knight, in Britain its use was encouraged by the monarch. At Crecy, Poitiers and Agincourt, the longbow in the hands of British commoners decimated the French armored (pg.47) knights. By 1369 Edward III was ordering the sheriffs of London to require "everyone of said city stronge in body, at leisure time on holidays" to "use in their recreation bowes and arrows."[9] He hardly needed the encouragement; the archery ranges outside London were so constantly swamped with arrows that no grass would grow upon them. Edward IV continued this policy, commanding that "every Englishman or Irishman dwelling in England must have a bow of his own height", and commanding that each town build and maintain an archery range upon which every citizen must practice on feast days.[10] In 1470 he banned games of dice, horseshoes, and tennis in order to force citizens to use nothing but the bow for sport.[11] He imposed price controls on bows in order to ensure that bows would be inexpensive enough for even the poorest citizen to purchase them.[12]

While the common law sought to force all commoners to possess what was then the most deadly military weapon, it also imposed only the most minimal restraints upon use of that weapon. These focused purely upon criminal misuse of the weapon or its transportation into certain highly protected areas. In 1279, for instance, those coming before the royal courts were required to "come without all force and armor".[13] The Statute of Arms, whose date of enactment is uncertain, required that spectators at tournaments attend without armament and that those participating in the tournament carry swords without points.[14] The 1328 Statute of Northampton prohibited anyone, other than the king's servants or citizens attempting to keep the peace, from coming before the king's

ministers "with force and arms", or acting "in affray of the peace", and from going or riding "armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers nor in no part elsewhere...."[15] In light of the common law preference for individual armament, however, English courts construed this to mean that only carrying of arms in a threatening or terrifying manner was prohibited. In the words of William Hawkins in his "Pleas of the Crown", "no wearing of arms is within the meaning of the statute, unless it be accompanied with such circumstances as are apt to terrify the people; from which it seems to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons...."[16] Thus the sole common law restraints upon use of armament in this period focused either upon carrying into specially protected areas or upon what today would be considered assault with a deadly weapon.

While firearms had been invented sometime before, only in the 16th century did they become truly portable with the invention of the wheellock. This breakthrough inspired a number of attempts in Europe and England to control weaponry. The Emperor Maximilian attempted to impose bans upon wheellock manufacture throughout his empire on the Continent; the French imposed strict controls both upon manufacture and sale of firearms and upon assembly of ammunition and making of powder.[17] The English briefly experimented with such but found them repugnant to their institutions. Henry VII had in 1503 banned the shooting of crossbows upon an extremely limited basis.[18] First, only shooting and not possession was outlawed, and that only without a license or "placarde" from the king. Secondly, an exception was made for those who shot in (pg.48) defense of a residence ("but if he shote aw of a howse for the lawefull defen of the same") and for lords who owned land worth 200 marks per year. Third, as might be surmised from the ban upon shooting rather than upon ownership, the purpose was to force citizens to use the longbow, which was considered a much deadlier weapon.

His successor Henry VIII was a great devotee of the longbow and early in his reign attempted to push its use by still more vigorous means. In 1511 he enacted "an act concerning shooting in longe bowes" which banned games, required fathers to purchase bows for sons between the ages of 7 and 14 and to "lern theym and bryng theym up in shootyng". From age 14 until 40 each non-disabled citizen was obliged to practice longbow shooting and also to have bow and arrows "contynually in hys house." Anyone who failed to own and use a longbow was subject to a fine. The ban upon crossbows was renewed and the property requirement for such was raised to 300 marks.[19]

In 1514 Henry extended the ban upon crossbows to include "handgonnes" (which at that time meant any firearm carried by hand, as opposed to cannons, rather than what are today called "pistols"), and to extend the ban to possession as well as shooting.[20] Once again the intent was to force ownership and use of the longbow in place of the less efficient firearms of the time.

Unlike his continental equivalents, Henry was soon forced to give up his attempt at gun control. In 1523 the property qualification was lowered from 300 pounds sterling to only 100 pounds, and the penalty was reduced from imprisonment and fine to a fine only.[21] In 1541 the statute was again amended (adding in its preface a protest that despite the earlier law people "have used and yet doe daylie ryde and go in the King's highwayes and elsewhere, having with them crosbowes and little handguns") to permit ownership of the longer arms (over three-quarters of a yard or one yard in total length, depending upon type) by any citizen, and ownership of the shorter arms by citizens with over 100 pounds' worth of land.[22] It also prohibited shooting within a quarter of a mile of a town except upon a range "or for defense of his person or house", and provided that "it shal be laufull from henceforth to all gentlemen, yoemen and servingemen ... and to all the inhabitants of citties, boroughes and markett townes of this realme of Englande to shote with any handgune, demyhake or hagbutt at anye butt or bank of earth ... to have and kepe in everie of their houses any such

handgune or handgunes ... with the intent to use and shote the same at a but or bank of earth ... this present act or anythinge therein conteyned to the contrarie notwithstandinge." Eventually Henry gave up the entire effort and simply rescinded his firearm laws by proclamation.[23] Weapons control—at least that which limited armament rather than required it—was recognized as repugnant to the English system. Indeed, the Tudor legal commentator Sir John Fortescue would comment (in his comparison between the happy state of peasants in England, with its limited monarchy, and the unhappy state of peasants in France, with absolute monarchy) that the French peasants were so poorly off that they not only starved but could not have any "Wepen" or the means to obtain it.[24] The consciousness of English as a weapons (pg.49) owning and using people, in contrast to the French and other Continentals, was beginning to take form.

Under Elizabeth the English militia system developed still farther; indeed, it was during her reign that the phrase "militia" was first used to describe the concept of a universally armed people ready to stand in defense of their nation.[25] The militia were now mustered by county lieutenants and called to formal musters to display and practice with their weapons.[26] Elizabeth also sought the creation of "trained bands" or "train bands", which were small militia units given special training and provided with governmentally purchased arms.[27]

Her efforts largely decayed under her successor James I, who permitted repeal of some of the most important militia statutes. His successor, Charles I, paid the price. Increasing hostility from Parliament, which was now beginning to assert itself as a distinct legislative body, brought the kingdom to the brink of civil war. The king compromised, sending his best advisor to the scaffold, but when Parliament asked for control over the militia he exploded. "By God, not for an hour, you have asked that of me in this, which was never asked of a king,"[28] he replied. An unsuccessful attempt to arrest five members of Parliament on charges of treason led to the final breach. The five members were protected by the London militia, and the king was forced to flee the city and attempt to muster his own army.

As the civil war wore on, Parliament was at length driven to create the "New Model Army", a standing body of veteran troops who were predominantly Puritan.[29] These were rigorously disciplined under the leadership of Oliver Cromwell, who eventually rose to head the army, and with their aid Parliament ended as the victor in the civil war. But in July 1647 the New Model Army (alienated by a failure of pay and by the anti-Puritan measures of the Parliament) marched on London and took over the government. On December 6, 1648 troops, acting on Cromwell's orders, surrounded the Parliament building and drove off over 140 members. The remainder formed what became known as "the Rump Parliament". By 1653 even the Rump was an impediment to Cromwell and he used his troops to totally shut down parliamentary government; the army officers then selected a new Parliament composed largely of Puritan elders. A short time later Cromwell pressured its dissolution and in 1654 he replaced it with yet another Parliament, in whose election only those whose land was worth over 200 pounds sterling could vote. This Parliament in turn named Cromwell "Lord Protector" and king of England in all but name. Yet a year later Cromwell dissolved even this Parliament and established a military dictatorship, dividing the nation into eleven districts, each headed by a major general whose duties included political surveillance, censorship of publications, and influencing future elections.[30] A major factor in the dissolution of several of these parliaments was their attempt to adopt new militia statutes; Cromwell, who controlled by the new model army, had little interest in permitting Parliament to reorganize the militia.

Following Cromwell's death, the English were more than happy to accept back the son of the late Charles, Charles II, as monarch. Charles II promptly dissolved the army, offering full pay plus a (pg.50) bonus from his own finances, and guaranteeing work on public works projects for the

demobilized troops.[31] He also sought to secure himself by a variety of legislation which people in Parliament, in their haste to welcome the end of Puritan rule, did not recognize as dictatorial. In 1661 and 1662 he expanded the definition of treason, imposed press censorship, restricted practice of religion by Puritans and others and leveled the protective walls of many towns which had sided with Parliament.[32] Instructions were also issued to the lord's lieutenant to form special militia units out of volunteers of favorable political views, "the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized...."[33] The excessive searches for arms under that order led to Parliamentary resistance and refusal to grant a militia bill in the sessions of 1660 and 1661.[34] Only in 1662 was Charles able to obtain a militia statute pleasing to him. The 1662 statute permitted the King to appoint Lieutenants for each county and major city; these lieutenants could charge persons with the responsibility of equipping and paying a militia man. But not every Englishman was required to be armed or serve, and those who were required could always hire a substitute to appear for them. The lieutenants were moreover empowered to hire persons "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenant or any two or more of their deputies shall judge dangerous to the peace of the kingdom...."[35] The Calendar of State Papers for the period is filled with reports of confiscations of weapons from suspicious persons and religious independents.[36] Charles also by proclamation ordered gunsmiths to produce records of all firearms sold; importation of firearms from overseas was banned; and carriers throughout the realm were forbidden to transport firearms without first obtaining a license. (The resemblance between these measures and the American 1968 Gun Control Act is astonishing).

In 1671 this was followed with an amendment to the Hunting Act. Hunting was restricted to those who owned lands worth 100 pounds and, most importantly, those who could not hunt (who formed the vast bulk of the kingdom) were "declared to be persons by the laws of this realm, not allowed to have or keep for themselves, or any other person or persons, any guns, bows, greyhounds...."[37] "Guns" were an addition to the list: all but the wealthiest land-owners could be disarmed. As Charles' reign wore on he encountered increasing opposition from Parliament and from what was becoming the Whig party. This he met by such drastic measures as moving the sitting of Parliament from London (which was quite favorable to the Whigs) to Oxford, and by arresting and executing several Whig leaders on charges of treason. Charles survived, but it was a close race.

James II, Charles' brother and successor, would not be so lucky. He continued to enforce the laws on disarmament, directing them with increasing force against Puritans and his political opponents. Moreover he used his "dispensing power" to permit Catholic officers to stay with the army. He sought to obtain permission to expand the standing army complaining that during rebellion the militia "is not sufficient for such occasions, and that there is nothing but a good force of well disciplined troops in constant pay that (pg.51) can defend us...."[38] Parliament refused, but James kept a limited standing army on foot from his own resources. In 1686 he issued orders to six lord lieutenants complaining that "a great many persons not qualified by law, under pretense of shooting matches, keep muskets or other guns in their houses," and that he desired them to "cause strict search to be made for such muskets or guns and to seize and safely keep them until further order."[39] In Ireland he ordered General Tyrconnel to disarm the populace:

> A royal order came from Whitehall for disarming the population. This order Tyrconnel strictly executed as he respected the English. Although the country was infested by predatory bands, a Protestant gentleman could scarcely obtain permission to keep a brace of pistols.[40]

These measures did James little good; in 1688 his son-in-law and daughter, William of Orange and Mary entered the nation in a supposed "invasion" which came to be known as the "the Glorious Revolution". After defection of a number of his nobility and refusal of the militia to fight, James fled to the Continent.

This left Parliament with an interesting question: was James king and, if not, how did they go about putting William and Mary on the throne? They approached this problem by promulgating a Declaration of Rights, which listed complaints against James and argued that these had forfeited him the right to rule. After William accepted this Declaration as definitive of the rights of Englishmen, he was permitted to assume the throne and call a Parliament, which then reenacted the Declaration as the Bill of Rights.[41]

The Declaration and Bill of Rights were later said to be "the essence of the revolution";[42] only a year before the adoption of the American Bill of Rights, the great English jurist Edmund Burke would refer to the Declaration as "the cornerstone of our Constitution."[43] The Declaration listed a variety of civil liberties which James was accused of infringing. Prominent among these was the right to keep and bear arms. The form finally adopted complained that James had violated the liberties of the kingdom by keeping a standing army and moreover by causing his Protestant subjects "to be disarmed at the same time when Papists were both armed and employed contrary to law." It accordingly resolved that "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[44] Since only slightly over one percent of the population was then Catholic, this amounted to a general right to own arms applicable to virtually all Englishmen. The possible restriction—that they be arms "as allowed by law"—was clarified by prompt amendment of the Hunting Act to remove the word "guns" from items which even the poorest Englishman was not permitted to own. Now all Englishmen could own arms "for their defense suitable to their conditions and as allowed by law" in the form of whatever firearms they desired.[45]

A few modern writers, none of whom cite any historical evidence, have claimed that the Bill of Rights was directed not so much at disarmament as at the fact that Catholics were permitted to be armed while the Protestants had been disarmed.[46] The statutory (pg.52) history of the Declaration of Rights proves beyond any doubt that this is totally incorrect. The debates in the House of Commons, as recorded by Lord Somers, the principal draftsman of the Declaration, show that the Members focused on the confiscation of private arms collections under the 1662 Militia Act. Sergeant Maynard, for instance, complains of James: "Can he sell or give away his subjects; an act of Parliament was made to disarm all Englishmen, whom the lieutenant should suspect, by day or by night, by force or otherwise—this was done in Ireland for the sake of putting arms into Irish hands." Somers condensed a speech by Sir Richard Temple to "Militia bill—power to disarm all England—now done in Ireland." A Mr. Boscawen complained of "arbitrary power exercised by the ministry—militia—imprisoning without reason; disarming—himself disarmed...." Sergeant Maynard complained of the "Militia Act—an abominable thing to disarm the nation...."[47]

The Lords felt even more strongly about the issue. The Commons originally passed a declaration simply declaring that "the acts concerning the militia are grievous to the subject" and that "it is necessary for the public safety that the subjects which are Protestant should provide and keep arms for the common defense; and that the arms which have been seized and taken from them be restored."[48] The Lords apparently felt this did not state the individual rights strongly enough and completely omitted the language regarding the common defense, substituting the final version: "The subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."[49] The language referring to the fact that Catholics were armed while the

disarmaments were proceeding was added only at conference, with the Lords suggesting that it was a "further aggravation" to the underlying illegality and therefore "fit to be mentioned."[50] Indeed, the modern British historian J. R. Western complains that the modifications by the House of Lords created too much of an individual right: "The original wording implied that everyone had a duty to be ready to appear in arms whenever the state was threatened. The revised wording suggested only that it was lawful to keep a blunderbuss to repel burglars."[51]

The "Glorious Revolution" also gave birth to the political philosophy which underlay the American Revolution less than a century later. The two major British parties, the Whigs and the Tories, had achieved both their essence and their names during the fight under Charles II to exclude his brother James II from the succession to the throne. One of the major points of the Whig philosophy was the need for a true militia, in the sense which England had had it during the Tudor years, and the scrapping of the standing army. All the major Whig authors stressed this point; Algernon Sidney counseled that "no state can be said to stand on a steady foundation, except those whose whole strength is in their own soldiery, and the body of their own people;"[52] Robert Molesworth advised that with standing armies "the people are contributors to their own misery; and their purses are drained in order to their misery,"[53] while attacking disarmament under the game laws with the argument that "I hope no wise man will put a hare or a partridge in balance with the safety and liberties of Englishmen".[54] (pg.53) These and other Whig authors were to be found in the library of every American political thinker during the years before the Revolution;[55] John Adams himself would estimate that ninety percent of Americans were at that time Whigs by sentiment.[56]

Notwithstanding this growing support for a true militia, the use of the militia system in Britain steadily declined. By 1757 when a new Militia Act was adopted, only 32,000 men, a very small part of the population, were to serve.[57] The officers were to be chosen from the more wealthy of the gentry; property qualifications were imposed for all commissioned officers. The government would issue the arms to the militia, which were to be kept under lock and key, and could be seized by the lieutenant or deputy lieutenant of the county whenever he "shall adjudge it necessary to the peace of the kingdom".[58] "The Whigs considered this "select militia" as little better than a standing army: it was hardly a true "militia", an armed citizenry. In the debates over the Scottish militia act, the Lord Mayor of London argued to the Commons that the militia "could not longer be deemed a constitutional defense, under the immediate control and direction of the people; for by that bill they were rendered a standing army for all intents and purpose."[59] This background—that of a tradition of an armed citizenry met with recent infringements upon the traditional right of bearing arms—formed the background of the political views of the framers of our own Constitution.

The American experience with citizen armament had been more extensive even than that of Britain. The early colonists brought their own arms and secured additional ones from the government. As early as September 1622, they were being armed not only with muskets but with "three hundred short pistols with firelocks".[60] Virginia in 1623 ordered that no one was to "go or send abroad with a sufficient party well armed" and each plantation was to insure that there was "sufficient of powder and ammunition within the plantation".[61] In 1631 it ordered that no one work their fields unarmed and required militia musters on a weekly basis following church services: "All men that are fittinge to bear armes, shall bring their peeces to church ..."[62] By 1673 the colony provided that persons unable to purchase firearms from their own finances would be supplied guns by the government and required to pay a reasonable price when able to do so. Similar legislation was imposed in the other colonies. The first session of the legislature of the New Plymouth Colony required "that every free man or other inhabitant of this Colony provide for himself and each under

him able to beare armes, a sufficient musket and other serviceable peece for war" with other equipment.[63] Similar measures were enacted in Connecticut in 1650.

When the colonies began drifting toward revolution following the elections of 1760, the colonists were thus well equipped for their role. The British government began extensive troop movements into Boston in 1768 to reduce opposition, and the town government responded by urging its citizens to arm themselves and be prepared to defend themselves against the deprivations of the soldiers. When Tories responded that this order was illegal, the colonial newspapers responded that the right of personal armament was guaranteed to every Englishman. The Boston Evening Post asserted that (pg.54) "It is certainly beyond human art and sophistry, to prove that the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and to live in a province where the law requires them to be equipped with arms, are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs."[64] The New York Journal Supplement argued that the proposal "was a measure as prudent as it was legal" and that "it is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defense...."[65] There can be little doubt from these passages that the American colonists viewed the English 1688 Declaration of Rights as recognizing an individual right to own private firearms for self defense—even defense against government agents.

Years passed before these proposals were actually put into effect, but the warning signs were present long before the revolution itself broke out, and some British heeded them. Pitt, the great Whig minister and friend of the Colonies, had warned that "three millions of Whigs, with arms in their hands, are a very formidable body."[66] Rather than the conciliation he called for, the result was an attempt to disarm the Americans—an attempt which brought on the Revolution. In December, 1774, for instance, export of guns and powder to the colonies was prohibited.[67] When a group of British regulars quietly emptied a militia powder magazine in September, 1774, the reaction was dramatic. To some "it seemed part of a well designed plan to disarm the people";[68] others were inflamed by incorrect rumors that six colonists had been killed during the raid. Over 60,000 armed citizens turned out, heading toward Boston, prepared for war.[69] This was more men under arms than would be boasted by the entire British military establishment at the time. Fortunately for that establishment, the colonists were convinced that their actions were premature and returned to their homes. By September, a Massachusetts town had instituted "the Minutemen", a group of select militia.[70] Others formed special companies of militia—one of which in Virginia included George Washington and George Mason, who would later draft the Virginia Declaration of Rights.[71] In December the Maryland Convention called upon the colonies to form a "well regulated militia" and illustrated what it meant by instructing all citizens between the ages of 16 and 50 to arm themselves and form into companies.[72] The following month the Fairfax Committee of Public Safety, chaired by George Washington, joined in this resolution, further defining its intent with the comment that "A well regulated militia, composed of gentlemen, freeholders, and other freemen, is the natural strength and only security of a free government", and recommending all persons between 16 and 50 to "provide themselves with good firelocks".[73] When Patrick Henry shortly thereafter gave his famed "give me liberty or give me death" speech, the resolution which he moved by his oration began "Resolved, that a well regulated militia, composed of gentlemen and freemen, is the natural strength and only security of a free government".[74]

The Colonials did not have long to wait. General Gage, military governor of Boston, was already writing to London with regard to (pg.55) the "idea of disarming certain counties."[75] In April, 1775, Gage made the mistake of repeating his earlier raid upon a militia arsenal. This time there was firing and a number of colonists were killed. The regulars were compelled to fight their way back

to Boston, swamped under the harassing fire of militia who swarmed in on their flanks; without a last minute relief attack from Boston the entire column might have been forced to surrender by ammunition exhaustion. The British lost nearly 300 men in killed, wounded, and missing. Within a few days 16,000 militia descended upon Boston and besieged the area. During a British attack on Breeds Hill, colonial sharpshooters (one of whom commented that he fired "taking deliberate aim, as at a squirrel, and saw a number of men fall")[76] inflicted disastrous losses on British troops. Over 1,000 regulars fell, 40 percent of the attacking force and over a tenth of the entire British army in the Colonies. Officers suffered especially serious losses; one rifleman was said to have shot down twenty officers in ten minutes; every single member of Gage's staff was shot down.[77]

In the meantime the militia throughout the rest of the Colonies seized political control at the grass roots. Tories were quickly put down; British foraging parties cut off; the mechanisms of government and administration lay solidly in the hands of revolutionaries. While the British during the French and Indian War were supplied primarily from the Colonies, throughout the revolution they would have to draw primarily from their homeland. The constant damage to British foraging parties ultimately led to a shipping problem which, one historian judges, would have ended the war by 1782 in any event.[78]

The militia played no minor role in the fighting: "Seldom has an armed force done so much with so little—providing a vast reservoir of manpower for a multiplicity of military needs, fighting (often unaided by Continentals) in the great majority of the 1,331 land engagements of the war."[79]

Following the war the colonies were temporarily governed under the Articles of Confederation, which permitted a federal force necessary to garrison forts and prohibited states from maintaining any standing forces. During these years a number of militia proposals were put forward by George Washington, Alexander Hamilton, Baron Steuben and Henry Knox.[80] All involved a general militia—in which essentially every free citizen would serve—and a "select militia". Steuben's proposal gave the greatest emphasis to the select militia; he would have had a small force of 21,000 select militiamen, chosen by volunteering, who would train one month out of each year. None of these proposals became law.

By 1787 the difficulties with the Articles of Confederation were becoming insurmountable, and work began on a new Constitution. As adopted, the Constitution gave Congress the power to provide "for organizing, arming and disciplining the militia" but it could "govern" only those in federal service, while the states would have the power of appointing officers and actually training the militia according to the uniform system of discipline. Militiamen would be subject to federal martial law only when called into active service.

In the state conventions called to ratify the Constitution, the proposal faced serious opposition. A major part of the opposition, (pg.56) later termed anti-Federalist, focused on the fact that the Constitution lacked a Bill of Rights. The British Bill of Rights was called into attention as a precedent for such a measure. In the conflicts in the states three themes relating to citizen armament soon became apparent. The first was the acceptance by both Federalist and anti-Federalist of the critical role of the armed citizen, the second was a distrust both of standing armies and of select militia, like the modern National Guard; the third was pressure for a Bill of Rights which would include provisions guaranteeing rights of individual armament.

These thoughts began to take form in Connecticut, the fourth state to ratify. An anti-Federalist article in the Connecticut Journal objected strongly to the failure to outlaw a standing army and went on to criticize the Constitution's militia provisions as permitting the formation of a select militia: "This looks too much like Baron Steuben's militia, by which a standing army was meant and intended."[81] In Pennsylvania the opposition became even stiffer as the sentiment for a Bill

of Rights grew. In a pamphlet hurriedly written to support adoption of the Constitution without the Bill of Rights, Noah Webster argued that the existing universal citizen armament made a standing army of little danger. He claimed that a standing army is oppressive only when it is "superior to any force that exists among the people" since otherwise it "would be annihilated on the first exercise of acts of oppression." He advised that the general armament of Americans rendered any constitutional limitations on a standing army unnecessary:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States."[82]

In the convention the fighting was heavy. Delegate John Smiley argued that "Congress may give us a select militia which will, in fact, be a standing army.... When a select militia is formed, the people in general may be disarmed."[83] (The universal hostility to a select militia forms a most convincing refutation to the current argument that the "militia" referred to in the Second Amendment is the National Guard. On the contrary, virtually every citation to such militia during the drafting and ratification period views them as an evil comparable to a standing army and stresses that only a militia composed of the entire body of the populace armed and trained will protect freedom). Ultimately, Delegate Robert Whitehill moved a series of fifteen proposed amendments which would have established a bill of rights protecting freedom of conscience, speech, press, and virtually every other right ultimately incorporated into the Bill of Rights. This proposal was not adopted in Pennsylvania but was widely read in the Colonies and formed the inspiration for later proposals.[84] Its provision of keeping and bearing arms made it very clear that the right protected was to be an individual right:(pg.57)

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals....[85]

In the Massachusetts Convention similar thoughts were expressed. Delegate Sedgwick asked whether a standing army "could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?"[86] Sam Adams, who had done so much to bring on the revolution, spoke convincingly for the anti-Federalist position. He called for a bill of rights which would have provided "that the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms...."[87] Like the Pennsylvania minority, Adams clearly considered the right of armament as a right of individual citizens to own personal arms.

In the following months additional states ratified, bringing the total to eight. A ninth vote was needed before the necessary majority would be obtained and the Constitution would become binding upon the states which had ratified to date. That critical vote was provided by New Hampshire, which added to its ratification a recommendation for a bill of rights including the provision that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion."[88] A clearer

statement of an absolute individual right could not have been drafted. The major commercial state—New York—and major intellectual state—Virginia—still remained to be heard from.

The Virginia Convention set the record for legal and intellectual talent. Major participants included Patrick Henry, George Mason, James Madison and John Marshall. The major writings of the period came from Richard Henry Lee, who had in the Continental Congress moved the drafting of the Declaration of Independence. In his "Letters from the Federal Farmer to the Republican" he warned that Congress might suddenly undermine the strength of the "yeomanry of the country" who possessed the lands, "possess arms, and are too strong a body of men to be openly offended."[89] He added "This might be done in a great measure by the Congress, if disposed to do it, by modeling the militia. Should one-fifth or one-eighth of the men capable of bearing arms be made a select militia, as has been proposed ... and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenseless."[90] Like others in Connecticut and Pennsylvania, Lee feared a "select militia" similar to the modern National Guard, which he considered a betrayal of the militia tradition and similar to a standing army. In strong terms he advised:

> First, the Constitution ought to secure a genuine, and guard against a select militia, by providing that the militia shall always be kept well organized, armed and disciplined, and include, according to the past and general (pg.58) usage of the states, all men capable of bearing arms, and that all regulations tending to establish this general useless and defenseless, by establishing select corps of militia or distinct bodies of military men, not having permanent attachments in the community, to be avoided.[91]

He extensively criticized select militia and argued that on the contrary "to preserve liberty, it is essential that the whole body of people always possess arms, and be taught alike, especially when young, how to use them...."[92] In the Convention, Patrick Henry seconded Lee's judgments. Henry joined with Lee—and with Sam Adams and others who defended individual armament—explaining that "The great object is that every man be armed" and that "Everyone who is able may have a gun."[93] While Virginia ratified, it did so with a call for a bill of rights, including a recognition "that the people have the right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms is the proper, natural and safe defense of a free state."[94]

From Virginia, the debate moved to New York. The New York controversy gave rise to the famed "Federalist Papers." Since these were devoted to justifying adoption of the constitution without a Bill of Rights, they are at best of marginal utility in interpreting the early amendments to the Constitution. Even so, their authors stressed citizen armament as a bulwark of liberty which made adoption of the Constitution safe. Hamilton, no friend of the militia (and little friend of democracy, for that matter) attacked proposed limits on standing armies in Federalists 25 and 26. In Federalist 29 he suggested that militia could not be expected to tolerate much professional training: "little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped." This armed but untrained citizenry, together with a select militia would ensure liberty despite a standing army: "That army can never be formitable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and use of arms ..."

Madison in Federalist 46 argued the point at greater length, stressing citizen armament and state governments as bulwarks of freedom:

> Besides the advantage of being armed, which the Americans possess over the people, 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 ... notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.

If those people were armed and formed into militia units by subordinate governments, Madison asserted, "It may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it." To him citizen armament was not merely a matter of (pg.59) military service or collective defense, but a guarantee of all other freedoms, to be used if necessary, against the government.

New York joined in ratifying, but by an even closer margin than most states: a shift of two votes out of fifty-seven cast would have rejected the constitution. It proposed amendments, including a recognition "That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defense of a free state."

Only a few weeks later, word came that North Carolina had joined Rhode Island in rejecting the proposed constitution, citing the lack of a bill of rights. Among the amendments they called for before the delegates would sign was a provision identical to the New York and Virginia "Keep and bear arms" sections.

The constitution thus went into effect with eleven ratifications. But the pressing need for a bill of rights was clear. Not only had two states repudiated the new constitution, but five of the ratifying states had demanded such a bill and influential minorities in two more had striven unsuccessfully for it. (While freedom of speech was designated by only three ratifying states, the right to bear arms was mentioned by all five which called for a bill of rights, as well as by both groups of minority delegates and the dissenting North Carolina convention. This constitutional preference poll would suggest the ratifying conventions considered the right of private armament to be even more important than free speech.)

The Constitution carried in New York and eventually in every other state: but the anti-Federalist sentiment for a bill of rights also triumphed. Ultimately James Madison was put to the task of drafting a bill of rights. From the many proposals by the state conventions, he eventually distilled a limited number of rights deserving specific recognition, protecting the rest with the "catch-all clauses" of the Ninth and Tenth Amendments. The rights given express recognition were primarily procedural. Only the First and Second Amendments created substantive rights and these were a very small number of rights: speech, press, assembly, and keeping and bearing arms. These were viewed as the critical matters upon which the federal government might not infringe, under any conditions (and even by proceeding in accord with the procedural guarantees of the Fourth, Fifth and Sixth Amendments). Madison's initial proposal for what became the Second Amendment was worded: "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."

There is no doubt that Madison saw this as an individual right. His earliest drafts of the Bill of Rights did not separate those proposals into numbered amendments which would follow the constitution. Instead, the amendments would have been inserted into the body of the constitution at specified points. Madison did not place the right to keep and bear arms as a limitation on Congress's power over the militia, set out in Article I section 8 of the constitution. Instead, he grouped the right to arms with rights of freedom of religion, speech and press, to be inserted "in article first, section (pg.60) nine, between clauses 3 and 4."[95] This would have put these provisions immediately following the general limitations of congressional power over citizens—outlawing suspension of habeas corpus, bills of attainder and ex post facto laws. Madison viewed his right to keep and bear arms proposal as a civil right, not a limit on federalization of the militia. Further, in an outline of a proposed speech on introduction of the Bill of Rights, Madison mentioned these "relate 1st to private rights," and indicated he meant to criticize the 1689 Declaration of Rights as too narrow: "No freedom of the press—conscience—GI. warrants ... attainders—arms to Protestants."[96] Apparently, he felt the 1689 recognition that "Protestants may have arms for their defense" should be extended to all, that the second amendment would broaden, not narrow, this.

Like most of his draft, the wording was both lengthy and convoluted. In the House of Representatives his proposals were edited extensively; since "the right of the people" was already contained in the provision, the comment that the militia would consist "of the body of the people" was deleted. The religious exemption was removed in view of objections that the Congress might exempt too many people on these grounds and thus destroy the concept of the militia. When the proposal was submitted to the Senate, it was proposed that the right be limited to keeping and bearing arms "for the common defense", but the Senate refused the amendment, retaining it in its broadest form.[97]

Contemporaries of the first Congress clearly viewed the Second Amendment as creating an individual right. When St. George Tucker, then a professor at William and Mary School of Law and later a Justice of the Virginia Supreme Court, published a five-volume edition of Blackstone's Commentaries in 1803, he commented that "whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally under the specious pretext of preserving the game."[98] He criticized the British Bill of Rights for limiting its guarantee of arms ownership to Protestants, whereas the American right was "without any qualification as to their condition or degree, as is the case in the British government."[99] William Rawle in his 1825 "View of the Constitution" suggested that:

> 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.[100]

Tucker and Rawle had unique advantages in interpreting the Bill of Rights. Tucker had fought in the Revolutionary militia and was twice wounded in action. He was a close friend of Jefferson, an associate of Madison, and had a brother in the first Senate. Rawle was a friend of Washington and was offered the post of first Attorney General.

The Congress itself made its intent clear when the second Congress adopted the Militia Act of 1792. This required every "free able bodied white male citizen.... who is or shall be of the age of 18 years, and under the age of 45 years" to be enrolled in the (pg.61) militia and "within six months thereafter, provide himself with a good musket or firelock," plus ammunition and equipment.[101] The bill remained on the books until 1903. Thus, from the subsequent enactments of Congress, as well

as the contemporaneous statements of the drafters and their associates, there can be little doubt that the drafters of the Second Amendment viewed that amendment as creating an individual right to keep and carry arms for purposes ranging from self protection to hunting to acquisition of military skills.

The right of individual citizens to keep and bear arms found early recognition by the courts, in a solid chain of precedent stretching forward for nearly two centuries. In 1813, Kentucky adopted the first general concealed weapon ban and nine years later the act was struck down as an invasion of the right to keep and bear arms.[102] Similar statutes were later upheld in other States—upon the grounds that only one form of carrying, not all forms, were restricted.[103] The Alabama Supreme Court, for instance, added:

> We do not desire to be understood as maintaining, that in regulating the manner of wearing arms, the legislature has no limit other than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense would be clearly unconstitutional.[104]

Likewise, when Georgia in 1837 enacted the first ban on pistol ownership, its supreme court promptly struck it down, holding in the process that the second amendment applied to the states. It explained the amendment's meaning: "The right of the whole people, old and young, men, women, and boys, and not militia only, to keep and bear arms of every description, and not merely such as are used by the militia, shall not be infringed ... and this for the important end to be achieved, the rearing up and qualifying of a well-regulated militia, so vitally necessary to the security of a free state."[105]

Second amendment issues rarely came before the federal courts at this time, simply because there were no federal controls on arms ownership. But the position of the United States Supreme Court was indicated in the famed *Dred Scott* case, where it held that the free black Americans were not citizens. The majority indicated that if blacks were regarded as citizens, "entitled to the privileges and immunities of citizens," they would have freedom of speech and assembly, "and to keep and carry arms wherever they went."[106]

Post civil war arms enactments encountered judicial limitations arising at the individual right to keep and bear arms. Tennessee, for instance, had to amend its constitution to expressly grant legislative power to "regulate the wearing of arms." Even so, its 1870 ban on carrying small ("pocket") pistols barely passed constitutional muster, the court warning that the legislature might not prohibit the carrying of "all manner of arms" since the power to regulate "does not fairly mean the power to prohibit."[107] Arkansas upheld a ban on pistol carrying only by construing it to apply only to pocket pistols and not to rifles, shotguns, or larger handguns. "To (pg.62) prohibit a citizen from wearing or carrying a war arm ... is an unwarranted restriction upon the constitutional right to keep and bear arms. If cowardly and dishonest men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and the gallows, and not by a general deprivation of a constitutional privilege."[108] A similar technique was used to construe Missouri's 1875 carrying ban to apply only to concealed carry, the court citing with approval the concept that legislatures might not limit carrying so as to make the arms useless for defense.[109]

Nor has recognition of the right to keep and bear arms been lacking in our century. City bans on handgun carrying have been struck down in North Carolina ("the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions")[110]

Tennessee,[111] and New Mexico.[112] The Michigan Supreme Court has stricken a ban on gun ownership by non-citizens with the comment that "the guarantee of the right of every person to bear arms in defense of himself means the right to possess arms for legitimate use in defense of himself (and) his property."[113] A similar statute was stricken in Colorado, its Supreme Court expressly rejecting the "collective rights" approach.[114] The U.S. Supreme Court, in *United States v. Miller*,[115] held that a court cannot merely take judicial notice that an arm is within the second amendment's protections, but explained:

> The Constitution as originally adopted granted to the Congress power "to provide for calling forth the Militia (etc.) ..." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the second amendment were made. It must be interpreted and applied with that end in view.
>
> The signification attributed to the term "militia" appears from the debates in the Convention, the history and legislation of the colonies and states, and the writings of approved commentators. These show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense ... and further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

The right to keep and bear arms has found its most recent recognition in two 1980 decisions in Oregon[116] and Indiana,[117] the first striking down a very narrow arms possession ban, the second strictly limiting power to refuse carrying licenses.

In summary, the right to keep and bear arms is, in all probability, the oldest right memorialized in the Bill of Rights. Its common law right extends beyond our written records forward to the 1689 Declaration of Rights—so largely a response to individual disarmament under laws of the 1660's—and to our own Revolution, brought on primarily by British attempts at disarmament of the colonists. The recognition of the right in our own Bill of Rights is a natural outgrowth of that experience and of demands for preservation (pg.63) of a clearly individual right to own and carry arms. It is a right reserved to "the people"—the same "people" who possess the right to assemble, and security from unreasonable searches and seizures, the "people" whom the tenth amendment distinguishes from "the states." It is clearly not a right relating solely to the National Guard, which had no legal recognition prior to 1903, and whose 18th century predecessors were criticized by Richard Henry Lee and other constitutional figures as equal in danger to standing armies. Rather, it is a right reserved to individual citizens, to possess ("keep") and carry ("bear") arms for personal and political defense of themselves and their rights.

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*. David T. Hardy received his Bachelor of Arts degree from the University of Arizona where he graduated cum laude in 1972. He received his Juris Doctorate from the University of Arizona College of Law in 1975. He graduated magna cum laude and served as Associate Editor of the Arizona Law Review from 1974 to 1975. Mr. Hardy is a member of the Bar of the Supreme Court of the United States, the Fourth and Ninth Circuit U.S. Courts of Appeals, and the Arizona Supreme Court, and is a partner in the law firm of Sando and Hardy, Tucson, Arizona. He serves on the Legal Advisory Board of the Second Amendment Foundation, is a member of the American Civil Liberties Union and the National Rifle Association.

Mr. Hardy has written extensively in the area of law and firearms regulation. He is the co-author of a lengthy article titled: "Of Arms and the Law," 51 Chicago-Kent Law Review 62 (1974), author of "Firearms Ownership and Regulation," 20 Wm. & Mary L. Rev. 235 (1978) and "Gun Laws and Gun Collectors," 85 Case & Comment 3 (Jan.-Feb. 1978). He would like to acknowledge,

with gratitude, the assistance of Bob Dowlut, Frances Averly, and Barbara Goldman in preparation of this report.

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19. 3 Henry VIII c.3, 13 (1511).

20. 6 Hen.VIII c.13 (1514).

21. 14 & 15 Hen. VIII c.7 (1523).

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109. *State v. Wilforth*, 85 Mo. 528, 530 (1882).

110. *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921).

111. *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W. 2d. 678 (1928).

112. *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P. ad 737 (1971) ("an ordinance may not deny the people the constitutionally guaranteed right to bear arms.")

113. *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1923).

114. *People v. Nakamura*, 99 Colo. 262, 62, P. 2d 246 (1936).

115. *United States v. Miller*, 307 U.S. 175, 178-79 (1939).

116. *State v. Kessler*, 289 Ore. 359, 614 p. 2d 94 (1980).

117. *Schubert v. DeBard*, _____ Ind. App. _____, 398 NE2d 1139 (1980).