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Joyce Lee Malcolm

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The Right of the People to Keep and Bear Arms: The Common Law Tradition

By JOYCE LEE MALCOLM*

Introduction**

Every generation suffers to some degree from historic amnesia. However, when the history of a major political tradition, along with the assumptions and passions that forged it, are forgotten, it becomes extraordinarily difficult to understand or evaluate its legacy. This is particularly unfortunate when that legacy has been written into the enduring fabric of government. The Second Amendment to the United States Constitution is such a relic, a fossil of a lost tradition. Even a century ago its purpose would have been clearly appreciated. To nineteenth century exponents of limited government, the checks and balances that preserved individual liberty were ultimately guaranteed by the right of the people to be armed. The preeminent Whig historian, Thomas Macaulay, labelled this "the security without which every other is insufficient,"[1] and a century earlier the great jurist, William Blackstone, regarded private arms as the means by which a people might vindicate their other rights if these were suppressed.[2] Earlier generations of political philosophers clearly had less confidence in written constitutions, no matter how wisely drafted. J.L. De Lolme, an eighteenth century author much read at the time of the American Revolution[3] pointed out:

* Visiting Scholar, Harvard Law School; B.A., 1963, Barnard College; Ph.D., 1977, Brandeis University.

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1. 1 T. MACAULAY, CRITICAL AND HISTORICAL ESSAYS, CONTRIBUTED TO THE EDINBURGH REVIEW 154, 162 (Leipzig 1850).

2. *See* 1 W. BLACKSTONE, COMMENTARIES *139-40 (1st ed. Oxford 1765).

3. De Lolme's book, THE CONSTITUTION OF ENGLAND, was first published in 1771 and quickly went through an impressive number of editions. D'Israeli later referred to De

> But all those privileges of the People, considered in themselves, are but feeble defences against the real strength of those who govern. All those provisions, all those reciprocal Rights, necessarily suppose that things remain in their legal and settled course: what would then be the recourse of the People, if ever the Prince, suddenly freeing himself from all restraint, and throwing himself as it were out of the Constitution, should no longer respect either the person, or the property of the subject, and either should make no account of his conversation with the Parliament, or attempt to force it implicitly to submit to his will?—It would be resistance . . . the question has been decided in favour of this doctrine by the Laws of England, and that resistance is looked upon by them as the ultimate and lawful resource against the violences of Power.[4]

This belief in the virtues of an armed citizenry had a profound influence upon the development of the English, and in consequence the American, system of government. However, the many years in which both the British and American governments have remained "in their legal and settled course[s]," have helped bring us to the point where the history of the individual's right to keep and bear arms is now obscure. British historians, no longer interested in the issue, have tended to ignore it, while American legal and constitutional scholars, ill-equipped to investigate the English origins of this troublesome liberty, have made a few cursory and imperfect attempts to research the subject.[5] As a result, Englishmen are uncertain of the circumstances surrounding the establishment of a right to bear arms and the Second Amendment to the Constitution remains this country's most hotly debated but least understood liberty.

In a report on the legal basis for firearms controls, a committee of the American Bar Association observed:

> There is probably less agreement, more misinformation, and less understanding of the right of citizens to keep and bear arms than on any other current controversial constitutional issue. The crux of the controversy is the construction of the Second Amendment to the Constitution, which reads: "A well-regulated militia, being

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Lolme as "the English Montesquieu." *See* OXFORD UNIVERSITY PRESS, 1 THE CONCISE DICTIONARY OF NATIONAL BIOGRAPHY 332 (2d ed. 1903); 7 ENCYCLOPAEDIA BRITANNICA 970 (11th ed. 1910).

4. J. DE LOLME, THE CONSTITUTION OF ENGLAND 227 (New York 1793).

5. *See, e.g.*, L. KENNET & J. ANDERSON, THE GUN IN AMERICA 25-27 (1975); G. Newton & F. Zimring, Firearms & Violence in American Life; A Staff Report Submitted to the National Commission on the Causes & Prevention of Violence 255 (1968); Levin, *The Right to Bear Arms: The Development of the American Experience* 48 CHI-KENT L. REV. 148 (1971); Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975).

> necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."[6]

Few would disagree that the crux of this controversy is the construction of the Second Amendment, but, as those writing on the subject have demonstrated, that single sentence is capable of an extraordinary number of interpretations.[7] The main source of confusion has been the meaning and purpose of the initial clause. Was it a qualifying or an amplifying clause? That is, was the right to arms guaranteed only to members of "a well-regulated militia" or was the militia merely the most pressing reason for maintenance of an armed community? The meaning of "militia" itself is by no means clear. It has been argued that only a small, highly trained citizen army was intended,[8] and, alternatively, that all able-bodied men constituted the militia.[9] Finally, emphasis on the militia has been proffered as evidence that the right to arms was only a "collective right" to defend the state, not an individual right to defend oneself.[10] Our pressing need to understand the Second Amendment has served to define areas of disagreement but has brought us no closer to a consensus on its original meaning.

The fault lies not with the legal, but with the scholarly, community. For if the crux of the controversy is the construction of the Second Amendment, the key to that construction is the English tradition the colonists inherited, and the English Bill of Rights from which much of the American Bill of Rights was drawn. Experts in English constitutional and legal history have neglected this subject, however, with the result that no full-scale study of the evolution of the right to keep and bear arms has yet been published. Consequently, there is doubt about such elementary facts as the legality and availability of arms in seventeenth and eighteenth century England, and uncertainty about whether the English right to have arms extended to the entire Protestant population or only to the aristocracy. Experts in American constitutional theory have nevertheless endeavored to define the common law tradition behind the Second Amendment without the benefit of research into these basic questions. These experts' findings are contradictory, often involve serious mistakes of fact, and muddle, rather than clarify, mat-

6. Miller, Sec. III *The Legal Basis for Firearms Controls*, in REPORT TO THE AMERICAN BAR ASSOCIATION 22 (1975).

7. *See, e.g.*, Caplan, *Handgun Control: Constitutional or Unconstitutional? A Reply to Mayor Jackson*, 10 N.C. CENT. L.J. 53, 54 (1978); Weatherup, *supra* note 5, at 973-74; Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, 78 W. VA. L. REV. 171, 176-78 (1975).

8. *See* Miller, *supra* note 6, at 25-28.

9. *See* Caplan, *supra* note 7, at 54-55.

10. *See, e.g.*, Levin, *supra* note 5, at 154, 159; Weatherup, *supra* note 5, at 973-74.

ters. For example, in their report to the National Commission on the Causes and Prevention of Violence, George Newton and Franklin Zimring insist that any traditional right of Englishmen to own weapons was "more nominal than real,"[11] while the authors of *The Gun in America* conclude that few Englishmen ever owned firearms because prior to the adoption of the English Bill of Rights in 1689, firearms were expensive and inefficient, and thereafter guns were not considered "suitable to the condition" of the average citizen.[12] Neither set of authors provides more than cursory evidence.[13] On the other hand, one British author found that until modern times his countrymen's right to keep arms was "unimpaired as it was then [in 1689] deliberately settled"[14] and a second noted that with only "minor exceptions" the Englishman's "right to keep arms seems not to have been questioned."[15]

The continuing confusion is apparent in the articles that have appeared on this subject in American law journals. David Caplan, writing in the *North Carolina Central Law Journal*, finds that "the private keeping of arms was completely guaranteed by the common law as an 'absolute right of individuals,' "[16] while James Whisker argues in the *West Virginia Law Review* that long before the American Revolution "Englishmen came to view the retention of arms by individuals or by private groups as productive only of rebellion or insurrection."[17] There is a temptation to superimpose the debate over the Second Amendment's militia clause back onto the English guarantee of the right to have arms, although the English guarantee contained no such clause. Roy Weatherup, for example, interprets the clear English guarantee that "Protestant subjects may have arms for their defence" to mean "Protestant members of the militia might keep and bear arms in ac-

11. G. NEWTON & F. ZIMRING, *supra* note 5, at 255.

12. L. KENNET & J. ANDERSON, *supra* note 5, at 25-27.

13. For example, Newton and Zimring, fail to cite a single seventeenth or eighteenth century source for the critical assertion that the English Convention Parliament of 1688 intended to guarantee only a general, not an individual, right to have arms. *See* G. NEWTON & F. ZIMRING, *supra* note 5, at 254-55, n.12. Kennet and Anderson conclude that in the seventeenth century firearms "were not generally held . . . because of their inefficiency, costliness, and general scarcity," but provide no evidence of their efficiency, cost, or availability in that period. *See* L. KENNET & J. ANDERSON, *supra* note 5, at 27.

14. 1 J. PATERSON, COMMENTARIES ON THE LIBERTY OF THE SUBJECT AND THE LAWS OF ENGLAND RELATING TO THE SECURITY OF THE PERSON 442 (London 1877).

15. C. GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 10 (1972).

16. Caplan, *supra* note 7, at 54.

17. Whisker, *supra* note 7, at 176.

cordance with their militia duties for the defense of the realm."[18] Despite the fact that the Convention Parliament which drafted the English Bill of Rights purposely adopted the phrase "their defence" in preference to "their common defence"[19] he could find "no recognition of any personal right to bear arms."[20] In short, there is disagreement over who could, or did, own firearms both before and after passage of the English Bill of Rights.

Nearly all writers agree, however, that an accurate reading of the Second Amendment is indispensable to resolving current debates over gun ownership, and that a clarification of the common law tradition is necessary to that reading.[21] There are compelling reasons for this consensus. To begin with, the royal charters that created the new colonies assured potential emigrants that they and their children would "have and enjoye all Liberties and Immunities of free and naturall Subjects . . . as if they and every of them were borne within the Realme of England."[22] Furthermore, the entire body of common law, with the exception of those portions inappropriate to their new situation, crossed the Atlantic with the colonists.[23] The perilous circumstances of the infant colonies made the common law tradition of an armed citizenry both appropriate and crucial to the survival of the plantations.[24] Indeed, the colonies began very early requiring residents to keep firearms and establishing militias.[25]

18. Weatherup, *supra* note 5, at 973-74. For the precise English guarantee of the rights of the subject to have arms, see The Bill of Rights, I W. & M., Sess. 2, ch. 2 (1689).

19. 10 H.C. JOUR., 1688-93, 21-22; 1 W. & M., Sess. 2, ch. 2 (1689).

20. Weatherup, *supra* note 5, at 974.

21. *See, e.g.*, Caplan, *supra* note 7, at 53-54; Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473-75 (1915); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 383 (1960); Levin, *supra* note 5, at 148; Weatherup, *supra* note 5, at 964; Whisker, *supra* note 7, at 175-76.

22. Charter of Connecticut, Charles II, 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 7 (Hartford 1850) [hereinafter cited as RECORDS OF CONNECTICUT]. *See also* Charter of the Province of Massachusetts-Bay, William and Mary, 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 14 (Boston 1869).

23. *See* T. BARNES, THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES 16 (1975).

24. *See, e.g.*, RECORDS OF CONNECTICUT, *supra* note 22, at 285-86; 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137 *passim* (Atlanta 1911); THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 39-41 (Hunt. Lib. reprint 1975) (1st ed. Boston 1648); 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 77, 94 (Providence 1856); W. BILLINGS, THE OLD DOMINION IN THE SEVENTEENTH CENTURY 172 (1975).

25. *See, e.g.*, ACTS OF THE GRAND ASSEMBLY OF VIRGINIA 1623-24, Nos. 24 & 25; ACTS OF THE GRAND ASSEMBLY OF VIRGINIA 1673, Act 2; THE COMPACT WITH THE CHARTER AND GENERAL LAWS OF THE COLONY OF NEW PLYMOUTH 44-45 (1836); 8 RECORDS OF

There is a further reason for examining the Second Amendment in the light of English legal traditions. Not only did colonists arrive in the new land equipped with an elaborate legal framework, they were for the most part imbued with that attitude of antiauthoritarianism that had fueled the traumatic upheavals of the seventeenth century: the English Civil War of 1642, and the Glorious Revolution of 1688. This general distrust of central power resulted in the English Bill of Rights in 1689 and was to produce the American Bill of Rights a century later. Bernard Bailyn, in *The Ideological Origins of the American Revolution*, is emphatic about there being a connection between English opposition philosophy and American political thought:

> To say simply that this tradition of opposition thought was quickly transmitted to America and widely appreciated there is to understate the fact. Opposition thought, in the form it acquired at the turn of the seventeenth century and in the early eighteenth century, was devoured by the colonists. . . . There seems never to have been a time after the Hanoverian succession when these writings were not central to American political expression or absent from polemical politics.[26]

When they had won their battle to retain the rights of Englishmen, and came to write the federal and state constitutions and draw up the federal Bill of Rights, American statesmen borrowed heavily from English models.[27] Since the federal Bill of Rights, including the Second Amendment, is to a very great extent an example of such borrowing, it behooves us to take a closer look at their English models.

I. The Traditional Obligation to be Armed[28]

During most of England's history, maintenance of an armed citizenry was neither merely permissive nor cosmetic but essential. Until late in the seventeenth century England had no standing army, and until the nineteenth century no regular police force. The maintenance of order was everyone's business and an armed and active citizenry was

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CONNECTICUT, *supra* note 22, at 380; 1 COLONIAL LAWS OF NEW YORK 161 (1894); South Carolina Stat. No. 206 (1703).

26. B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 43 (1967).

27. *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 509, 617 (M. Ferrand ed. 1911); DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, HELD IN THE YEAR 1788, 198-99 (Boston 1856); DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA, 1788, 271 (2d ed. Richmond 1805); THE FEDERALIST Nos. 26, 84 (Hamilton).

28. Earlier versions of sections I, II, & III of this article appear in Malcolm, *Disarmed: The Loss of the Right to Bear Arms in Restoration England* (Bunting Inst., Radcliffe College 1980).

written into the system. All able-bodied men between the ages of sixteen and sixty were liable to be summoned to serve on the sheriff's posse to pursue malefactors or to suppress local disorders.[29] For larger scale emergencies, such as invasion or insurrection, a civilian militia was intermittently mustered for military duty.[30] While all able-bodied males were liable for this service, the practice during the late sixteenth and seventeenth centuries had been to select a group of men within each county to be intensively trained.[31] Whenever possible, members of these trained bands were supposed to be prosperous farmers and townsmen, but in practice, the rank-and-file were usually men of modest means—small freeholders, craftsmen, or tenant-farmers.[32] They were, however, invariably led by prestigious members of their community, and commanded by lords lieutenant, who were peers appointed by, and directly responsible to, the Crown.[33] The effectiveness of the militia varied with the need for their services, the interest of particular monarchs, and even with the enthusiasm of individual muster masters and captains.[34] During some reigns, the trained bands were scarcely mustered from one year to the next; in others they were drilled with regularity. In the 1630's, a major effort was made to re-equip these citizen-soldiers and have them instructed in the latest European military tactics.[35]

The militia and the posse were summoned only occasionally, but English subjects were frequently involved in everyday police work. The old common law custom persisted that when a crime occurred citizens were to raise a "hue and cry" to alert their neighbors, and were expected to pursue the criminals "from town to town, and from county to county."[36] Villagers who preferred not to get involved were subject to fine and imprisonment.[37] As an additional incentive to aid in crime

29. *See* R. BURN, 2 THE JUSTICE OF THE PEACE AND PARISH OFFICER 16-20 (London 1755); F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 276-77 (1968) (1st ed. Cambridge 1908).

30. *See* ASSIZES OF ARMS, Hen. 2 (1181); STATUTE OF WINCHESTER, Edw. (1285); 4 & 5 Phil. and M., ch. 3 (1557).

31. *See* C. CRUICKSHANK, ELIZABETH'S ARMY 24-25 (2d ed. 1966).

32. Manuscripts of the sixteenth and seventeenth centuries contain repeated complaints to this effect. For printed comment, *see, e.g.*, J. MORRILL, CHESHIRE, 1630-1660, 26 (1974); G. TREVELYAN, ENGLAND UNDER THE STUARTS 187-88 (1928).

33. *See* C. CRUICKSHANK, *supra* note 31, at 19-20; H. HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 386 (London 1870).

34. *See, e.g.*, R. ASHTON, THE ENGLISH CIVIL WAR 55-59, 66 (1978); L. BOYNTON, THE ELIZABETHAN MILITIA 212 *passim*, 264-65 (1967); C. CRUICKSHANK, *supra* note 31, at 5-11.

35. *See* L. BOYNTON, *supra* note 34, at 245-54.

36. *See* R. BURN, *supra* note 29, at 17-20.

37. *See id.*

prevention, local residents were expected to make good half the loss caused by robbers or rioters.[38]

The most frequent police duty was the keeping of watch and ward. Town gates were closed from sundown until sunrise and all householders, "sufficiently weaponed" according to the requirement, took turns standing watch at night or ward during that day.[39] Widows, disabled men, and other townsmen unable to carry out the task had to hire substitutes to serve in their stead.[40]

Citizens were not only expected to have suitable weapons at the ready for these duties, but, since passage of the Statute of Winchester in 1285, were assessed according to their wealth for a contribution of arms for the militia.[41] When not in use for musters or emergencies, nearly all of this equipment remained in private hands. A series of later statutes spelled out in detail the arms each household was required to own and the frequency of practice sessions.[42] During the reign of Queen Elizabeth, for example, every family was commanded to provide a bow and two shafts for each son between the ages of seven and seventeen and to train them in their use or be subject to a fine.[43] To promote proficiency in arms, Henry VIII and his successors ordered every village to maintain targets on its green at which local men were to practice shooting "in holy days and other times convenient."[44]

The obligation to own and be skilled in the use of weapons does not, of course, imply that there were no restrictions upon the type of weapon owned or the manner of its use. A statute passed in 1541, for instance, cited the problem of "evil-disposed" persons who daily rode the King's highway armed with crossbows and handguns—weapons easily concealed beneath a cloak—and preyed upon Henry VIII's good subjects. The new law limited ownership of such questionable weapons to persons with incomes over one hundred pounds a year—citizens presumably more trustworthy—whereas those with less income were not to carry a crossbow bent, or a gun charged "except it be in time and

38. *See id.*

39. *See id.* at 512.

40. *See id.*

41. *See* STATUTE OF WINCHESTER, Edw. (1285).

42. *See, e.g.*, 2 ACTS & ORDS. INTERREGNUM 397-402 (London 1911); AN ACT FOR SETLING THE MILITIA OF THE COMMONWEALTH OF ENGLAND (London 1650); 4 & 5 Phil. & M., ch. 3 (1557); AN ACT DECLARING THE SOLE RIGHT OF THE MILITIA TO BE IN THE KING, 14 Car. 2, ch. 3 (1662).

43. *See* G. SHARP, TRACTS, CONCERNING THE ANTIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE, BY A FREE MILITIA 12 (London 1782).

44. *Id.* at 13.

service of war."[45] This law, often misinterpreted as restricting all ownership of firearms to the upper classes, merely limited the use of those weapons most common in crime. Indeed, the statute specifically states that it is permissible not only for gentlemen, but for yeomen, servingmen, the inhabitants of cities, boroughs, market towns, and those living outside of towns "to have and keep in every of their houses any such hand-gun or hand-guns, of the length of one whole yard."[46] The use of shot was forbidden, as was the brandishing of a firearm so as to terrify others, and the use of guns in hunting by unqualified persons.[47] It is notable that in cases in which crossbows, handguns, or other weapons were confiscated because of improper use, the courts were at pains to specify that the weapon in question was "noe muskett or such as is used for defence of the realm."[48]

The kingdom's Catholics formed an important exception to the tolerant attitude toward individual ownership of weapons. After the English Reformation they were regarded as potential subversives, and as such were liable to have their arms impounded. They were still assessed for a contribution of weapons for the militia, but were not permitted to keep these in their homes or to serve in the trained bands.[49] They were allowed to keep personal weapons for their defense, although in times of extreme religious tension their homes might be searched and all weapons removed.[50] The various restrictions on Catholic subjects are significant for demonstrating that a particular group could be singled out for special arms controls, but they did not advantage a substantial proportion of the community, for, by the second half of the seventeenth century, Catholics seem to have comprised not more than one in fifty of the English population.[51]

For the great majority of Englishmen there was a natural tendency during tranquil years or in periods of government indifference to become blasé about military duties; complaints of widespread negligence echo through the years. In 1569, a jury presented a grievance "that

45. 33 Hen. 8, ch. 6 (1541).

46. *Id.*

47. 2 & 3 Edw. 6, ch. 14 (1549); STATUTE OF NORTHAMPTON, 2 Edw. 3, ch. 3 (1328).

48. W. FISHER, THE FOREST OF ESSEX 214-15 (1887).

49. *See* C. CRUICKSHANK, *supra* note 31, at 24.

50. This occurred, for example, just prior to the outbreak of the English Civil War in 1642. *See* Manning, *The Outbreak of the English Civil War*, in THE ENGLISH CIVIL WAR AND AFTER, 1642-1658, 16 (R. Perry ed. 1970). Charles I empowered Catholics who had been disarmed to rearm in 1642. *See A Discourse of the Warr in Lancashire*, 62 CHETHAM SOC. 12-14 (1864); *Tracts Relating to Military Proceedings in Lancashire during the Great Civil War* 2 CHETHAM SOC. 38-40 (1844).

51. *See* J. JONES, THE REVOLUTION OF 1688 IN ENGLAND 77 n.2 (1972).

there is to much bowling and to little shoting,"[52] and fifty years later, in the 1620's, Charles I had to resort to the closure of alehouses on Sundays to keep men at their shooting practice.[53] In 1621 Sir James Parrett complained of the lamentable decline in the numbers of armed retainers maintained by the wealthy. "Those gentlemen whose grandfathers kept 15 or 17 lusty serveing men and but one or 2 good silver boules to drinke in," he noted, had been succeeded by "grand-children fallen from Charity to impiety [who] keepe scarce 6 men and greate Cubards of plate to noe purpose." Worse still, Parrett reported that public complacency had reached the stage where "in two shyres [there was] not a barrell of Gunn-powder to bee seene."[54]

During the 1620's and 1630's there was a serious effort to modernize the militia, but the increased expenses and requirement of additonal participation aroused popular resistance. Robert Ward, author of a military manual published just prior to the Civil War, was distressed at the failure of many bandsmen to appreciate

> how deeply every man is interested in it, for if they did, our yeomandrie would not be so proud and base to refuse to be taught, and to thinke it a shame to serve in their own armes, and to understand the use of them; were they but sensible, that there is not the worth of the peny in a kingdome well secured without the due use of Armes.[55]

Two years later, with the commencement of frantic preparations for civil war and party struggles over public arsenals, the public's attitude had completely altered. Wails of despair were heard from city after city as the royal army confiscated public magazines and disarmed local residents. "The best of it is," a disarmed and distraught townsman of Nantwich wrote, "if we stay at home, we are now their slaves. Being naked they will have of us what they list, and do with us what they list."[56] Forewarned was forearmed, and from 1642 Englishmen learned to hide their firearms and to stockpile weapons.

Nearly twenty years later, this proliferation of privately owned weapons would be regarded by the restored monarch and his supporters as a menace. It was their efforts to control weapons that convinced

52. *See* G. ROBERTS, THE SOCIAL HISTORY OF THE PEOPLE OF THE SOUTHERN COUNTIES OF ENGLAND IN PAST CENTURIES viii-ix (London 1856).

53. *Id.*

54. 6 COMMONS DEBATES 1621, at 318 (1935).

55. R. WARD, ANIMADVERSIONS OF WARRE, OR A MILITAIRE MAGAZINE OF THE TRUEST RULES AND ABLEST INSTRUCTION FOR THE MANAGING OF WARRE 150 (London 1639).

56. *The Latest Remarkable Truths from Worcester, Chester, Salop* in TRACTS RELATING TO THE CIVIL WAR IN CHESHIRE, 1641-1659, *reprinted in* 65 CHETHAM SOC. (n.s.) 238 app. B (1909).

Englishmen that the duty to keep arms must be recognized as a right. The events of the Restoration period, therefore, are of crucial importance.

II. Royal Efforts to Control Arms

To grasp the magnitude of the problem that awaited Charles II upon his return in 1660 it is useful to get some idea of the numbers of firearms kept in private homes. In ordinary times each household was expected to possess arms suitable to its defense, but what was considered suitable? It is possible to obtain an indication of what was regarded as a minimal arsenal by examining the responses of those charged by Charles II's government with stockpiling weapons. For example, in 1660, in reply to allegations that he had concealed weapons, one Robert Hope pleaded that in the past he had, indeed, kept guns for neighbors, but at present he had only "one light rapire and a small birdinge gunne."[57] Hope obviously considered this small stock beyond exception. In 1667, a Catholic subject informed an official that he was "not so well furnished with arms" as formerly, having only two fowling pieces and two swords.[58] Those not suspected of disaffection had, or at least admitted to having, comparatively more weapons. A Buckinghamshire squire kept for private use a pair of pocket pistols, another pair of "screwed" pistols, a suit of light armour, a sword, and a carbine.[59] A country curate in the early eighteenth century, unqualified to hunt and certainly no soldier, nonetheless owned two guns and a blunderbuss.[60] While wealthier citizens usually owned more weapons, firearms seem to have been well distributed throughout the community.[61] Quarter Session records reveal that men charged with illegal use of a gun for hunting were most often poor laborers, small farmers, or

57. William Cavendish, Earl of Devonshire, *Correspondence as Lord Lieutenant of Derbyshire from 1660 to 1666*, Additional MS. 34, 306, fol. 12, British Library, London.

58. LeFleming MS, HISTORICAL MANUSCRIPTS COMMISSION, 12TH REPORT, Pt. 7, at 44 (1890).

59. *See* 4 MEMOIRS OF THE VERNEY FAMILY 167 (1899).

60. *See* E. THOMPSON, WHIGS AND HUNTERS 71 (1975).

61. Much evidence of the widespread ownership of firearms is scattered throughout the personal and public documents of this period. The most accessible proof is found in the county quarter session records, some of which are in print, which cite English men and women from all walks of life for misuse of firearms. *See, e.g., Minutes of the Proceedings in Quarter Sessions Held for the Parts of Kesteven in the County of Lincoln, 1674-1695, reprinted in* LINCOLN RECORD SOC. 25, 26 (1931); *Quarter Session Records for the County of Somerset, 1607-77, reprinted in* SOMERSET REC. SOC. 23-24, 28, 34 (1907-19); *Warwick County Records: Quarter Session Order Books, 1625-90, reprinted in* WARWICK COUNTY COUNCIL 6,7 (1935-53); *Worcestershire County Records Division 1: Documents Relating to Quarter Sessions*, in WORCESTERSHIRE HIST. SOC. *passim* (1899-1900).

craftsmen.[62] This is not surprising, since guns abounded during and after the Civil War[63] and seem not to have been beyond the means of the poorer members of the community. In 1664 a musket could be purchased for ten shillings, a sum that would take only a little over a week for a foot soldier in a militia band to accumulate from his wages, and a little more than two weeks for a citizen to afford with the modest wages paid for standing night watch.[64] Used weapons could probably be bought even more cheaply.

The anxious period between Cromwell's death and the arrival of Charles II was no ordinary time, and many citizens began to assemble caches of weapons, some of which turned up years later in homes, churches, and guildhalls throughout the realm.[65] In 1660 a Bristol prebendary notified authorities that the stables of his predecessor's house were full of cannon balls and, even twenty years later, a Shropshire man and his son were found with a cache of some thirty muskets and other guns and admitted to having owned and burned fifty pikes.[66] City officials stockpiled weapons as well, and Northampton and Exeter were among those communities later embarrassed by the disclosure of stocks of arms hidden in public buildings. In 1661 the city of Exeter surrendered 937 musket barrels only to have another hoard of weapons discovered shortly afterwards in the guildhall.[67]

As his subjects and the republican army of some 60,000 men waited, "armed to the teeth," to greet their new monarch, Charles II found himself virtually unarmed. In the months before his arrival public arsenals had suffered such extensive embezzlements that the King's men were unable to find in them "firearms enough . . . to arm three thousand men."[68] The King was careful to conceal the fact "that it might not be known abroad or at home, in how ill a posture he was to defend himself against an enemy."[69]

It is scarcely surprising, therefore, that the wild rejoicing that

62. *See* sources cited *supra* note 61.

63. *See, e.g.*, E. THOMPSON, *supra* note 60, at 71; J. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY 4, 5 (1965); 4 MEMOIRS OF THE VERNEY FAMILY 167 (1899); Letter from West to Fleming, Jan. 27, 1667, LeFleming MS, *supra* note 58, at 44.

64. *See* 92 Clarendon MS 143, Bodleian Library, Oxford.

65. *See* J. WESTERN, *supra* note 63, at 4-5.

66. *See id.*

67. *See id.* at 4; Privy Council Registers, P.C. 2, vol. 55, fol. 520 (Jan. 22, 1661), Public Record Office, London.

68. E. HYDE, 2 THE LIFE OF EDWARD EARL OF CLARENDON 117 (Oxford 1827).

69. *Id.*

greeted Charles II upon his return to London in May, 1660[70] failed to disguise from the King the precariousness of his position. He was painfully aware that many of these same citizens had gathered for his father's execution eleven years earlier and that despite its obedient professions, Parliament had never been at "so high a pitch," for "the power which brought in may cast out, if the power and interest be not removed."[71] A study sent to his Court recommended the removal of that power. The anonymous author argued that no prince could be safe "where Lords and Commons are capable of revolt," hence it was essential to disarm the populace and establish a professional army. "It is not the splendor of precious stones and gold, that makes Ennemies submit," he observed, "but the force of armes. The strength of title, and the bare interest of possession will not now defend, the stres will not lye there, the sword is the thing."[72]

Charles agreed completely. But to achieve a shift in the balance of armed might from the general populace to reliable supporters, he needed an obedient police establishment and a series of legal or quasi-legal enactments that would permit the disarmament of his opponents, among whom he counted members of the republican army.[73] In this latter task he had help from Parliament, whose members had learned a lasting distrust of all armies at the hands of Cromwell's soldiers. Parliament speedily devised a scheme to pay off regiments by lot, taking care to secure their weapons "for his Majesty's service."[74] While Charles was relieved to have this particular army disbanded, he was anxious to launch a permanent establishment of his own, and shortly after his return to England secretly began to plan for a force of eight thousand men. A loophole in the disbandment bill permitted the King to maintain as many soldiers as he liked, provided he paid for their upkeep.[75]

The militia was a knottier problem. Both King and Parliament were eager to reestablish the old trained band system, but Parliament was reluctant to confront the numerous difficulties any militia act would have to resolve. A bill submitted at the time of the Restoration had been rejected because many representatives believed its provision

70. *See* 3 MEMOIRS ILLUSTRATIVE OF THE LIFE AND WRITINGS OF JOHN EVELYN 246 (deBeer ed. 1955).

71. *Two Treatises Addressed to the Duke of Buckingham*, Lansdowne MS 805, fol. 79 British Library, London.

72. *Id.*

73. *See* 8 H. C. JOUR. 5-6; E. HYDE, *supra* note 68, vol. 1 at 335.

74. *See* 8 H. C. JOUR. 142-43, 161, 163, 167.

75. *See id.* at 167.

for martial law might make Englishmen "wards of an army."[76] The struggle over control of the militia had driven the realm to war in 1642;[77] the issue of royal command would have to be clarified and a militia assessment set, which would involve an evaluation of every subject's property. Despite vigorous pressure from the Court, members of Parliament refused to approve even a temporary militia bill for more than a year.[78] The King, however, was unwilling to wait even a few days before establishing a militia, and was reported within ten days of his return to London to be "settling the militia in all counties by Lords Lieutenants."[79] His right to do so, even in the absence of a valid militia act, does not seem to have been questioned. All candidates for the post of lord lieutenant were carefully screened, and officers were instructed to select bandsmen of unblemished royalist complexion.[80] The resulting force should in no way be seen as representative of the people.

In conjunction with this purged and loyal militia, Charles created a new military body as large again as the militia for which there was far less precedent. It was composed of regiments of volunteers who met at their own, rather than the county's, expense and drilled alongside the regular militia.[81] Both the size of this private army and its longevity were impressive. It continued as an organized force well after the Militia Act of 1662 took effect, and at least through 1667, when the entire militia fell into decline.[82] Although the official task of the volunteers was "to assist on occasion," occasion occurred with great frequency, particularly when such controversial and unpopular duties as the disarmament of fellow subjects were involved.[83]

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76. 4 PARL. HIST. ENG., 145 (London 1808-20).

77. *See* J. KENYON, THE STUART CONSTITUTION 196 (1966); J. MALCOLM, CAESAR'S DUE: LOYALTY AND KING CHARLES 1642-1646, at 17-21 (1983).

78. A militia act was not passed until the spring of 1662, although a temporary measure was passed a year earlier. *See* 13 Car. 2, ch. 6 (1661); 13 & 14 Car. 2, ch. 3 (1662).

79. HISTORICAL MANUSCRIPTS COMMISSION, 5TH REPORT 153 (1876).

80. *See id.*; *State Papers Domestic, Charles II*, S.P. 29, vol. 11, fols. 146-74 (Aug. 26, 1660), Public Record Office, London; *Instructions to Lords Lieutenants, Whitehall, 1660*, Egerton MS 2542, fol. 512, British Library, London.

81. *See* sources quoted in Malcolm, *supra* note 28, at 8-9.

82. *See, e.g., Letter Book of Thomas Belasyse, Viscount Fauconberg Lord Lieutenant of the North Riding of Yorkshire, 1665-84*, Additional MS 41,254, fols. 20-22, British Library, London, which reported that the militia had not been ordered to muster for several years. *See also* J. WESTERN, *supra* note 63, at 48.

83. *See, e.g., Norfolk Lieutenancy Journal, 1661-1674*, Additional MS 11,601, fol. 29, British Library, London; *Earl of Westmorland Letter Book, 1660-1665, Northamptonshire Militia*, Additional MS 34,222, fols. 25-26, 32, British Library, London; Westmorland to Vane, July 21, 1662, *Clarendon State Papers*, vol. 77, fol. 66a, Bodleian Library, Oxford.

Charles II employed his militia and volunteer regiments differently from the manner in which militia had been used before the Civil War. In place of the occasional muster in time of peace and mobilization during an invasion or rebellion, his men were to be ready for action at an hour's warning.[84] Their main task was to police possible opponents of the regime. Their first order was to monitor the "motions" of persons of "suspected or knowne disaffection" and prevent their meeting or stockpiling weapons.[85] All arms and munitions in the possession of such suspects beyond what they might require for personal defense were to be confiscated.[86]

With this police apparatus in place, the King turned to the royal proclamation, a device of uncertain legal status, to tighten arms control. In September, 1660, he issued a proclamation forbidding footmen to wear swords or to carry other weapons in London.[87] In December another proclamation expressed alarm that many "formerly cashiered Officers and Soldiers, and other dissolute and disaffected persons do daily resort to this City."[88] All such soldiers and others "that cannot give a good Account for their being here" were to leave London within two days and remain at least twenty miles away indefinitely.[89] At the same time the royal government launched a campaign to control firearms at the source. Gunsmiths were ordered to produce a record of all weapons they had manufactured over the past six months together with a list of their purchasers.[90] In future they were commanded to report every Saturday night to the ordnance office the number of guns made and sold that week.[91] Carriers throughout the kingdom were required

84. Additional MS 34,306, *supra* note 57, at fol. 14. The King went still further and, for a time, required militia commanders to keep a portion of their men on duty at all times. This scheme proved unworkable. *See* Additional MS 34,222, *supra* note 83, at fol. 43; Additional MS 34,304, fol. 44; D. OGG, ENGLAND IN THE REIGN OF CHARLES II 253 (1967).

85. *Instructions to Lords Lieutenants, Whitehall, 1660*, Egerton MS 2542, *supra* note 80, at fol. 512.

86. *See id.*

87. *"A Proclamation For Suppressing of disorderly and unseasonable Meetings, in Taverns and Tipling Houses, And also forbidding Footmen to wear Swords, or other Weapons, within London, Westminster, and their Liberties"*, Sept. 29, 1660, B.M. 669, fol. 26 (13), British Library, London. This and subsequent proclamations cited in this article are calendared in R. STEELE, TUDOR AND STUART PROCLAMATIONS (1910). Originals can be found at the British Library and the citations will be to these.

88. *"A Proclamation commanding all cashiered Soldiers and other Persons that cannot give a good account of their being here to depart out of the Cities of London and Westminster"*, Dec. 17, 1660, B.M. 669, fol. 26 (37), British Library, London.

89. *Id.*

90. *See* Privy Council Registers, P.C. 2, vol. 55, fol. 71 (Dec. 1660), Public Record Office, London.

91. *See id.*

to obtain a license if they wished to transport guns, and all importation of firearms was banned.[92]

Events then played into Charles's hands, for on January 6, 1661, an uprising by a handful of religious zealots provided the perfect excuse to crack down on all suspicious persons and to recruit his own standing army. Thomas Venner, a cooper, had led his small band of Fifth Monarchists into the streets of London to launch the prophesied fifth universal monarchy of the world. Although the group was soon subdued,[93] the Court administration blatantly exaggerated the threat they had posed. Speaking to Parliament six months later, the Lord Chancellor characterized the pitiful uprising as the "most desperate and prodigious Rebellion . . . that hath been heard of in any Age" and insisted the plot had "reached very far," and that "there hath not been a Week since that Time in which there hath not been Combinations and Conspiracies formed."[94]

The timing of the Fifth Monarchist uprising was especially opportune, for it occurred the very day the last regiments of the Commonwealth army were due to be disbanded. In response to this visible danger, these regiments were retained and twelve more companies were recruited to form the nucleus of a royalist army.[95] The militia and volunteers throughout the realm were ordered to carry out a general disarmament of everyone of doubtful loyalty.[96] By January 8, 1661, two days after the Venner uprising, Northamptonshire lieutenants reported that all men of known "evill Principles" had been disarmed and secured "so as we have not left them in any ways of power to attempt a breach of the peace."[97]

By the autumn of 1661, with his enemies in prison or at least disarmed and under surveillance, with strict monitoring of both production and distribution of weapons, and with a small standing army and a large police establishment, Charles was ready to disarm the most dan-

92. *See* Privy Council Register, P.C. 2, vol. 55, fol. 187 (Sept. 4, 1661), fol. 189 (Mar. 29, 1661), Public Record Office, London.

93. *See* Burrage, *The Fifth Monarchy Insurrections*, 25 THE ENGLISH HIST. REV. 722-47 (1910).

94. 11 H.L. JOUR. 243.

95. *See* 1 J. CLARKE, THE LIFE OF JAMES THE SECOND, KING OF ENGLAND, ETC. COLLECTED OUT OF MEMOIRS WRIT OF HIS OWN HAND 390-91 (London 1816).

96. *See* Additional MS. 34,222, *supra* note 83, at fol. 15.

97. *Id.* at fol. 17. The seizure of arms and persons was so zealously carried out—a Derbyshire man claimed his house had been searched nine times in one week—that in mid-January the King had to issue a proclamation to reassure outraged Londoners that the customary restrictions against unwarranted search and seizure were still in effect. *See* B.M. 669, fol. 26 (49), British Library, London.

gerous element of the population—the thousands of disbanded soldiers of the republican army. Acting by proclamation on November 28, he ordered all veterans of that army and all those who had ever fought against the Stuarts to depart from the capital within the week and to remain at least twenty miles away until June 24, 1662.[98] During their six months of banishment the veterans were warned not to "weare, use, or carry or ryde with any sword, pistoll or other armes or weapons."[99] Two days before this proclamation was due to expire, another appeared which extended the ban and the prohibition against carrying arms for an additional six months.[100] The scope of these bans was so broad it is doubtful whether the militia and volunteers were capable of enforcing them. Nevertheless, the proclamations had the practical effect of depriving a large portion of the male population of its legal right to carry firearms.

Endless alarms of plots provided an excuse to keep the militia on full alert, to impose restrictions on the production, importation, and movement of arms, and to create a standing royal army. Parliament cooperated in this policy by passing militia acts in 1661 and 1662 which reaffirmed the King's control of that force and specifically authorized bandsmen to continue the seizure of arms that Charles's militia had been undertaking on the King's orders alone.[101] Any two deputy lieutenants could initiate a search for, and seizure of, arms in the possession of any person whom they judged "dangerous to the Peace of the Kingdom."[102] This definition of those who could be disarmed was less precise than that of any former militia act, and permitted lower ranking officers great latitude in disarming their neighbors.

Charles II's program to police his realm and control its arms demonstrated skill, timing, and resourcefulness. Arriving unarmed in 1660 to confront an armed nation and a veteran republican army, he succeeded within two years in molding the militia and volunteers into a police force of unprecedented size and effectiveness. All possible adversaries were watched, harassed, disarmed, and in many instances imprisoned. And the men of Oliver Cromwell's army, once the pride of England and terror of Europe, were flattened, disbanded, psychologically disarmed, and then actually deprived of their right to carry weap-

98. *See* B.M. 1851, ch. 8 (133), (134), (135), British Library, London.

99. *Id.*

100. This proclamation was issued on June 22, 1662. There is no record of a proclamation for 1663, but on November 18, 1664, June 28, 1665, and June 10, 1670, the proclamation was reissued. *See* R. STEELE, *supra* note 87.

101. 13 Car. 2, ch. 6 (1661); 14 Car. 2, ch. 3 (1662).

102. *Id.*

ons. Many members of Parliament were skeptical about the need for such broad powers or the actual danger of rebellion[103] but were content to give the King what he wished as long as their own interests were protected.

III. Parliament's Campaign to Regulate Arms

The royalist aristocrats who flocked to welcome Charles II on his return had every reason to rejoice, for his restoration was theirs as well. After twenty years during which their prestige, pocketbooks, and property had been ravaged by war, revolution, and a republican government, they had an opportunity to restore, and even enhance, their former position. The royalists were to be so successful in this aim that their position by 1688 was described as like that of the barons of Henry III.[104] In order to restore order they were prepared to concede much to the Crown, but jealously guarded the power of the sword and mastery of the localities. They administered local justice, staffed the militia, served in the royal volunteers, and sat in Parliament.[105] The King was dependent upon them to carry out his policies and shore up his regime.[106] For the sake of maintaining their political dominance they acquiesced in the King's program of arms control and, in the Militia Act of 1662, extended the power of militia officers to disarm suspects.[107] But the aristocracy went beyond approving the royal controls. On its own initiative, Parliament passed a game act in 1671 that, for the first time, deprived the vast majority of Englishmen of their legal right to keep weapons.[108]

Game acts had been passed from time to time and were ostensibly designed to protect wild game and to reserve the privilege of hunting for the wealthy. But disarming the rural population was sometimes an

103. Sir John Dalrymple observed that in government rhetoric, "mobs were swelled into insurrections, and insurrections into concerted rebellion." J. DALRYMPLE, 1 MEMOIRS OF GREAT BRITAIN AND IRELAND 26 (2d ed. London 1771-73).

104. *See* J. PLUMB, THE GROWTH OF POLITICAL STABILITY ENGLAND, 1675-1725, at 21-22 (1967).

105. *See id.* at 20-21. *See also* C. HILL, REFORMATION TO INDUSTRIAL REVOLUTION 110-11 (1967).

106. The English monarch had only a small bureaucracy and was dependent upon the nobility and, in particular, the gentry throughout the realm to carry out numerous functions of government as unpaid volunteers. In reference to the militia itself, *see* J. WESTERN, *supra* note 63, at 16-17, 63.

107. *See* 13 & 14 Car. 2, ch. 3 (1662-63).

108. *See* 22 & 23 Car. 2, ch. 25 (1671).

underlying motive for their passage.[109] Game acts of the sixteenth and early seventeenth centuries had made possession of certain breeds of dog and possession of equipment specifically designed for hunting illegal for all those not qualified by income to hunt.[110] However, since guns were acknowledged to have legitimate purposes, they were confiscated only if used illegally.[111]

The Game Act passed in 1671 differed from its predecessors in several important respects. To begin with, it raised the property qualification necessary to hunt from forty pounds to one hundred pounds annual income from land, a figure so high that only the nobility, gentry, and a very few yeomen could qualify, whereas all those whose wealth came from a source other than land—such as lawyers and merchants—were forbidden to hunt.[112] This extraordinarily high qualification divided the rural population into two very unequal groups and placed the aristocracy at odds with everyone else. Many critics would later express astonishment that "the legislature of a mighty empire should require one hundred [pounds] a year to shoot a poor partridge, and only forty shillings to vote for a senator!"[113] The qualification to hunt was fifty times that required to vote.

Of more importance, this game law stated that all persons unqualified to hunt, at least ninety-five percent of the population, were not qualified to keep or bear arms. In the language of the statute: "[A]ll and every person and persons, not having Lands and Tenements of the clear yearly value of One hundred pounds . . . are . . . not allowed to have or keep for themselves, or any other person or persons, any Guns,

109. The very first game act to set a property qualification on the right to hunt appeared in 1389, eight years after that century's devastating peasant rebellion. The preamble to 13 Ric. 2, ch. 13, "None shall hunt but they which have a sufficient living" read: "Item, for as much as divers artificers, labourers, and servants, and grooms, keep greyhounds and other dogs, and on the holy days, when good christian people be at church, hearing divine service, they go hunting in parks, warrens, and connigries of lords and others, to the very great destruction of the same, and sometimes under such colour they make their assemblies, conferences, and conspiracies for to rise and disobey their allegiance." *See* J. CHITTY, A TREATISE ON THE GAME LAWS, AND ON FISHERIES 368 (2d ed. London 1826); W. HOLDSWORTH, 4 A HISTORY OF ENGLISH LAW 505 (1924).

110. *See* 19 Hen. 7, ch. 11 (1495); 5 Eliz., ch. 21 (1562); 3 Jac. ch. 13 (1605); 7 Jac. ch. 13 (1609); 13 Car. 2, ch. 10 (1663).

111. *See* sources cited *supra* note 110.

112. The Game Act of 1609, in effect until the act of 1671, provided that those who had personal property of £400 were entitled to hunt. This permitted merchants and professionals whose wealth was not based on land to hunt. The Act of 1671, however, abolished this category. *Compare* 7 Jac., ch. 13 (1609) *with* 22 & 23 Car. 2, ch. 25 (1671).

113. J. CHITTY, OBSERVATIONS OF THE GAME LAWS, WITH PROPOSED ALTERATIONS FOR THE PROTECTION AND INCREASE OF GAME, AND THE DECREASE OF CRIME 180 (London 1816).

Bowes, . . . or other Engines."[114] It was no longer necessary to prove illegal use or intent; the mere possession of a firearm was illegal. The new act also empowered owners of forests and parks to appoint gamekeepers who, by warrant, could search the homes of persons suspected of harboring weapons, and confiscate any arms they found.[115]

There can be little doubt that it was the intention of the promoters of the Game Act to give themselves the power to disarm their tenants and neighbors and to bolster the position of their class with respect to that of the King and of the wealthy members of the middle class. They had begun to be suspicious of Charles II by 1671, and frightened by a spate of rural violence.[116] Hence, the provision of the Game Act that enabled country squires to set up their own gamekeeper-police and to confiscate the weapons of unqualified persons at their discretion must have seemed most desirable. As James II was to demonstrate, however, it was a statute with great potential for the Crown.

There appears to have been no overt protest or widespread alarm over the royalist program of arms control. While this may have been due to the conviction that such controls were necessary, it seems more likely that the real reason was that the program was not rigidly enforced during the reign of Charles II. It would have been difficult to carry out the proclamations against the carriage of arms by parliamentary veterans, and the militia's disarmament of suspicious persons was always selective.[117] The prosecution of the Game Act of 1671 was left to the gentry and from the scant evidence available appears to have been sporadic.

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114. 22 & 23 Car. 2, ch. 25 (1671).

115. *Id.*

116. From at least 1665 there was growing distrust of the regime of Charles II. At the beginning of 1667, Samuel Pepys, a civil servant, found the royal court "[a] sad, vicious, negligent Court, and all sober men there fearful of the ruin of the whole kingdom this next year; from which good God, deliver us!" *Cited by* D. WITCOMBE, CHARLES II AND THE CAVALIER HOUSE OF COMMONS, 1663-1674, at 55 (1966); *see* D. OGG, *supra* note 84, at 313; 22 & 23 Car. 2, ch. 7 (1671).

117. Persons judged to be suspicious by the royal administration were those active in the parliamentary party during the Civil War and its aftermath, and those who belonged to the Protestant sects that refused to remain within the Church of England. The Quakers were prominent sufferers. *See, e.g.*, fol. 18, Additional MS 34,306, British Library, London, *and* 13 Car. 2, ch. 6 (1661), a militia act which noted that since June 24, 1660, less than a month after Charles II's return, "divers persons suspected to be fanaticks, sectaries or disturbers of the peace have been assaulted, arrested, detained or imprisoned, [by the militia] and divers arms have been seized and houses searched for arms." The militia had specifically been ordered to disarm all persons "notoriously knowne to be of ill principles or [who] have lately . . . by words or actions shewn any disaffection to his Majestie or his Government, or in any kind disturbed the publique peace." Additional MS 34,222, *supra* note 83, at 15.

After 1680, however, Charles II began to use the Militia Act to disarm his Whig opponents, and in 1686, James II made use of both the Militia Act and the Game Act to disarm his Protestant subjects.[118] Englishmen were outraged and alarmed, and finally convinced of the need to guarantee their right to own weapons. After James II had fled from the kingdom, members of the Convention Parliament convened by William of Orange[119] felt it incumbent upon them to shore up the rights of English subjects before a new monarch ascended the throne. During their discussions, the need for Protestant subjects to have arms came up repeatedly.[120] When the many rights considered most in need of reaffirmation had been pared to thirteen, and a Declaration of Rights presented to William and Mary, the seventh among the "true, ancient, and indubitable" rights proclaimed was the right of all Protestants "to have Arms for their Defence suitable to their Conditions and as allowed by Law."[121]

IV. The English Bill of Rights and the Present Controversy

As an article of the English Bill of Rights, the right to have arms was part and parcel of that bundle of rights and privileges that English-

118. *See* J. WESTERN, *supra* note 63, at 48-51; CALENDAR OF STATE PAPERS DOMESTIC, 1686-87, at 314 (1964).

119. James II decided to abandon his kingdom in the face of a growing army of his subjects led by William of Orange and the desertion of his own army. The realm was thrown into a constitutional crisis, as no Parliament was in session and only the king could legally summon a parliament. William consulted with the nobility and former members of the Commons and on their advice summoned a convention parliament to meet to resolve the kingdom's succession. He promised to abide by its decision. A convention parliament had been called in 1659 by George Monck, again in the absence of a reigning monarch, and it was this body that invited Charles II to return as king. Unlike its predecessor, however, the Convention Parliament of 1688 was determined to ensure the rights of subjects and to prevent any infringement by future monarchs. *See infra* sources cited at note 120.

120. We have only sketchy records remaining of the debates of the Convention Parliament. The best of these in print are the notes made by John Somers, chairman of the committee that drafted the English Bill of Rights *reprinted in* 2 MISCELLANEOUS STATE PAPERS FROM 1501 TO 1726 *passim* & esp. 407-18 (London 1778). Somers's notes are punctuated with the angry comments of members at the use of the Militia Act in particular to disarm law-abiding citizens. Sir John Maynard was furious that "an Act of Parliament was made to disarm all Englishmen, whom the lieutenant should suspect, by day or night, by force or otherwise" and branded it "an abominable thing to disarm a nation, to set up a standing army." *Id.* at 407. Another member argued that there was "no safety but the consent of the nation—the constitution being limited, there is a good foundation for defensive arms—It has given us right to demand full and ample security." *Id.* at 410. *See also* L. SCHWOERER, THE DECLARATION OF RIGHTS, 1689 (1981) (a recent study of the Convention Parliament).

121. 1 W. & M., Sess. 2, ch. 2 (1689). The English Declaration of Rights drawn up by the Convention Parliament was approved by the first parliament summoned by William and Mary and incorporated with the legislation recognizing them as king and queen. It was thereafter known as the English Bill of Rights.

men carried with them to America and which they later fought to preserve. Much of the present confusion over the Second Amendment to the United States Constitution stems from the failure to understand the meaning or to determine the effect of the English right—problems that can both be finally solved by a careful reading of the historic record.

Roy Weatherup is one of several authors who fail in the attempt to fix the meaning of the English right by slipping into the common trap of imposing a modern controversy upon past events.[122] Weatherup is so caught up in the debate over the reference to the militia in the Second Amendment and the attendant quarrel over whether that amendment conveys a collective or an individual right[123] that he totally ignores the fact that the English right to arms makes no mention whatsoever of the militia. Undeterred, Weatherup insists that the English right conveyed "no recognition of any personal right to bear arms on the part of subjects generally" but merely granted members of the militia the right to "keep and bear arms in accordance with their militia duties."[124] Such an interpretation ignores the clear language of the English right and disregards the accompanying historic record. The militia was certainly of grave concern to members of the Convention Parliament, but this was not because members of the militia had been disarmed. Quite the contrary. The militia was a problem because the Militia Act of 1662 had permitted its officers wide latitude to disarm *law-abiding citizens*. The correction of this abuse and many others that preoccupied the members required new legislation which, they reluctantly admitted, in the present emergency they did not have the leisure to draft.[125] Instead, they decided to concentrate their energies upon reaffirming those ancient rights most recently imperiled through a declaration of rights they hoped would be "like a new magna charta."[126] Legislative reform was meant to follow when time allowed.

Weatherup is somewhat nearer the mark in his assertion that a collective right was intended.[127] A collective right to arms was discussed by the Convention, but it was rejected in favor of an individual

122. *See* Weatherup, *supra* note 5.

123. *See id.* at 962-64.

124. *Id.* at 973-74.

125. *Anonymous Account of the Convention Proceeding, 1688*, Rawlinson MS D1079, fol. 10, Bodleian Library, Oxford. The committee was instructed "to distinguish such of the . . . heads [of grievances] as are introductory of new laws, from those that are declaratory of ancient rights." The revised version of their report can be found in 10 H.C. JOUR. 1688-93, at 21-22.

126. *See* G. BURNET, 2 BISHOP BURNET'S HISTORY OF HIS OWN TIME 534 (London 1840).

127. *See* Weatherup, *supra* note 5, at 974.

right alone. The Whig members of the Convention had pressed hard for a collective as well as an individual right[128] and the first version of the arms article adhered to their view that the public should be armed to protect their rights:

> It is necessary for the publick Safety, that the Subjects which are Protestants, should provide and keep Arms for their common Defence. And that the Arms which have been seized, and taken from them, be restored.[129]

The second version of this article retreated somewhat from this stance. It stated:

> That the Subjects, which are Protestants, may provide and keep Arms, for their common Defence.[130]

All mention of arms being "necessary for the publick Safety" was omitted although this version still asserts that arms could be kept for "common" defense; instead of the exhortation that citizens "should" provide and keep arms, the permissive "may" is used.

It was the third, and final version, however, that constituted a complete retreat from any collective right to have arms. It read:

> That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law.[131]

The reference to a need for arms for "their common Defence" was replaced by the right to keep arms for "their Defence," and two modifying clauses were added at the last moment at the instigation of the cautious House of Lords.

In the opinion of a modern British scholar, the retreat from a collective to an exclusively individual right to have arms "emasculated" the article: "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."[132] The Whigs continued to press for the notion that it was necessary for the safety of the constitution that subjects be armed and, in the course of the eighteenth century, Blackstone among others

128. The Whigs had sizable majorities on the committes which drafted the Declaration of Rights, and those most outspoken in favor of a general possession of arms for the purpose of resisting tyranny were Whigs. *See* L. SCHWOERER, *supra* note 120, at 152; and members quoted in J. SOMERS, *supra* note 120, at 107-18, with their affiliation as described by Schwoerer. *See also* D. LACEY, DISSENT AND PARLIAMENTARY POLITICS IN ENGLAND, 1661-1689, at 382-83, 422-23 (1969).

129. Rawlinson MS D1079, *supra* note 125, at fol. 8.

130. 10 H.C. JOUR., 1688-93, at 21-22.

131. 1 W. & M., Sess. 2, ch. 2 (1689).

132. J. WESTERN, MONARCHY AND REVOLUTION: THE ENGLISH STATE IN THE 1680'S, 339 (1972).

reinterpreted the English right to arms to include that position.[133] At the time it was drafted, however, the English right to have arms was solely an individual right. By the outbreak of the American Revolution, it had been transformed into both an individual and a collective right.

The actual impact of the English right as stated in the new Bill of Rights is far more difficult to determine than its meaning. Modern critics have argued that the limitation to Protestants of the right to have arms and the qualifying clauses further restricting lawful possession by Protestants to those weapons "suitable to their conditions" and "as allowed by Law" made this right so exclusive and uncertain as to be "more nominal than real."[134] But if, at first glance, the article's exclusiveness appears striking, much hinges on how these clauses, added at the last moment, were in fact interpreted. There is no doubt that "as allowed by law" included those sixteenth century laws which placed certain restrictions on the type of arms subjects could own, but did not deprive Protestant subjects of their right to have firearms.[135] However, the Game Act of 1671 was in direct conflict with that right. Since the Convention Parliament had agreed to restate rights but leave legislative reform for the future,[136] it is not surprising that the right to have arms contradicted laws still on the statute books. The best means of determining the extent to which the qualifying clauses limited ownership of firearms is to examine subsequent legislation and those legal cases that decided permissible use.

Early in the reign of William and Mary, Parliament approved two acts affecting arms ownership: "An Act for the better securing the Government by disarming Papists and reputed Papists" in 1689,[137] and, in 1692, "An Act for the more easie Discovery and Conviction of such as shall Destroy the Game of this Kingdom."[138] A militia act was also

133. For examples of Whig efforts to incorporate into legislation their view that the citizenry must be armed to prevent tyranny, see 10 H.C. JOUR. 621; 5 PARL. HIST. ENG., *supra* note 76, at 344; N. LUTTRELL, THE PARLIAMENTARY DIARY OF NARCISSUS LUTTRELL, 1691-1693, at 444 (H. Horwitz ed. 1972). *See also* 2 W. BLACKSTONE, COMMENTARIES 441 (E. Christian ed. London 1793-95) (editor's comment); and 1 W. BLACKSTONE, *surpa* note 2, at * 140-41.

134. G. NEWTON & F. ZIMRING, *supra* note 5, at 255 (quoting from 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 678 (3d ed. 1858)).

135. These acts were: 33 Henry 8, ch. 6 (1541) and 2 & 3 Edw. 6, ch. 14 (1549). For evidence of their continued enforcement, see sources cited *supra* note 61 (relating to quarter session records); G. SHARP, *supra* note 43, at 17-18; Rex v. Alsop, 4 Mod. Rep. 51 (K.B. 1691).

136. *See supra* notes 125-26 and accompanying text.

137. 1 W. & M., ch. 15 (1689).

138. 4 & 5 W. & M., ch. 23 (1692).

approved by the House of Commons in July 1689, but failed to pass the House of Lords.[139] The first of these acts, the act for disarming Catholics, was meant to secure the realm against a rising on behalf of the deposed Catholic king, James II. It prohibited Catholics from keeping all "Arms, Weapons, Gunpowder, or Ammunition," but did permit a Catholic to retain those weapons that local justices at Quarter Sessions thought necessary "for the Defence of his House or Person."[140] This exception is especially significant, as it demonstrates that even when there were fears of religious war, Catholic Englishmen were permitted the means to defend themselves and their households; they were merely forbidden to stockpile arms. The need for individual self-defense was conceded to have precedence over other considerations. Furthermore, while the Bill of Rights excluded Catholics from any absolute right to have arms, members of that faith were, in practice, accorded the privilege of retaining some weapons.

In 1692, Parliament passed a game statute designed to supercede all previous game acts.[141] This act incorporated many articles of the Game Act of 1671, but altered that act's ban on ownership of firearms by persons unqualified to hunt by omitting all mention of guns from the list of forbidden devices. Whereas the Game Act of 1671 stated that persons not qualified to hunt were "not allowed to have or keep for themselves, or any other person or persons, any Guns, Bowes, Greyhounds . . . or other Engines,"[142] the new act prohibited such persons from keeping and using "any bows, greyhounds . . . or any other instruments for destruction of . . . game."[143] According to the rule of law of that era, a later statute expressed in terms contrary to those of a former statute takes away the force of the first statute even without express negative words.[144] Of course, it was possible that guns could be included among "other instruments for destruction of . . . game." All evidence, however, points to the intentional exclusion of firearms from the terms of the statute.

139. In July, 1689, members of the House of Commons passed a measure "for ordering the Forces in the several Counties of this Kingdom," which was designed to make the militia more efficient, to strengthen local control over it, and to eliminate its powers to search for and seize weapons of so-called suspects. The measure ran into opposition in the House of Lords and was lost when the King dissolved Parliament. *See* J. WESTERN, *supra* note 132, at 340 n.1, 343; J. WESTERN, *supra* note 63, at 85-89; 5 PARL. HIST. ENG., *supra* note 76, at 344.

140. 1 W. & M. ch. 15 (1689).

141. 4 & 5 W. & M., ch. 23 (1692).

142. 22 Car. 2, ch. 25 (1671).

143. 4 & 5 W. & M., *supra* note 141.

144. H. ROLLE, REPORTS 91 (London 1675).

The House of Commons journals reveal the sensitivity of members to the new act's potential for disarming Englishmen. At the time of the bill's third reading, an engrossed clause, offered as a rider, stated that "any Protestant may keep a Musquet in his House, notwithstanding this or any other Act."[145] This was a very sweeping proposal, as it made no allowance for factors such as the sanity or previous criminality of the gun owner, and would, moreover, have purportedly bound future parliaments—something no session was really at liberty to do.[146] On the question of whether this rider should have a second reading, there was sufficient controversy to compel a division. The proposal lost by sixty-five votes to one hundred sixty-nine.[147] Despite its failure to become part of the new game act, it is of interest for two reasons: first, because it indicated the awareness of members that a game act could jeopardize the right of Protestants to have arms; second, because although it was an extreme proposal, it was not dismissed out of hand but occasioned a rare division in the House of Commons.

There is a frustrating lack of commentary or cases bearing on the issue of whether the omission of guns from the list of proscribed devices in the Game Act of 1692 should be regarded as legalizing their ownership, or whether firearms ought to be included under "any other engine." But the fact that there is no recorded instance of anyone charged under the new act for mere possession of a firearm, coupled with decisions from cases under a later law with similar language,[148] lends weight to the conclusion that guns were meant to be excluded from the terms of the statute.

In reference to the successor to the Game Act of 1692, "An act for the better preservation of the game," passed in 1706,[149] Joseph Chitty, an expert on game law, notes: "We find that guns which were expressly mentioned in the former acts were purposely omitted in this because it

145. 10 H.C. JOUR. 824.

146. A future parliament was always at liberty to amend a statute or to repeal it. During the debate on this rider an opponent of the measure argued that it "savours of the politics to arm the mob, which I think is not very safe for any government." *See* N. LUTTRELL, *supra* note 133, at 444. The Whig view expressed later by Blackstone did not yet prevail.

147. 10 H.C. JOUR. 824.

148. *See* 5 Ann, ch. 14 (1706). This statute levied a fine against any person or persons "not qualified by the laws of this realm so to do" who "shall keep or use any greyhounds, setting dogs . . . or any other engines to kill and destroy the game." *Id.*

The Devonshire Quarter Sessions clearly regarded the possession of firearms as legal after passage of the 1692 Game Act, for in 1704 it explained that while the houses of unqualified persons could be searched for dogs, nets and other "engines," no Protestant was to be deprived of his gun. *See* A.H.A. HAMILTON, QUARTER SESSIONS FROM QUEEN ELIZABETH TO QUEEN ANN 289 (1878).

149. 5 Ann, ch. 14 (1706).

might be attended with great inconvenience to render the mere possession of a gun *prima facie* evidence of its being kept for an unlawful purpose."[150] Two cases brought under that game act dealt specifically with the question of the inclusion of firearms under prohibited devices. Perhaps the most important of these was *Rex v. Gardner*,[151] in which the defendant had been convicted by a justice of the peace for keeping a gun in alleged violation of the Game Act. There was no evidence that the gun in question had been wrongfully used. But it was argued that a gun was mentioned in the 1671 Game Act[152] and considered there as an engine, and that the use of the general words "other engines" in the 1706 Act should be taken to include a gun.[153] It was objected "that a gun is not mentioned in the statute [of 1706], and though there may be many things for the bare keeping of which a man may be convicted, yet they are only such as can only be used for destruction of the game, whereas a gun is necessary for defence of a house, or for a farmer to shoot crows."[154]

The court concluded that "a gun differs from nets and dogs, which can only be kept for an ill purpose, and therefore this conviction must be quashed."[155] The justices reasoned:

> [I]f the statute is to be construed so largely, as to extend to the bare having of any instrument, that may possibly be used in destroying game, it will be attended with very great inconvenience; there being scarce any, tho' ever so useful, but what may be applied to that purpose. And tho' a gun may be used in destroying game, and when it is so, doth then fall within the words of the act; yet as it is an instrument proper, and frequently necessary to be kept and used for other purposes, as the killing of noxious vermin, and the like, it is not the having a gun, without applying it in the destruction of game, that is prohibited by the act.[156]

Indeed, Lord Macclesfield commented in this regard that he himself was in the House of Commons when that game act was drafted and personally objected to the insertion of the word gun therein "because it might be attended with great inconvenience."[157]

150. J. CHITTY, *supra* note 109, at 83 & note c.

151. Rex v. Gardner, Strange, 2 Reports 1098, 93 Eng. Rep. 1056 (K.B. 1739); 1 R. BURN, *supra* note 29, at 442-43.

152. *See supra* text accompanying note 114.

153. Rex v. Gardner, 93 Eng. Rep. at 1056.

154. *Id.*

155. *Id.*

156. *Id.*

157. 1 R. BURN, *supra* note 29, at 443. Lord Macclesfield sat on an earlier case, King v. King, 3 Geo. 2, in which the question of whether guns were intentionally omitted from the

In *Wingfield v. Stratford & Osman*,[158] appellant challenged his conviction under the Game Act and the confiscation of his gun and dog, the dog being a setting dog, the gun allegedly "an engine" for killing of game. The prosecution's plea was held faulty because it amounted to a general issue,[159] but the court pointed out that it would have held for appellant in any case as the prosecution had not alleged that the gun had been used for killing game:

> It is not to be imagined, that it was the Intention of the Legislature, in making the 5 Ann.c.14 to disarm all the People of England. As Greyhounds, Setting Dogs . . . are expressly mentioned in that Statute, it is never necessary to alledge, that any of these have been used for killing or destroying the Game; and the rather, as they can scarcely be kept for any other Purpose than to kill or destroy the Game. But as Guns are not expressly mentioned in that Statute, and as a Gun may be kept for the Defence of a Man's House, and for divers other lawful Purposes, it was necessary to alledge, in order to its being comprehended within the Meaning of the Words "any other Engines to kill the Game", that the Gun had been used for killing the Game.[160]

By the middle of the eighteenth century, therefore, English courts could not "imagine" that Parliament intended to disarm the people of England.

In 1775, the American colonists fought for what they regarded as the rights of Englishmen.[161] Fortunately, there is ample contemporary evidence defining exactly what the rights of Englishmen were at that time in respect to the keeping and bearing of arms. In 1782, Granville Sharp, an English supporter of the American cause, wrote that no Englishman "can be truly Loyal" who opposed the principles of English law whereby the people are required to have "arms of defence and peace, for mutual as well as private defence."[162] He argued that the laws of England "always required the people to be armed, and not only

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statute was raised but never determined. This is noted in the *Gardner* decision, along with his comments. *See* 93 Eng. Rep. at 1056.

158. Wingfield v. Stratford & Osman, Sayer, Reports 15-17, 96 Eng. Rep. 787 (K.B. 1752).

159. *Id.* at 16, 96 Eng. Rep. at 787.

160. *Id.* (Lee, C.J., concurring).

161. For extensive treatment of this subject *see* B. BAILYN, *supra* note 26. Bailyn writes, for example: "For the primary goal of the American Revolution, which transformed American life and introduced a new era in human history, was not the overthrow or even the alteration of the existing social order but the preservation of political liberty threatened by the apparent corruption of the [English] constitution, and the establishment in principle of the existing conditions of liberty." *Id.* at 19.

162. G. SHARP, *supra* note 43, at 18, 27.

to be *armed*, but to be *expert in arms*."[163] Edward Christian noted in his edition of Blackstone's *Commentaries*, published in 1793, that "ever since the modern practice of killing game with a gun had prevailed, everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game."[164] But the most definitive opinion on the rights of Englishmen "to bear arms, and to instruct themselves in the use of them" came from the Recorder of London, the chief legal adviser to the mayor and council, in 1780. He stated:

> The right of his majesty's Protestant 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 kindom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses, *individually*, *may*, and in many cases *must*, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.[165]

V. Conclusion

Prior to the Restoration, Englishmen had the obligation to be armed for the public defense and the privilege of keeping arms for their personal defense. During the reigns of Charles II and James II, from 1660 to 1688, the Court and Parliament passed laws and issued proclamations that severely restricted the rights of the people to possess firearms, and followed a policy designed to control production and distribution of weapons. The English Bill of Rights of 1689, however, not only reasserted, but guaranteed, the right of Protestant subjects to be armed. The qualifying clauses of the Bill that appear to limit arms ownership were, in fact, interpreted in a way that permitted Catholics to have personal weapons and allowed Protestants, regardless of their social and economic station, to own firearms. The ancillary clause "as allowed by Law" merely limited the type of weapon that could be legally owned to a full-length firearm, enforced the ban on shot, and permitted legal definition of appropriate use. The right of Englishmen to have arms was a very real and an individual right. For all able-bodied

163. *Id.* at 18.

164. 2 W. BLACKSTONE, COMMENTARIES 411 (E. Christian ed. 1793-95).

165. W. BLIZARD, DESULTORY REFLECTIONS ON POLICE 59-60 (London 1785) (emphasis in original).

men there was also the civic duty to bear arms in the militia. The twin concepts of a people armed and a people trained to arms were linked, but not inseparably.

If one applies English rights and practice to the construction of the Second Amendment to the United States Constitution, it is clear that the Amendment's first clause is an amplifying rather than a qualifying clause, and that a general rather than a select militia was intended. In fact, every American colony formed a militia that, like its English model, comprised all able-bodied male citizens.[166] This continued to be the practice when the young republic passed its first uniform militia act under its new constitution in 1792.[167] Such a militia implied a people armed and trained to arms.

The Second Amendment should properly be read to extend to every citizen the right to have arms for personal defense. This right was a legacy of the English, whose right to have arms was, at base, as much a personal right as a collective duty. It is significant that the American right to keep arms was unfettered, unlike the English right, which was limited in various ways throughout its development.

Thus, in guaranteeing the individual right to keep and bear arms, and the collective right to maintain a general militia, the Second Amendment amplified the tradition of the English Bill of Rights for the purpose of preserving and protecting government by and for the people.

166. *See supra* notes 24-25 and accompanying text.

167. That act stipulated that "each and every free able-bodied white male citizen . . . between the ages of 18 and 45 . . . shall severally and respectively be enrolled in the militia." Act of May 8, 1792, 2d Cong., 1st Sess., ch. 33.