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In Defense of Security, Liberty and Property: The English Origins of an Individual Right to Bear Arms

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Introduction

I. Background

Tensions in the city had rapidly grown over several months. On a wintry night in early March, 1770, a sentry and a civilian exchanged insults over a seemingly trivial matter, a disputed lodging bill. Soon, protests mounted as a soldier shoved a young boy. With the sounds of church bells ringing through the night, events quickly spiraled out of control as an angry armed mob confronted the sentry and the eight other soldiers who had come to his assistance. Rocks and snowballs rained down on the soldiers; British muskets fired into the crowd. When the smoke cleared, three civilians were left on the ground, dead.

Public outrage over the "Boston Massacre" culminated in a tense trial of the British soldiers for murder. In a politically charged courtroom, the defense was led by John Adams and Josiah Quincy, the most prominent Boston lawyers of the day. Facing an enraged public seeking revenge, they invoked the names of jurists and philosophers of the past to assert that the soldiers possessed a fundamental right of self- preservation. "It is the first, and strongest principle in our nature… the primary canon in the law of nature!"[1] proclaimed John Adams to the jury.

The trial highlighted the question; "Under what circumstances may one defend oneself by shooting an assailant?" By studying the arguments made by the lawyers representing both sides in the case, we can look back upon the English antecedents of this right, both from the standpoint of English political philosophers who first expounded it and the English common law

[1] John Adams, *Legal Papers of John Adams,* vol. 3 https://www.masshist.org/publications (accessed May 25, 2019).

precedents that supported it. The right of self- defense is also inextricably intertwined with the right to bear arms. We can also study the trial to gain insight into the historical environment which shaped how the founding fathers interpreted an individual right to keep and bear arms.

The attorneys cited English political theorists and English common law precedent as authority for the proposition that a shooting in self-defense was justifiable.[2] Both attorneys reached back to legal authorities from the seventeenth and early eighteenth centuries by citing English jurists, Sir Matthew Hale, Sir William Hawkins, and Sir William Blackstone, authorities both numerous and widely recognized. The right of self-defense was not only asserted by the defense. The prosecution also used the same authorities to justify the actions of the armed colonists who were portrayed not as a mob but as the embodiment of the noble "armed citizen" so often invoked by Whig political theorists of the late seventeenth- and eighteenth-century England. Clearly, in later eighteenth century colonial America, the proposition that one may arm oneself in personal self- defense had found support in not only the "Boston Massacre" courtroom, but among the public at large. The two sets of arguments to the jury would have made no sense otherwise.

These authorities were not obscure names pulled from dusty treatises only known to the elite few. The works of John Locke and William Blackstone were widely disseminated in the colonies and were well known to the general public.[3] The founding fathers stocked their libraries

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[2] *"Adams' Argument for the Defense," 3-4 December 1770,"* Founders Online, The Papers of John Adams, https://Founders.archives.gov/ (accessed February 12, 2019).

[3] Blackstone's *Commentaries* were immensely popular in the colonies because it had particular appeal to the layman; justices of the peace and other local officials frequently referred to it in order to become conversant in the common law. It allowed ordinary citizens to familiarize themselves with criminal law. The *Commentaries* received most acclaim in thinly settled colonial America. Julius S. Waterman, "Thomas Jefferson and Blackstone's Commentaries," in

with their treatises, as well as the writings of the Whig political theorists including James Harrington, Algernon Sydney, John Trenchard and Thomas Gordon; men who helped shape the founders' view of the role of the armed citizen as a bulwark for liberty against a tyrannical government. Thus, by studying this trial, we can analyze both the English precedents for the right to keep and bear arms as well as gain a greater understanding of the profound influence that these English writers had upon the founding fathers' view of this right.

The exact nature of the right to keep and bear arms has been at the core of historical and legal debate for over two hundred years. Is it a collective right inextricably linked to military service in an anachronistic militia? Is it a private right to keep arms for the purpose of self-defense? Does the correct interpretation lie somewhere in between? In the case, District of Columbia v. Heller (2008),[4] the U.S. Supreme Court narrowly held that the Second Amendment protects an individual's right to possess a firearm for traditional lawful purposes such as self-defense in the home. The fact that four Supreme Court justices dissented from this view suggests that the constitutional issue is far from settled.

While there has been a prodigious amount of research devoted to the American side of the constitutional right to bear arms, a much smaller group of historians has explored the English development of the right. English historiography similarly divides over the question of whether the right is held by the individual, irrespective of military service, or whether it is a collective right. The most comprehensive examination of the English right to bear arms is Joyce Lee

Essays in The History Of Early American Law, ed., David H. Flaherty (Chapel Hill: The University of North Carolina Press, 1969): 454.

[4] 554 U.S. 570 (2008).

Malcolm's *To Keep And Bear Arms: The Origins of an Anglo-American Right.*[5] Malcolm traces the development of the right during the seventeenth and eighteenth centuries, concluding that the English right belonged to the individual, regardless of a connection to military service. Lois G. Schwoerer, in, *The Declaration of Rights, 1689* and *Gun Culture in Early Modern England*, and in several articles, disputes Malcolm's conclusions, finding that the individual right to hold and bear arms was so limited by law and class restrictions as to render it insignificant. Other historians have viewed the development of the English right from the vantage point of a collective right – as a symbol of a political independence and as a deterrent to the abuse of liberties by a tyrannical power. Lawrence Delbert Cress focused part of his research upon the political treatises and essays of the radical Whig writers of the seventeenth and eighteenth centuries.[6] Steven Heyman, examining the political and legal treatises of John Locke and William Blackstone, concluded that the right was collective rather than individual.[7] This paper will analyze how the historical development of the right of self-defense in seventeenth- and eighteenth-century England resulted in the recognition of an individual right to bear arms. In particular, it will show how the founding fathers were influenced by English political and legal theorists who first articulated this right, adopting it as their own and acknowledging the debt.

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[5] Joyce Lee Malcolm, *To Keep And Bear Arms: The Origins of an Anglo-American Right* (Cambridge: Harvard University Press, 1994).

[6] See Lawrence Delbert Cress, "An Armed Community: The Origins and Meaning of the Right to Bear Arms," *The Journal of American History,* Vol. 71, No. 1 (Jun. 1984) p. 22-42; Lawrence Delbert Cress, "Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia," *Journal of the History of Ideas,* Vol. 40, No. 1 (Jan. – Mar., 1979) p. 43-60.

[7] Steven J. Heyman, "Natural Rights and the Second Amendment," in Carl T. Bogus, ed., *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms,* (New York: The New Press, 2000).

II. Gun Ownership in Colonial America

Crucial to the question is the degree of gun ownership in seventeenth- and eighteenth-century colonial America, which has become a subject of a considerable debate in recent years. Some studies argue that eighteenth century gun ownership was quite common and supported a robust militia structure, others that it was prevalent but that the militia was in decline during the course of the century. One historian has posited that the extent of gun ownership was actually quite small.[8] The lack of consensus on this issue may be attributable to the difficulty of acquiring and interpreting the data upon which the conclusions were drawn. Most studies rely on militia strength returns, gun censuses, and probate records, all of which have provided a wealth of information regarding the level of ownership by both members of the militia and the general population. Yet each have limitations. Militia strength returns offer a tabulation of men at each rank and the arms and ammunition in their possession.[9] They indicate the extent of gun possession among the militiamen, but often fail to differentiate between firearms provided by the local government and those already in the possession of the militiamen. They also record arms possession by younger, poorer men, who were often under-represented in probate inventories.[10] Local officials visiting homes and businesses also compiled lists of able-bodied men in the

[8] In his book, *Arming America: The Origins of a National Gun Culture* (New York, 2000), Professor Michael A. Bellesiles stoked controversy with his study that found that gun ownership in colonial America was actually rare; no more than 15 percent of the population owned guns. This study was later discredited as it was found to be based upon a biased interpretation of data, and in some instances, actual fraud. See Stanley N. Katz, Hannah H. Gray, and Laurel Thatcher Ulrich, "Report of the Investigative Committee in the Matter of Professor Michael Bellesiles," July 10, 2002, https://www.emory.edu (accessed July 25, 2019).

[9] Robert H. Churchill. "Gun Ownership in Early America: A Survey of Manuscript Militia Returns" *The William and Mary Quarterly,* Vol 60, No 3 (Jul., 2003) http://www.jstor.org.ezproxy.shu.edu (accessed February 23, 2019): 616.

[10] ibid., 616.

community and all firearms in their possession.[11] Probate records likewise provide information regarding gun ownership. They are quite useful because they focus on gun ownership beyond the ambit of militia service. However, they have two significant limitations. First, these records focus upon a smaller segment of the population; only the relatively wealthy and older would have wills and possess probate estates. They tell us nothing about the level of gun ownership by the younger and poorer segment of the population. Secondly, possession of a firearm was often viewed as so commonplace as not to be separately listed in the probate inventories but buried, rather, in the general category of other personal property, such as "in small things forgotten."[12] These records also suffered from the limitation that they did not consider the level of gun ownership by slaves, free blacks and women. Recent studies have sought to overcome these limitations by using the varying types of records to supplement each other.

In a recent study, Robert H. Churchill analyzed all the sources to conclude that gun ownership in colonial America, while varying from region to region even within a single colony, was quite common. He found that the Northeast had levels of ownership of approximately 75 percent by the time of the revolution. The level of armament in the Middle Atlantic was also high.[13] As might be expected, regions along the frontier had the greatest percentage of gun ownership, based on the need for defense. For example, Piedmont in Virginia had a very low percentage of ownership due to the efforts of the government to buy guns for public use. The effort was concentrated in the Piedmont because the region was relatively safe from invasion.

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[11] ibid., 620.
[12] Gloria L. Main, "Many Things Forgotten: The Use of Probate Records in *Arming America,*" *The William and Mary Quarterly,* Vol. 59, No. 1 (Jan., 2002). http://www.jstor.org.ezproxy.shu.edu (accessed February 24, 2019): 211.
[13] Churchill, "Gun Ownership in Early America," 635.

While recognizing that there were gaps in the data due to the age of the archives, Churchill concluded that guns were quite prevalent for a multitude of uses: defense of person and property, hunting, defense of the frontier, and for service in the local militia.

Kevin M. Sweeney also reviewed probate inventories, militia returns, census data and other correspondence in his study of gun ownership in colonial America. Spanning the seventeenth and eighteenth century, he concluded that while the level of gun ownership was high, the participation rate in militias actually declined during the eighteenth century. Outside the Delaware Valley, he wrote, "gun ownership appears to have been very common during the 1600's and remained widespread during the 1700's"[14] His study illuminatingly focuses not only on the extent of gun ownership but on the types of weapons favored by the colonials.

The diversity of the weaponry suggests ownership for a multitude of non-military uses. The iconic image of the *Minute Man* farmer carrying his musket into battle is a mis-representation. Although the typical British heavy, large caliber musket was preferred for military use, colonists, as a rule, preferred guns better suited to hunting, pest control, and self-defense.[15] These tended to be lighter firearms, including flintlock fowlers and birding pieces.[16] In the early eighteenth century, the overwhelming majority of these weapons were imported, being few gunsmiths in America. Arms making in America at that time consisted mainly of

[14] Kevin M. Sweeney, "Firearms, Militias, and the Second Amendment," appearing in *The Second Amendment on Trial: Critical Essays on District of Columbia v. Heller,* Saul Cornell, Nathan Kozuskanich, eds., (Massachusetts: University of Massachusetts Press, 2013) https://www.jstor.org/stable (accessed May 30, 2019): 312.
[15] ibid., 312.
[16] ibid., 316.

assembling old or salvaged parts.[17] Thus, the ownership of guns was motivated for use in hunting and self-defense, interests separate and apart from that of the military.

Demand for hunting weapons was high given the nature of life in eighteenth century colonial America. The majority of people lived on farms. Only five percent of the population in America in 1750 lived in cities, none of which exceeded sixteen thousand people.[18] In addition, gun ownership was actively encouraged as seventeenth- and eighteenth-century statutes often required militia men to possess their own weapons. Militia service was compulsory, with well over six hundred laws passed by colonial and state governments during this period.[19] Typical of these statutes, a Maryland law passed in 1649 required a master of a family to provide "every hired servant or other sojourner also residing and dwelling in his house with one fixed gun, two pounds of powder, and eight pounds of shot."[20] The prevalence of firearms may also be attributable to the fact that they were affordable. The cost of a firearm ranged from £1 -1.5, whereas the cost of a cow was approximately £3.[21] Gun ownership was thus motivated by the need for defense and survival, the requirements of the local governments, and affordability.

As with ownership, the prevalence of the number of gunsmiths in colonial America has also been the subject of recent debate. Much of the difficulty in identifying the number of gunsmiths relates to the incompleteness of records and the fact that many artisans performed dual functions in the colonial economy. Gunsmiths were first and foremost blacksmiths.

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[17] Tom Grinslade, "Eighteenth Century American Fowlers – The First Guns Made In America," *American Society of Arms Collectors Bulletin 89:1-9,* http://americansocietyofarmscollectors.org/resources/articles (accessed March 5, 2019).
[18] ibid., 1.
[19] Sweeney, "Firearms, Militias, and the Second Amendment," 311.
[20] ibid, 314.
[21] ibid., 314.

Consequently, it is difficult to establish the exact number of gunsmiths.[22] It is clear, however, that at the beginning of the eighteenth century, virtually all guns were imported; the American colonies suffered a chronic labor shortage, which encouraged skilled labor to be done in Britain, where labor was not in short supply.[23] Guns were repaired in the colonies, or built from recycled parts of imported guns. Yet the number of guns manufactured in the colonies grew significantly by the time of the Revolution as demand for the weapons grew.

In the interests of public order, the possession and use of firearms was, of course, subject to restrictions. Various statutes and judicial orders required a certain standard of care for the use of firearms. For example, a man in New Haven in 1643 was fined 20 s. for negligently shooting his gun "to the great danger of the lives of divers persons, who were in the chamber when the shott came through the window."[24] The hunting of wolves was also restricted.[25]

Gun ownership can also be seen anecdotally. In 1759, the Governor of Virginia, Sir Jeffrey Amherst noted, "Most people in North America have arms of their own."[26] In 1779, the noted radical Whig, Dr. Richard Price commented that in America, "every inhabitant has in his house (as part of his furniture) a book on law and government, to enable him to understand his civil rights; a musket to enable him to defend these rights; and a Bible to enable him to

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[22] In one study, the author concluded that the number of gunsmiths in colonial America increased rapidly by the time of the Revolution, growing from four in 1700 to 112 by the Revolution. See Grinsdale, "Eighteenth Century American Fowlers," 9.
[23] Clayton E. Cramer, *Firearms Ownership & Manufacturing In Early America,* https://www.claytoncramer.com/unpublished/ArmingAmericaLong.pdf (accessed July 25, 2019) :185.
[24] Lee's case (1643) cited in Richard B. Morris, "Studies in the History of American Law: With Special Reference to the Seventeenth and Eighteenth Centuries," https://heinonline.org/HOL/Liciense (accessed February 11, 2019): 245.
[25] ibid., 245.
[26] Grinslade, "Eighteenth Century American Fowlers," 1.

understand and practice his religion."[27] At the time of the revolution, one British minister commented:

> "Rifles, infinitely better than those imported, are daily made in many places in Pennsylvania, and all the gunsmiths everywhere constantly employed. In this country, my lord, boys, as soon as they can discharge a gun, frequently exercise themselves therewith, some a fowling and others a hunting. The great quantities of game, the many kinds, and the great privileges of killing making the Americans the best marksmen in the world."[28]

Professor Robert Churchill, author of one of the studies, aptly concluded: "…it is clear that early Americans owned guns. They owned a lot of them."[29]

[27] Dr. Richard Price, "A Sermon Delivered to a Congregation of Protestant Dissenters" (London, 1779, in Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms,* (Chicago: The Independent Institute, 2008): 149.
[28] Leonard W. Levy, *Origins of the Bill of Rights,* (Yale University Press, 1999) https://www.jstor.org/stable (accessed September 25, 2018): 140. The minister was likely referring to the Pennsylvania long rifle, the first firearm manufactured entirely in the colonies. The rifling of the barrel made it a particularly accurate hunting and military weapon.
[29] Churchill, "Gun Ownership in Early America," 642.

Chapter 1: Firearms in Early Modern England

I. Transformation from a Duty to a Right

When John Adams assembled the legal precedents upon which to base the soldiers' claims of self-defense, they dated no earlier than the late sixteenth century because pre-modern England recognized no such right. Prior legal authorities spoke only of a duty to bear arms. England did not maintain standing armies until the later part of the seventeenth century, and no professional police force until the nineteenth. Therefore, the duty to keep and bear arms was necessitated by the obligation of the citizenry to serve in the militia and to serve a law enforcement function within society.

The keeping of arms was authorized for certain prescribed purposes. Statutes and proclamations limited the possession and use of firearms by subjects whose income fell below a certain level – the vast majority of the population. The crown desired to restrict the ownership of guns to the wealthy. The primary reason for this was to protect royal and aristocratic hunting privileges, also to limit ownership of firearms by that portion of the population perceived to be more likely to revolt. The assumption was that disloyalty was linked to poverty.[30] Under Edward III, it was an offense to ride armed at night, or by day in fairs, markets, or in the presence of the king's ministers.[31] During the early sixteenth century, as gun ownership became more prevalent, more restrictions were imposed. In 1511, a property qualification of £200 was imposed upon the ownership of crossbows, a requirement extended to firearms in 1514 by the

[30] Lois G. Schwoerer, *Gun Culture in Early Modern England,* (Charlottesville: University of Virginia Press, 2016) https://eds.a.ebscohost.com (accessed May 5, 2019): 73.
[31] Statute of Northampton, 2 Edw. 3, c. 3 (1328), in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution, vol. 5,* (Chicago: The University of Chicago Press, 1987); 209

game law.[32] (The qualification was reduced to £100 in 1523) In 1553, Edward VI ordered "all persons who shoot guns" must register their names with the local justice of the peace.[33] The most restrictive Games Law was enacted in 1671, limiting gun ownership to only the wealthiest subjects. For the first time, persons whose wealth was derived from sources other than land, such as trade, were prohibited from owning guns. Some historians have suggested that the measure was intended to discriminate against the urban "moneyed" interests.[34] The growing practice of carrying arms in crowded streets made it harder to maintain the peace; as a result, carrying arms and handguns was prohibited in London in the early seventeenth century.[35] Throughout the period, limitations on the use of firearms were ostensibly imposed under the Game Acts to restrict hunting; in reality they were used to prevent popular uprisings against the crown by disarming the majority of the people.

The effectiveness of these statutes and proclamations was mixed. The enforcement of the various rules restricting hunting faced numerous challenges. First, the practice of issuing gun licenses undermined the effectiveness of these laws. Persons who were granted a gun license were exempted from the statute's proscriptions. The major challenge related to the widespread lack of compliance by the public, many of whom felt that game should not be considered the property of the king or the wealthy. The response of many included grudging acceptance, willful disobedience, angrily expressed outrage, and written requests for change.[36] The Game Law of

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[32] Schwoerer, *Gun Culture in Early Modern England,* 73.
[33] Joyce Lee Malcolm. *To Keep And Bear Arms: The Origins of an Anglo-American Right* (Cambridge: Harvard University Press, 1994): 10.
[34] Schwoerer, *Gun Culture in Early Modern England,* 75.
[35] Sir William Holdsworth. *History of English Law* (London: Methuen & Co., Ltd., 1924) Vol. IV, 304.
[36] Schwoerer, *Gun Culture in Early Modern England,* 77.

1671 had authorized forests to appoint gamekeepers who could "search the houses, Outhouses, or other places" of persons suspected of possessing weapons.[37] Yet the evidence of enforcement is sparse. A review of the recorded cases indicates that the act was seldom enforced.[38]

Under ancient Anglo-Saxon codes, rules also specified when the use of physical force was permissible, and killing in self-defense was never justifiable.[39] The basis for these rules was the premise that, in order to maintain the peace, one must compensate another for committing an act that causes physical damage. The early history of English law contained frequent and detailed prohibitions against asserting one's rights by force.[40] A claim of self-defense would not excuse a homicide but under appropriate circumstances might entitle one to a pardon from the king.[41] A medieval statute provided that trial judges should ask the jury if the homicide was accidental or in self-defense, then the justices shall inform the king, and the king shall give him grace, if he pleases.[42]

As the law further matured and obedience to it became more common, self-defense claims increased. Having to seek pardon was gradually discarded as the law began to recognize certain circumstances in which a claim of self-defense could excuse the commission of a homicide. Sir Edward Coke, Chief Justice of the King's Bench in the early 1600's, memorialized

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[37] Joyce Lee Malcolm. "The Creation of a "True Antient and Indubitable" Right: The English Bill of Rights and the Right to Be Armed," *The Journal of British Studies,* Vol. 32, No. 3 (Jul., 1993) https://www.jstor.org/stable/176081 (accessed January 28, 2019): 239.
[38] ibid., 240.
[39] Holdsworth, *History of English Law,* Vol. II, 44.
[40] ibid., Vol. III, 278.
[41] The Statute of Gloucester 6 Edw 1, C. 9 (1278) provided that whatever might be urged in mitigation of the offense only could be urged before the King as part of an appeal for pardon; it could not be considered by a court of law. Appearing in Theodore F. T. Plucknett. *A Concise History of the Common Law* (Boston: Little Brown & Co., 1956): 445.
[42] ibid., 445.

the principle that self-defense could justify a homicide in his seminal works on the English Common Law, *The Institutes*. In the Third Institute, he delineated particular circumstances in which a claim of self-defense would be recognized:

> "If A. assault B. so fiercely and violently, and in such a place, and in such a manner as if B. should give back, he should be in danger of his life, he may in this case defend himself and if in that defense he killeth A, it is *se defendo*."[43]

The right of self-defense thus became increasingly recognized in the English common law.

II. Evolution of a natural rights theory

The political turmoil of the seventeenth century and the evolution of natural rights theory also contributed to the formulation of a right to bear arms. The dispute between crown and Parliament over the control of the militia became a recurring theme during the Civil War and following the restoration of Charles II. Before the civil war, Parliament feared that Charles I might use the army raised to fight against the Irish against themselves. At the outset of the war, controversy surrounded the crown's monopoly over gunpowder, accelerating the competition between king and Parliament.[44] During the interregnum, former royalists were repeatedly stripped of their weapons.[45]

With the Restoration, further restrictions on gun ownership were imposed by Charles II in an effort to disarm his political opponents. In his Proclamation of November 28, 1661, Charles sought to disarm former soldiers of the republican army.[46] This was followed by a series of Militia Acts in which the crown sought to exert control over the militia. Prior to their enactment,

[43] Sir Edward Coke. *The Institutes of the Lawes of England, Third Part,* 54.
[44] Malcolm. "The Creation of a "True Antient and Indubitable" Right," 233.
[45] ibid., 234.
[46] ibid., 235.

Charles II used his prerogatives to create a militia whose officers were given authority to disarm anyone they considered dangerous. A temporary militia act in 1661 granted Charles sole authority over the militia, followed by the permanent militia acts of 1662 and 1663 by which two deputies were required in order to disarm anyone.[47]

The transformation of the right of self-defense and the concomitant right to possess arms can best be understood in the context of the overarching changes in the philosophy of law and political theory that occurred during the seventeenth century. Leo Strauss saw this period from the perspective of a transition from natural law to natural right: "The old doctrine of natural law forever called citizens to duties they were to fulfill, while the rhetoric of subjective rights proclaims rights to be vindicated and even new ones to be acquired."[48] The focus of law shifted from imposing duties upon society to the defense of the individual's inalienable rights.

While the seeds of this change can be seen in Plato and Aristotle, the foremost English political theorist to espouse "natural rights" theory was Thomas Hobbes. In *Leviathan*, Hobbes rejected the scholastic notion of a natural law that enshrined certain moral goods and which was a participation in the divine and eternal law. Rather, he posited man in a state of nature – a savage and lawless condition of war. Men then enter into a contract among themselves to give up many of their rights to the sovereign in order to make peace possible. Inasmuch as the ruler is not a party to the contract, there is no justification for resistance to the sovereign. Hobbes' analysis changes the focus from law to "pre-social" natural rights: "whereas right is the liberty to

[47] ibid., 236-237.
[48] Daniel Tanguey. *Leo Strauss: An Intellectual Biography* (New Haven: Yale University Press, 2007): 106.

do or refrain from doing, law constrains the individual and commands him to act in a certain way."[49]

According to Hobbes, the fundamental pre-social right is that of self-preservation. It is inalienable for one cannot transfer one's right of self- defense: "As, first, a man cannot lay down the right of resisting them who assault him by force, to take away his life, because he cannot be understood to aim thereby at any good to himself."[50]

The theory of natural right and the right of self- defense was further expounded upon by John Locke in his *Two Treatises Of Government.*[51] First published in 1690, the treatise was written in part to provide a justification for the Glorious Revolution of 1688. [52] Locke rejected the idea of natural law as a means to structure an orderly and peaceful society, replacing it with individual natural rights derived from self-interest. The fundamental rights of life, liberty and property make the law: the law does not create them.[53] The true purpose of government is to preserve and develop these rights. Both Hobbes and Locke replace natural law with natural right. They both contemplate a strong state that possesses extensive powers principally devoted to the protection of property interests. Hobbes contemplates an absolute monarchy, as long as the power is exerted for a proper use. Locke accepts that under certain circumstances,

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[49] ibid., 104.
[50] *Leviathan,* 14.8.
[51] John Locke. *Two Treatises Of Government* (London: The Everyman Library, 1993).
[52] This purpose is explicitly stated by John Locke in "The Preface" off *Two Treatises of Government.* While historians had therefore previously assumed that it was completely written in 1689, Peter Laslett concluded that it was most likely written years earlier to justify resistance to the policies of Charles II. Mark Goldie, editor, *Two Treatises Of Government, (*London: Everyman, 1993): xx.
[53] Heinrich A. Rommen. *The Natural Law: A Study in Legal and Social History (Indianapolis: Liberty Fund Inc., 1998), 79* https://search.ebscohost.com/login.aspx *79* (accessed March 3, 2019).

individuals have a right to rebel against a tyrannical government that has not fulfilled its obligation to protect life, liberty and property. Significantly, Locke did not limit this right to a collective right of self-preservation against a tyrant; he also posited that an individual could exercise this right where the exigencies of the situation are such that the law cannot protect life, liberty or property.[54]

The Glorious Revolution of 1688 marked the culmination of opposition to repeated attempts by the crown during the seventeenth century to assert its prerogatives by deploying a standing army and disarming political opponents. In response to these attempts, a nascent Whig political movement was born. Early Whig political writers raised the alarm of a tyrannical monarch and praised the ideal of a "citizen soldier" to protect against the infringement of fundamental rights and liberties. The citizen who would protect these rights was to be armed; ownership of firearms became a symbol of liberty. The political theorist, James Harrington, was the first prominent advocate for such an armed citizenry. In *The Commonwealth Of Oceana*, he contemplated a commonwealth comprised of a mixed form of government; "A council without a balance is not a commonwealth," he argued, "but an oligarchy; and every oligarchy, except it be put to the defense of its wickedness or power against or power against some outward danger, is

[54] "For where the injured party may be relieved, and his damages repaired by appeal to the law, there can be no pretense for force, which is only to be used where a man is intercepted from appealing to the law."… "The reason whereof is plain, because the one using force, which threatens my life, I could not have time to appeal to the law to secure it: and when it was gone, 'twas too late to appeal. The law could not restore life to my dead carcass: the loss was irreparable, which to prevent, the law of nature gave me a right to destroy him, who had put himself into a state of war with me, and threatened my destruction." Locke, *Two Treatises Of Government,* Sec 207, p. 220.

factious."[55] The balance of government would be maintained by the threat of armed citizens serving in a militia. For Harrington, possession of arms was necessary for political freedom. To him, citizenship was predicated on the ownership of land and the possession of arms, "Domestic empire is founded upon dominion. Dominion is property, real or personal, that is to say, in lands, or in money and goods."[56] Possession of arms became the means by which individuals asserted political power. Civic virtue came to be defined as the freeholder bearing arms in defense of his property and of his state.[57] A citizen lived on his own property, could hold public office, and had the right and responsibility to bear arms to protect the property and defend the state. The militia was a body to be composed of all freeholders; Harrington objected to the practice of arming the poor and exempting the wealthy from military service.[58] The possession of arms was not merely a civic obligation, it was necessary in order to protect one's land and property.

Algernon Sidney was a prominent leader of the opposition during the latter part of the reign of Charles II. Amplifying Harrington's ideas, he too believed that a militia of freeholders was essential in order to protect civil liberties and maintain a balanced government: "…in a popular or mixed government every man is concerned: everyone has a part, according to his quality or merit, all changes are prejudicial to all: whatsoever any man conceives to be for the

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[55] James Harrington. *The Commonwealth of Oceana,* first published 1656, (England: Anodos Books, 2017): 57.
[56] ibid., 10.
[57] Robert E. Shalhope. "The Ideological Origins of the Second Amendment" *The Journal of American History* Vol. 69, No. 3 (Dec. 1982) https://www.jstor.org/stable/1903139 (accessed January 20, 2019): 603.
[58] Lawrence Delbert Cress. "Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia" *Journal of the History of Ideas* Vol. 40, No. 1 (Jan.-Mar., 1979) https://www.jstor.org/stable/2709259 (accessed December 28, 2018): 44.

public good, he may propose it to the magistracy or to the magistrate: the body of the people is the public defense, and every man is armed and disciplined."[59] Sidney considered a standing army to be a threat to mixed government, an instrument of tyranny. The only bulwark against this threat was an armed citizenry: "And no state can be said to stand upon a steady foundation, except those whose strength is in their own soldiery, and the body of their own people."[60] These early Whig theorists had set the stage for the confrontation with James II and the Glorious Revolution of 1688.

III. The English Bill of Rights

In the years leading up to the Boston Massacre, the political tracts of several American protestors repeatedly invoked the Glorious Revolution and the English Bill of Rights as sources of their "Rights as Englishmen." Much of the historical debate surrounding the English Bill of Rights has centered on whether "new" rights were established or merely memorialized as dating back to the "Ancient Constitution." The impetus for the Bill of Rights was the deposing of James II and the negotiation with William and Mary to assume the throne. James, a Catholic, was perceived as a threat to the Protestant majority and the birth of a Catholic heir raised alarms. These concerns were not without basis. He initiated an ongoing campaign to disarm his political adversaries; he called for strict enforcement of all firearm restrictions and commanded militia officers to disarm suspicious persons.[61] He then tried to use the Game Act of 1671 to generally

[59] Algernon Sidney. *Discourses Concerning Government.* (Indianapolis: Liberty Fund,1990): 216.
[60] ibid., 215.
[61] Malcom. *"Creation of a "True Antient and Indubitable" Right,"* 241.

disarm his Protestant opponents, under the guise "that a great many persons not qualified by law under pretense of shooting matches keep muskets and other guns in their houses."[62]

The enactment of the English Bill of Rights in 1689 represented a pivotal event in the assertion of gun ownership in seventeenth-century England. In reaction to James II's efforts to restrict ownership, Article VII of the Declaration and Bill of Rights states: "That the Subjects which are Protestants may have Armes for their defense Suitable to their Condition and as allowed by law." The exact significance of this language has become the subject of much debate. Did it merely reiterate an ancient, albeit limited right, or did it conclusively transform a duty into an individual right to bear arms? Did it enunciate a collective right to bear arms for the purpose of public safety, or did it for the first time memorialize an individual right to keep and bear arms? Lois G. Schwoerer and Joyce Lee Malcolm have become the leading advocates for each side in this debate.

Some insight into the questions can be found in its legislative history. The Convention Parliament of 1689 was assembled to deliberate over the terms under which William of Orange might assume the throne. A Declaration of Rights was drafted which in part enumerated the grievances against James II. Among them, the disarming of subjects was addressed: "By causing several good Subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and imployed, contrary to Law."[63] The earlier version of the proclaimed right to keep arms has been the source of the debate. The first version provided: "It is necessary for the publick Safety, that the Subjects, which are Protestants, should provide and keep Arms for their

[62] ibid., 242.
[63] ibid., 244.

common Defense: And that the Arms which have been seized, and taken from them, be restored." A revised version provided: "That the Subjects, which are Protestants, may provide and keep Arms, for their common Defense." The final version dropped the clause "for their common defense" and substituted "for their defense."[64]

There is a dearth of contemporaneous explanation for these versions. Schwoerer argues that the right was severely circumscribed because the final version of Article VII specified that it was limited to Protestants, by one's "condition" in life, and subject to alteration by Parliament. She ascribes little significance to the dropping of the phrase "common defense," attributing its removal to the fact that William and his advisors objected to the implication that Protestant subjects, rather than he, were responsible for the "common defense" of the realm.[65] This explanation is presented without historical citation and ignores the plain meaning of the term "common defense." Schwoerer finds a limited right to possess arms for the sole purpose of collective defense. Joyce Lee Malcolm presents the more compelling argument, finding significance in the fact that the first reference to the "publick safety" was removed, followed by the removal of the "common defense" purpose, suggesting to her the blossoming of an individual right to bear arms. The plain interpretation of the legislative history indicates that the drafters specifically did not want to limit the right to bear arms to a collective right. The Bill of Rights was a watershed. After it, both an individual and collective right to bear arms became deeply ingrained in the cultural, legal and political philosophy of eighteenth-century England.

IV. The Whig Contribution

[64] ibid., 245.
[65] Schwoerer, *Gun Culture in Early Modern England,* 162.

The early eighteenth century saw a growing political contest between Whigs, who advocated for a constitutional monarchy of strictly limited royal prerogatives, and Tories, who tended to support the traditional role of the crown beyond the control of Parliament. Notwithstanding the shift in power towards Parliament initiated by the Glorious Revolution, Whigs maintained that the balance of a mixed government was in continual jeopardy, particularly threatened by the presence of a standing army in peacetime. When William III advocated for a small peacetime standing army after the Treaty of Ryswick, the request was met with widespread Whig opposition. Whig political theorists extoled the virtues of a militia and expounded on themes first enunciated by James Harrington and Algernon Sydney. John Trenchard warned of the threat of standing armies in *An Argument Shewing that a Standing Army is Inconsistent with a Free Government* (1697) and *A Short History of Standing Armies in England* (1698). Collaborating with Walter Moyle, he used *An Argument Shewing* to attack the proposal to increase the size of the English regular army and to praise the use of the militia composed of freeholders to promote a balanced government:

> Now this Balance can never be preserved but by a Union of the natural and artificial Strength of the Kingdom, that is by making the Militia to consist of the same Persons as have the Property…but the Constitution must either break the Army, or the Army will destroy the Constitution…the Militia to consist of the same Parts as the Government, where the King was General, the Lords by virtue of their Castles and Honours, the great Commanders, and the Freeholders by their Tenures, The Body of the Army.[66]

[66] Walter Moyle and John Trenchard, *An Argument Shewing, that a Standing Army Is inconsistent with A Free Government, and absolutely destructive to the Constitution of the English Monarchy,* (London, 1697 ed.): 4.

Ancient and classical precedent showed that one hallmark of a free society was the absence of a standing army: "as the *Israelites, Athenians, Corinthians, Achaians, Lacedemonians, Thebans, Samnites, and Roman*; none of which Nations whilst they kept their Liberty were ever known to maintain any Souldiers in constant Pay within their Cities, or suffered any of their Subjects to make War their Profession…" The remedy for tyranny was a militia of freeholders – "Their arms were never lodg'd in the hands of any who had not an Interest in preserving the Publick Peace." "A general Exercise of the best of their People in the use of Arms, was the only Bulwark of their Liberties; this was reckon'd the surest way to preserve them both at home and abroad…" [67] For Trenchard and Moyle, the surrender of military functions of the citizenry and nobility to salaried professionals was inconsistent with free citizenship and balanced government.

A common theme of Whig writers was that disarming the public posed an existential threat to liberty, an idea that found great popularity in 1770's Boston. Robert Viscount Molesworth, in his *Account of Denmark as It Was in the Year 1692 (1694),* used Denmark as a cautionary tale of how a free society could deteriorate into absolutism. For forty years, the citizenry failed to accept their civic responsibilities and the nobility was eventually prevented by a standing army from returning to their estates where they could have fought to protect their liberties.[68] Freemen who chose to hire a standing army did not remain free for very long.[69] Only an armed population could preserve its own liberty.

[67] ibid., 7.
[68] Cress, "Radical Whiggery on the Role of the Military," 48.
[69] ibid., 50.

The most famous Whig essays were authored by John Trenchard and Thomas Gordon and published from 1720-1723 in a weekly periodical called *The Independent Whig.* "*Cato's Letters*" condemned corruption in government, the threat of standing armies, and the general moral decay of society. Standing armies were facilitators of oppression and the militia was praised as the last guarantor of liberty against the oppression of a corrupt government. In the September 15, 1722 letter, the authors cite James II's use of a standing army as the principal cause of his demise; "It was chiefly, if not Wholly, King James' usurped Power, and his many Forces, and not his being a Papist, that rendered him dreadful to his People."[70] The overarching theme was a pervasive distrust of power itself. Indeed, even Tories began to argue that a Parliament could provide the necessary check against a tyrannical monarchy, and therefore a professional standing army financed by Parliament could represent a superior military force compared to the relatively untrained militia, a view espoused by Daniel Defoe and James Somers.[71] To that extent, the Whig point was conceded: power itself was the problem. Armies, and who controlled them, were largely metaphors.

In the years leading up to the American Revolution, the Whig political theorist James Burgh wrote the popular *Political Disquisitions* (1774) in which he presented his theories of religious and political reforms. In it, he developed the themes of Harrington and Locke, drawing a close association between the possession of firearms and political power in society. "Those,

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[70] Cato's Letters, in David L. Jacobson, ed., *The English Libertarian Heritage: From the Writings of John Trenchard and Thomas Gordon in The Independent Whig and Cato's Letter.* (Indianapolis: The Bobbs-Merrill Company, Inc., 1965): 218.

[71] Lawrence Delbert Cress, "An Armed Community: The Origins and Meaning of the Right to Bear Arms," *The Journal of American History,* Vol. 71, No. 1 (Jun., 1984) https://www.jstor.org/stable/1899832 (accessed October 1, 2018): 27.

who have the command of the arms in a country, says *Aristotle*, are masters of the state, and have it in their power to make what revolutions they please."[72] Burgh believed that the possession of arms was the critical feature in a free society:

> No kingdom can be secured otherwise than by arming the people. The possession of arms is the distinction between a freeman and a slave. He who has nothing, and who himself belongs to another, must be defended by him, whose property he is, and needs no arms. But he, who thinks he is his own master, and has what he can call his own, ought to have arms to defend himself, and what he possesses; else he lives precariously, and at discretion.[73]

Some historians have interpreted the writings of Whig political theorists to support only a collective right to bear arms.[74] Yet nowhere in these tracts is this limitation explicitly stated and it runs contrary to their underlying themes. Locke, Harrington, and others theorized that a well-ordered society is predicated upon the secure ownership of property. Where government fails or is unable to protect this right, the individual himself must be able to exercise it. In order to achieve a vital and balanced society, it was necessary for each individual to have the ability to keep and bear arms to defend himself, to defend his property and to defend the state.

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[72] James Burgh, *Political Disquisitions: Or, an Enquiry into Public Errors, Defects, and Abuses, (3 vols., London, 1774-1775)*: vol. III.
[73] ibid., vol. III.
[74] See, for example, Lawrence Delbert Cress, "An Armed Community: The Origins and Meaning of the Right to Bear Arms," *The Journal of American History,* Vol. 71, No. 1 (Jun., 1984), pp. 22-42; Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," in *The Second Amendment in Law and History, ed., Carl T. Bogus* (New York, 2000); Roy G. Weathercup, "Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment," 2 Hastings Const. L.Q. 961 (1975).

Chapter 2: The English Common Law Tradition

I. The English Jurists

Throughout the later seventeenth century and eighteenth centuries, English common law consistently recognized the right to keep and bear arms to be used in self-defense, a right predicated on the theory of justifiable homicide that had been memorialized by English jurists. Of these English legal authorities, the most famous was Sir Edward Coke (1552-1634). A lawyer and politician, Coke served as Lord Chief Justice of England from 1613 until 1616. His *Institutes of the Lawes of England*, published from 1628 to 1644, was a series of legal treatises widely regarded as the definitive and authoritative statement on the English common law. The Third Part of the institutes dealt with High Treason, Other Pleas of the Crown, and Criminal Causes – the law against murder was grounded upon the law of God.[75]

Chapter VIII of the 3rd Institutes dealt specifically with the law of homicide. It defined homicide as a voluntary act with malice aforethought. If there was no malice aforethought, the act might constitute manslaughter. Coke goes on to set forth several circumstances in which a claim of self- defense will be recognized.[76] Thus, the common law permitted the taking up of arms against an armed person.

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[75] Charles F. Mullett, "Coke and the American Revolution," *Economica,* No. 38 (Nov., 1932) https://www.jstor.org/stable/2549144 (accessed February 18, 2019): 461.

[76] "As if A. be assaulted by B. and they fight together, and before any mortall blow given A. giveth back, until he commeth unto a hedge, wall or other strait, beyond which he cannot passe, and then in his own defence, and for safeguard of his owne life killeth the other: this is voluntary, and yet no felony, and the jury that finde, it was done *fe defendo*, ought to find the special matter." … "As if a thiefe offer to rob or murder B. either abroad, or in his house, and thereupon assault him, and B. defends himself… and in his defence killeth the thief, there is no felony; for a man shall never give way to a thief, & c. neither shall he forfeit anything.," ibid., 55.

The treatise most frequently cited in John Adams' legal notes of the Boston Massacre trials was written by William Hawkins (1681-1750), a barrister and deputy chief justice. *A Treatise of the Pleas of the Crown, or, A System of the Principal Matters relating to That Subject: Digested Under Their Proper Heads,* published in 1716, was the first comprehensive work on criminal law and served as a definitive statement on the state of the law throughout the eighteenth century. In it, he recognized the right of individual armed self-defense.

Hawkins expanded upon Coke by providing greater explanation of the circumstances in which arms may be used in self- defense. "I can see no reason," he said, "why a person, without provocation, is assaulted by another in any place whatsoever, in such a manner as plainly shows an intent to murder him, as by discharging a pistol, or pushing him with a drawn sword, may not justify killing such an assailant."[77] In a section that was particularly relevant to the Boston Massacre:

> "If those who are engaged in a Riot…stand in their Defense, and continue the Force in Opposition to the Command of a Justice of Peace, & c., or resist such Justice endeavoring to arrest them, the Killing of them may be justified; and so Perhaps may the killing of dangerous Rioters by any private Persons, who cannot Otherwise suppress them or defend themselves from them, *inasmuch as every Private Person seems to be authorized by the Law to arm himself for the Purposes aforesaid.* (emphasis added)[78]

The claim of self-defense received the utmost deference in situations dealing with one's home. As the legal maxim provides: *Domus sua est cuique tutissimum refugium* (*A man's house*

[77] William Hawkins, *A Treatise of the Pleas of the Crown: or a system of the Principal Matters relating to that subject, digested under the proper Heads,* (New York: Arno Press, 1972) Chapter 72.
[78] ibid., Ch. 71.

is his safest retreat.)[79] In such circumstances, Hawkins devoted much discussion to the assertion of a claim of self- defense when defending the home:

> And now I am to consider Homicide *se defendo*, which seems to be where one, who has no other possible Means of preserving his Life from one who combats with him on a sudden Quarrel, or defending his Person from one who attempt to beat him, (especially if such Attempt be made upon him in his own House) kills the Person by whom he is reduced to such an inevitable Necessity…[80]

He states further:

> Yet an Assembly of a Man's Friends in his own House, for the Defense of the Possession thereof against those who threaten to make an unlawful Entry there-Into, or for the Defense of his Person against those who threaten to beat him Herein, is indulged by Law; for a Man's House is looked upon as his Castle."[81] "…but it hath been resolved, That no one shall incur the Penalty of the said Statute for assembling his Neighbors and Friends in his own House, against Those who threaten to do him any violence therein, because a Man's House is His Castle.[82]

By the eighteenth century, the principle of the right of armed self-defense was firmly entrenched in English common law.

The Boston Massacre defense team also found support for their theory of self- defense in the writings of Sir Matthew Hale (1609-1676) and Sir Michael Foster (1689-1763). Hale was a noted judge and barrister whose compilation of the history of English criminal law was published posthumously in 1736 under the title *Historia Placitorum Coronae, or The History of the Pleas of the Crown.* In it, he discussed the circumstances under which a homicide may be excused because of a claim of self- defense: "1. It must be an inevitable necessity, and 2. It must be in his

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[79] Walter Shirley, "Selection of Leading Cases in the Common Law," https://heinonline.org/HOL/License (accessed February 21, 2019).
[80] Hawkins, *A Treatise of the Pleas of the Crown,* Ch. 29, sec 13.
[81] ibid., Ch. 29, sec. 10.
[82] ibid., Ch. 29, sec. 8.

Defense – If A. upon malice prepense strike B. and then fly to the wall, and then in his own defense kills B. this is Murder. But if there be Malice Between A. and B. and A. strike first, B. retreats to the wall, and in his own defense kills A. this is *Se defendo."*[83]

Foster was a prominent English judge whose treatise, *Crown Cases*[84] was first published in 1762 and was widely cited in colonial American litigation. Sections 273 and 274, dealing with the law of self-defense, embodied pure natural rights theory:

> In the case of Justifiable self- defense the injured Party may repel Force with Force in Defense of his Person, Habitation, or Property, against one who Manifestly intendeth and endeavoreth with Violence or Surprize to commit a Known Felony upon either. In these cases He is not obligated to retreat, But may pursue his adversary 'till he findeth himself out of Danger, and if in a Conflict between them he happeneth to Kill, such Killing is Justifiable. The Right of Self- Defense in these cases is founded in the law of nature, and is Not nor can be superseded by any Law of Society.[85]

Section 274 expands the right of self- defense even to those who come to the assistance of the victim:

> Where a known felony is attempted upon the Person, be it to Rob or Murder here the Party assaulted may repel Force with Force, and even his servant than attendant on Him, or any Other Person present may interpose for preventing Mischief; and if Death ensueth, the Party so interposing will be Justified. In This case, Nature and Social duty cooperate.[86]

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[83] Matthew Hale, *Pleas of the Crown: Or, a Methodical Summary of the Principal Matters Relating to That Subject (1736)*, Eighteenth Century Collections Online, https://heinonline.org/HOL/License (accessed January 19, 2019): 41.
[84] Full title is *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surrey; And of Other Crown Cases: to which are Added Discourses Upon a Few Branches of the Crown Law.*
[85] Foster, *Crown Cases,* cited in John Adams, *Legal Papers of John Adams,* L. H. Butterfield, ed., (Cambridge: The Belknap Press of Harvard University Press, 1965): 84.
[86] ibid., 84.

By the eighteenth century, legal treatises had acknowledged the right of self- defense as fundamental, one based on the law of nature.

II. Common Law Development

Statutory and case law precedent of the later seventeenth and eighteenth centuries explicitly acknowledge the right to keep firearms for self-defense and other non-military purposes. In personal correspondence, Charles II recognized that arms might be needed by an individual for self-defense.[87] After the fall of James II, Parliament passed a bill to disarm all Catholics in March 1689.[88] Significantly, the bill left the individual Catholic "such necessary Weapons as shall be allowed to him by Order of the Justices of the Peace… for the Defense of his House or Person."[89] Despite her minimization of an individual right to bear arms, Lois Schwoerer admits that "members of the Convention were sensitive to the natural and common law right of self- defense and did not deny it."[90] The courts also objected to efforts by the crown to disarm political enemies. In April 1686, the sheriff of Bristol, Sir John Knight actively sought to enforce laws against Catholic worship. James II tried to silence him by charging him with

[87] In a letter from Charles II to John Egerton, Second Earl of Bridgewater, dated December 19, 1660, the king instructed the militia to "seize any quantity [of arms]… discovered in a house… above what may be reasonably be believed necessary for [the person's] safeguard and defence." Schwoerer, "An Individual Right to Arms?", 161.
[88] *An Act for the better securing the Government by disarming papists and reputed Papists,* cited in ibid., 162.
[89] ibid., 160.
[90] ibid., 160.

unlawful use of a firearm. It was alleged that he walked the streets with guns and that he entered a church with a gun to terrorize the king's subjects. A jury acquitted him of the charges.[91]

During the eighteenth century, courts repeatedly held that individuals could keep guns in their homes to be used for self- defense and to ward off predators. Firearms could only be seized if it were proven that they were being used for proscribed hunting purposes. Several of these cases arose under the Game Act of 1706, which provided that no "person, not qualified, shall keep or use any greyhounds, setting-dogs, hays, lurchers, tunnels, or any other engine to kill or destroy games."[92] The act excluded "guns" from the list of proscribed weapons, because a gun was "frequently necessary to be kept and used for other purposes, as the killing of noxious vermin and the like."[93] Several court cases affirmed this interpretation. In the decision *Rex v. Gardner,*[94] the defendant was convicted by a justice of the peace for having unlawfully kept a gun. Finding for the defendant and against the broad interpretation of the statute that the mere keeping of a gun was a crime, the court concluded that the statute should be applied only to those weapons that by their nature are almost solely applicable to the destruction of game:

> …but a gun is a very useful and necessary thing in a house, both for defense, and to prevent birds and other rapacious animals from destroying corn or other such things; for this purpose any man may lawfully keep a gun in his house, and though it may be applied to an unlawful purpose, yet it by no means follows, that it is kept for such an end, unless that be manifested by some act done, which shews it is kept to destroy the game.[95]

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[91] *Rex v. Sir John Knight (1686),* English Reports Full Reprint Vol. 90 – King's Bench (1378-1865) https://heinonline.org/HOL/License (accessed January 21, 2019).
[92] 5 Ann c. 14.
[93] Schwoerer, "An Individual Right to Arms?," 165.
[94] 93 Eng. Rep. 1056, https://heinonline.org/HOL/License (accessed February 7, 2019)
[95] *Rex v. Gardner,* 93 Eng. Rep. 1056 (1739) For similar decisions interpreting the Game Act of 1706, see *Thrustout v. Troublesome,* 93 Eng. Rep 1056 (1739), *Rex v. Gibbs,* 93 Eng. Rep. 657, *Rex v. Thompson,* 100 Eng. Rep. 10 (1787) ("the act of keeping a gun was in itself ambiguous, and that it must be shewn to be kept for the purpose of killing game, in order to bring the party

In *Wingfield v. Stratford and Osman,* the court concluded that the keeping of a gun, *per se*, is not a keeping of a weapon for killing or destroying 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… But as Guns are not expressly mentioned in that Statute, and as a Gun may be kept for the Defense 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.[96]

Thus, even where the English Bill of Rights qualified the right of Protestants to bear arms with the clause "as allowed by law," the courts concluded that individuals had an overriding right to keep arms for self- defense and other purposes. This view was re-affirmed as late as 1780, when the recorder of London responded to an inquiry regarding the right of individuals to keep firearms. He stated in response:

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

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keeping it within the Act of Parliament; it was not like keeping a greyhound or a snare which could not be kept for any other purpose, and which was expressly prohibited by the Act"), *Cary v. Jenkins*, 93 Eng. Rep. 657, *Castel v. Carter,* 93 Eng. Rep. 1056, *Rex v. Solgard*, 93 Eng. Rep. 1055, *Colborne v. Stockdale*, 93 Eng. Rep. 655, *Murray v. Wilson,* 96 Eng. Rep. 788, *Clemens v. Reynolds*, 96 Eng. Rep. 788, *Goss v. Withers*, 96 Eng. Rep. 1196, *Rex v. Spencer*, 96 Eng. Rep. 787, *Cunningham v. Johnson*, 96 Eng. Rep. 788, *Wilford v. Berkeley*, 97 Eng. Rep. 472, *Doe d. Hitchins v. Lewis* 97 Eng. Rep. 475.

[96] *Wingfield v. Stratford and Osman,* 96 Eng. Rep. (1752).

by reason and common sense. (emphasis added) [97]

III. Sir William Blackstone

The most celebrated English jurist of the eighteenth century was Sir William Blackstone (1723-1780), whose *Commentaries on the Laws of England, An Analysis of the Laws of England,* published in 1766, was recognized as the definitive summary of English common law. Noted for its accessibility and readability, it became the standard text in both England and Colonial America.[98]

The first volume of the *Commentaries* deals with the Rights of Persons. The rights of Englishmen, Blackstone says, stem from "the natural right of resistance and self- preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." [99] At the outset, he sets forth what he considers to be the absolute rights possessed by each *individual*:

> The rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular man, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other.[100]

The absolute rights are:

> 1. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

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[97] Leonard W. Levy, *Origins of the Bill of Rights,* Yale University Press (1999). https://www.jstor.org/stable (accessed September 25, 2018): 138.
[98] Julius S. Waterman, "Thomas Jefferson and Blackstone's Commentaries," in *Essays In The History Of Early American Law*, ed., David H. Flaherty (Chapel Hill: The University of North Carolina Press, 1969): 454.
[99] 1 William Blackstone, *Commentaries on the Laws of England*, 144.
[100] ibid., 123.

> 2. Next to personal security, the law of England regards, asserts, and preserves liberty of individuals.
> 3. The third absolute right inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the law of the land.[101]

Blackstone observed that these absolute rights would have been illusory, "if the constitution had provided no other method to secure their enjoyment."[102] Therefore,

> It has, therefore, established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property.[103]

Blackstone goes on to enumerate five auxiliary rights, the fifth being the right of subjects to have arms for their defense:

> The fifth and last auxiliary right of the subject, that I shall present mention, is that of having arms for their defense suitable to their condition and degree, and as such are allowed by law… and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[104]

As the English origins of the right to keep and bear arms has received more recent attention in the context of the Second Amendment debate, defenders of a collective right have focused on this language to support their argument. Steven Heyman concludes that the right is not an "absolute right of individuals" nor an "inalienable right to arms for private defense."[105] In support of this claim, he argues that the right is constrained by the exigencies of immediate

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[101] ibid., 129-138.
[102] ibid., 140.
[103] ibid., 140.
[104] ibid., 143.
[105] Steven. J. Heyman, "Natural Rights and the Second Amendment, in Carl T. Bogus, ed., *The Second Amendment in Law and History* (New York: The New Press, 2000): 190.

violence. Suggesting that the right is a collective one held by the community to defend against tyranny, he finds support in Blackstone:

> For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.[106]

Saul Cornell, in *A Well Regulated Militia,* also viewed Blackstone as supporting a collective right to keep and bear arms, focusing on the term "public allowance" and the imposition of due "restrictions" in support of the claim. He concludes that "This ancient right was not exercised by individuals acting unilaterally or in isolation, but rather required that citizens act together in concert as part of a well-regulated militia."[107] He believes that the right of self-defense was so limited by common law restrictions as to render it unimportant.

These arguments do not withstand scrutiny. The notion that Blackstone contemplated only a "public" right to bear arms conflates "resistance" and "self-preservation" into one collective purpose, thereby rendering "self-preservation" meaningless. Heyman's claim that "self-preservation" is synonymous with "public defense" is made without support. To suggest that arms may only be used collectively to protect "personal security," "personal liberty," and "private property" is implausible. Locke insists there are times when society cannot act to preserve personal security and property. Are we to believe that an individual does not have a right to use firearms in such instances? In fact, rather than categorizing auxiliary rights as of lesser importance, Blackstone deems them crucial:

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[106] ibid., 192.
[107] Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York: Oxford University Press, 2006): 14.

> And lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law, next, to the right of petitioning the king and parliament for redress of grievances; and lastly, *to the right of having and using arms for self-preservation and defense.* (emphasis added) [108]

The suggestion that the right of self-defense is confined to a small corner of minor rights is also belied by Blackstone's treatment of this topic in the *Commentaries*. It is the specific authority cited by John Adams and Josiah Quincey in their "Boston Massacre" arguments. Blackstone devotes a chapter to the right of self-defense in his 4th Book dealing with criminal law. He begins by defining a "justifiable homicide" as:

> In the next place, such homicide as is committed for the preservation of any forcible or atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton, and as it since declared by statute 24 Hen. VIII, c.5. If any person attempts a robbery or murder of another, or attempts to break open a house in the night time, (which extends also to an attempt to burn it) and shall be killed in such attempt, the slayer shall be acquitted and discharged.[109]

Blackstone contemplates a fundamental, but limited right of self-defense, but one that is not unlimited:

> For the one uniform principle that runs through our own, and all other laws, seems to be this; that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the visionary length that Mr. Locke does: "that all manner of force without right upon a man's person, puts him in a state of war with the aggressor; and, of consequence that, being in such a state of war, he may lawfully kill him that puts him under this un-natural constraint.[110]

Blackstone differentiates an "excusable homicide" from a "justifiable homicide;"

> "Homicide in self-defense, or *se defendendo,* upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-

[108] 1 William Blackstone, *Commentaries on the Laws of England,* 144.
[109] 4 William Blackstone, *Commentaries on the Laws of England,*180.
[110] ibid., 181.

> defense must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification; but the self-defense, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him."[111]

Blackstone's summary of the law of self-defense represented the culmination of almost 150 years of legal theory and analysis. Some have suggested that the absence of an explicit reference to the use of firearms to be used in self-defense was meaningful. Heyman notes that Blackstone does not discuss how arms are to be held, whether they are to be held by the individual or by the public associated with the militia. He dismisses this as a mere practical question.[112] Yet if it is considered that the bearing of firearms was only to be the right of the community, the ability of the individual to use them in self- defense would be rendered meaningless. Such a conclusion is rebutted by English case law and the clear meaning of Blackstone's words.

[111] ibid., 183.
[112] Heyman, *Natural Rights and the Second Amendment,* 192.

Chapter 3: Impact on Colonial Political and Legal Thought

I. Influence of the English Writers

As the record of the Boston Massacre trial demonstrates, it is difficult to overstate the influence that English Enlightenment, legal and radical Whig writers had upon American legal and political thought during the eighteenth century. "Despite the efforts that have been made to discount the influence of the "glittering generalities" of the European Enlightenment on eighteenth-century Americans, their influence remains, and is profusely illustrated in the political literature."[113] The extent to which the American political leaders read and cited their English antecedents is impressive, as the references in political tracts, pamphlets and personal correspondence is pervasive. "In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract, Montesquieu and later Delolme on the character of British liberty and on the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law."[114]

Donald Lutz has compiled a study of the influence of European writers on late eighteenth-century American political thought,[115] reviewing the political writings of Americans between 1760 and 1805 to determine which authors were most popular. Included in the review were an estimated 15,000 items, including books, pamphlets, newspaper articles, and monographs. After Montesquieu, the most prominent Enlightenment theorist cited was John

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[113] Bernard Bailyn, *The Ideological Origins of the American Revolution,* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1990): 27.
[114] Bernard Bailyn, ed., *Pamphlets Of The American Revolution, Vol. 1 1750-1765* (Cambridge, Mass.: The Belknap Press Of Harvard University Press, 1965): 24.
[115] Donald S. Lutz, "The Relative Influence of European Writers on Eighteenth-Century American Political Thought," *The American Political Science Review,* Vol. 78, No. 1 (Mar., 1984), https://www.jstor.org/stable/1961257 (accessed January 8, 2019) p. 189-197.

Locke, especially during the revolutionary period. The Founding Fathers recognized that the philosophical basis for the break with England was the application of English precedent to the American situation. "I did not consider it as any part of my charge," Jefferson wrote to Madison, "to invent new ideas altogether…"[116] "No Government was ever made so perfectly upon the Principle of the Peoples Right and Equality." John Adams wrote. "It is Locke, Sydney and Rousseau and Mably reduced to Practice in the first Instance."[117]

The Italian legal philosopher Cesare Beccaria was often cited by Jefferson, Blackstone, and John Adams on the topic of criminal law reform.[118] His book, *On Crimes and Punishment,* published in 1764, provided the first organized theory of criminal justice. Beccaria's views had particular relevancy to the topic of the right to bear arms:

> The laws that forbid the carrying of arms are laws of such a nature. They disarm only those who are neither inclined nor determined to commit crimes… Such laws make things worse for the assaulted and better for the assailant; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.[119]

Beccaria strongly disapproved of European laws of that time that prohibited the bearing of arms. Throughout his adult life, Thomas Jefferson maintained a *Commonplace Book* which contained many of his thoughts on government. In it, there are no fewer than twenty-six extracts from Beccaria in Italian, including his comments on carrying arms.[120]

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[116] Eugene C. Gerhart, *American Liberty and Natural Law,* (Boston: The Beacon Press, 1953): 65.
[117] Correspondence from John Adams to Edmund Jenings, June 20, 1780, "Founders Online – National Archives" https://founders.archives.gov (accessed February 3, 2019).
[118] Clayton C. Cramer, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms* (Westport, Connecticut: Praeger Publishers, 1994): 24.
[119] ibid., 28.
[120] Cramer, *For The Defense Of Themselves And The State,*: 28.

Whig political writers enjoyed considerable popularity in the colonies, and were widely cited during the 1770's. The most important of these writers were John Trenchard and Thomas Gordon, some even suggesting that their writings were of equal importance to John Locke.[121] As the historian Clinton Rossiter put it, "… *Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period."[122]

Trenchard and Gordon had great influence on the founding fathers. John Adams made frequent references in his correspondence. "Cato's letters and the Independent Whig, and all the Writings of Trenchard and Gordon, Mrs. Maccahy's history, Burgh's political disquisitions, Clarendons history, of the civil war, & all of the writings relative to the revolutions in England, became fashionable reading."[123] Jefferson was known to admire *Cato's Letters* and *The Independent Whig* whose writings he had in his library. Copies were frequently found in public libraries. For those without books or access to libraries, newspapers and pamphlets provided a ready introduction to their ideas.[124] Printed versions of the works of Trenchard were used frequently in the protests against the quartering of British troops in the 1760's.[125]

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[121] Bernard Bailyn, *Pamphlets of the American Revolution,* 30.
[122] David L. Jacobson, ed., *The English Libertarian Heritage: From the Writings of John Trenchard and Thomas Gordon in The Independent Whig and Cato's Letters,* (Indianapolis: The Bobbs-Merrill Company, Inc., 1965): viii.
[123] Correspondence from John Adams to Jedidiah Morse, January 5, 1816, "Founders Online – National Archives," https://founders.archives.gov (accessed February 3, 2019) in a letter to James McHenry, dated July 27, 1799, he proclaimed: "All the Declamations as well as Demonstrations of Trenchard & Gordon, Bolingbroke Bernard & Wapole, Hume, Burgh and Burke, rush upon my memory and frighten me out of my witts. https://founders.archives.gov (accessed February 3, 2019).
[124] Jacobson, ed., *The English Libertarian Heritage,* ivi.
[125] *An Argument Shewing that A Standing Army is Inconsistent with a Free Government* appeared in the New York Journal in 1766 and 1767. Cress, "Radical Whiggery on the Role of the Military," 50.

Algernon Sydney also stands out. His *Discourses on Government* was frequently cited in newspapers and pamphlets; Jefferson considered him a leading source for the American understanding of the principles of political liberty and the rights of humanity. When enunciating the principles of government to be included in University of Virginia law school curriculum, he wished that: "as to the general principles of liberty and the rights of man, in nature, and in society, the doctrines of Locke in his "Essay concerning the true original, extent, & end of civil gov't, and of Sydney in his "Discourses on govmt'", may be considered as those generally approved by our fellow citizens."[126] According to Caroline Robbins, "During the American Revolution Sydney's *Discourses* was more of a Bible to the revolutionaries than any of the other works of this century, Milton only excepted."[127] John Adams was effusive in his praise of Sydney in his correspondences with Thomas Jefferson.[128]

James Burgh's *Political Disquisitions* (1774) has been described as "perhaps the most important political treatise which appeared in England in the first half of the reign of George III."[129] Its themes of an armed citizenry willing to defend themselves resonated with colonial

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[126] Thomas Jefferson: Principles of Government For UVA, February 1825, "Founders Online – National Archives," https://founders.archives.gov (accessed February 3, 2019).
[127] Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development, and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (Indianapolis: Liberty Fund, Inc., 2004): 43.
[128] In a letter to Thomas Jefferson, dated September 17, 1823, he states: "I have lately undertaken to read Algernon Sydney on government… As often as I have read it, and fumbled it over, it now excites fresh wonder that this work has excited so little interest in the literary world. As splendid an edition of it as the art of printing can produce – as well for the intrinsic merit of the work, as for the proof it brings of the bitter sufferings of the advocates of liberty from that time to this, and to show the progress of moral, philosophical, and political illuminations in the world – ought to be now published in America." "Founders Online – National Archives," https://founders.archives.gov (accessed February 5, 2019).
[129] Carla H. Hay, "Benjamin Franklin, James Burgh, and the Authorship of "The Colonist's Advocate" Letters," *The William and Mary Quarterly,* Vol. 32, No. 1 (Jan., 1975): 112.

Americans and made it, says Bernard Bailyn, "the key book" of the founding generation. [130] Jefferson included it in a course of recommended reading for James Madison and James Monroe.

The influence of James Burgh and others was not merely derived passively by reading: there was an active dialogue between colonial American political leaders and their British counterparts during the revolutionary period. In fact, *Political Disquisitions* may have been the product of political meetings that took place between American and English political theorists. James Burgh, Richard Price and Benjamin Franklin belonged to the club of Honest Whigs, a radical Whig political discussion group, which met in London taverns during the 1760's and early 1770's. Burgh may have even ghost-written Franklin's political tracts, under the pseudonym, "The Colonist's Advocate."[131]

The popularity of Whig political theorists in colonial America was rivaled by interest in the writings of common law jurists. Prominent among them was Sir Edward Coke, often cited in revolutionary pamphlets to support challenges to the authority of Parliament to legislate for the colonies.[132] Later arguments were based upon the supremacy of natural law. Bailyn states: "Sir Edward Coke is everywhere in the literature – the citations are almost as frequent as, and occasionally even less precise than, those to Locke, Montesquieu, and Voltaire."[133] For Jefferson, "Coke Lyttleton was the universal law book of students, and a sounder Whig never

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[130] Bailyn, *The Ideological Origins of the American Revolution,* 41.
[131] Hay, "Benjamin Franklin, James Burgh," 114.
[132] Coke's famous Dr. Bonham's Case (1610) (8 Co. Rep. 107a) decision stood for the idea that the common law could be regarded as fundamental law. Acts of Parliament could be invalidated if they were considered to violate fundamental law – "against common right and reason…the common law will control it and adjudge such act to be void.".
[133] Bailyn, *The Ideological Origins of the American Revolution,* 30.

wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or what was called British liberties."[134] Coke's *Institutes*, he said, was "executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied."[135] John Adams considered Coke as "our judicial oracle."[136]

The greatest common law theorist, and one who had the most profound impact upon colonial Americans, was Sir William Blackstone. In his *Commentaries,* Blackstone presented a readable and comprehensive account of English common law, its "large mass of legal detail" making it "particularly useful in eighteenth-century America."[137] The *Commentaries* were the principal means by which colonists learned of the state of English law. It was the standard legal authority of the day.

Blackstone's *Commentaries* were immensely popular in the colonies because it had particular appeal to the layman; justices of the peace and other local officials frequently referred to it in order to become conversant in the common law. It allowed ordinary people to acquaint themselves with criminal law. The *Commentaries* received most acclaim in thinly settled colonial America.[138]

While popular with the general public, Blackstone's greater influence was on opinion forums. In the drafting of the Declaration of Independence, the recitation of the grievances

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[134] James R. Stoner. *Common Law and Liberty Theory,* (Kansas: University Press of Kansas, 1992): 13.
[135] ibid., 13.
[136] Charles F. Mullett. "Coke and the American Revolution," *Economica* No. 38 (Nov., 1932) https://www.jstor.org/stable/2549144 (accessed February 18, 2019): 458.
[137] Theodore F. T. Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown & Company, 1956): 287.
[138] Waterman, "Thomas Jefferson and Blackstone's Commentaries," 452.

against George III "in the main are sustained by Blackstone's description of the rights of Englishmen and the principles of the British Constitution."[139] Jefferson's theory of natural rights echoed the theories of Blackstone in the *Commentaries:* "This law of nature being coeval with mankind and dictated by God himself, is of course superior to any other… no human laws are of any validity, if contrary to this.."[140] He frequently cited Blackstone in his legal writings and recommended the *Commentaries* to his students. In his law lectures, James Wilson also drew heavily on Blackstone.[141]

Bailyn has suggested that "the citations are plentiful, but the knowledge they reflect, like that of the ancient classics, is at times superficial."[142] But the references to Blackstone by the founding fathers belie this contention. The correspondence of John Adams reveals an avid reader of Blackstone, one intimately familiar with him. His diaries are filled with references.[143] A letter to Mercy Otis Warren, of July 11, 1807 is typical:

> My opinion of the British Constitution was formed long before I had any Thing to do in Public Life, more than twenty years before I ever saw the British Island. I learned from Fortescue Smith Montesquieu Vattel, Ackerly,

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[139] ibid., 455.
[140] 1 Blackstone 91.
[141] Stoner, *Common Law and Liberty Theory,* 162.
[142] Bailyn, *The Ideological Origins of the American Revolution,* 28.
[143] In a letter to Abigail Adams, dated May 24, 1789, he writes:" The Books I wish for, are Hume, Johnson Priestly, Ainsworth Dictionary, and Such other Books as may be most amusing and useful – The great works and Collections I would not bring on. But Blackstone and De Lolme on the English Constitution and the Collection of American Constitutions I would have Sent on." On November 20, 1787 he writes: "Proceed slowly in the third volume of Blackstone. As this is the most important of all those that will occur, I make large extracts from him, which takes me up so much time that I cannot read above twenty or thirty pages in a day." On October 4, 1787, he writes: "I this day concluded the first volume of my author [Blackstone]; and employ'd all the afternoon in copying from it, under heads." On October 5, "After writing a few lines in my common place book, I took the second volume, of Blackstone, which treats of the rights of things." "Founders Online – National Archives" https://founders.archives.gov (accessed January 28, 2019).

> Bacon Bolinbrooke Sullivan and Blackstone and Delolme and even from Marchamont Nedham Algernon Sydney, James Harrington and every other Writer on Government and from al the Examples I had ever read in History.[144]

In 1782, a list was prepared of the books that should be imported for use by the Continental Congress. Included were Coke's *Institutes*, Blackstone's *Commentaries*, Burgh's *Political Disquisitions*, Price's Political works, Hobbes' Works, Harrington's works, Sidney on Government, Locke on Government, Parliamentary History, and Parliamentary debates.[145] This was not window dressing.

What lessons did the Founding Fathers learn from these authors? For a century, Whig political theorists had warned of the dangers of power in the hands of those hostile to individual liberty. The embodiment of this threat was the standing army. It was the right of each individual to arm himself for protection. The events leading to the American Revolution provided the opportunity to test those theories in practice.

During the course of the 1760's, American colonists increasingly asserted their rights as Englishmen, the first of them the right of self-preservation. In 1764, James Otis published *The rights of the British colonies asserted and proved.* In it, he quoted verbatim from the English Bill of Rights: "That the subjects which are protestants, may have arms for their defense, suitable to their conditions, and as allowed by law."[146] He then quoted John Locke:

> For no man or society of men having a power to deliver up their preservation or consequently the means of it to the absolute will and arbitrary dominion

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[144] Correspondence from John Adams to Mercy Otis Warren, July 11, 1807, "Founders Online – National Archives" https://founders.archives.gov (accessed February 3, 2019).
[145] Report On Books For Congress, January 23, 1783, "Founders Online – National Archives" https://founders.archives.gov (accessed January 28, 2019).
[146] James Otis, *The Rights Of The British Colonies asserted and proved.* "Eighteenth Century Collections Online" http://find.galegroup.com.ezproxy.shu.edu (accessed February 11, 2019).

> of another, whenever anyone shall go about to bring them into such a slavish condition, they will always have a right to preserve what they have not a power to part with, and to *rid* themselves of *those* who invade this fundamental, sacred, and unalterable law of self-preservation for which they entered into society.[147]

The Stamp Act of 1765 imposed on the colonies a direct tax on printed materials, including newspapers and legal and other commercial documents. It was met with widespread opposition and was repealed in 1766. Following its repeal, the Townshend Acts imposed new taxes in 1767 and 1768 on various products including paper and tea. In 1768, the Massachusetts House of Representatives circulated a letter among the colonies, condemning unjust taxation.[148] Tensions between the colonists and the Crown and Parliament escalated to the point where a contingent of British troops was sent to Boston to maintain the peace, evoking fears of a standing army and the threat to the rights of Englishmen, among them the right to bear arms.

The "Journal of the Times" was a daily record of politically significant events for the entire British Empire prepared by men in the particular town in which they were living. The serial Boston column, believed to have been written by John Adams, Samuel Adams, and Josiah Quincey, was also published in the *New York Journal.*[149] In an anonymous piece from April 27, 1769, the author invoked the right to bear arms:

> 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; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.[150]

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[147] ibid.
[148] Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms,* (Chicago: The Independent Institute, 2008): 14.
[149] ibid., 17.
[150] Oliver Morton Dickerson, ed., *"Boston Under Military Rule" 1768-1769: as revealed in "A Journal of the Times,"* (Boston: Mount Vernon Press, 1936): 79.

A February 6, 1769 column in *The Boston Evening Post* was emphatic:

> For it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is explicitly recognized by the Bill of Rights, and who live in a province where the law requires them to be equip'd with arms…[151]

Samuel Adams wrote an editorial in the *Boston Gazette* on February 27, 1769 defending a resolution passed by the town of Boston to keep arms for its own defense. He repeatedly invoked Blackstone:

> "At the revolution, the British Constitution was again restor'd to its original principles, declared in the bill of rights; which was afterwards pass'd into a law, and stands as a bulwark to the natural rights of subjects. "To vindicate these rights, says Mr. *Blackstone*, when actually violated or attack'd, the subjects of England are entitled first to the regular administration and *free course of justice* in the courts of law – next to the right of *petitioning the King* and parliament for redress of grievances – and lastly, to the right of *having and using arms for self-preservation and defence."* These he calls "auxiliary subordinate rights, which serve principally as *Barriers* to protect and maintain inviolate the three great and primary rights of *personal security, personal liberty and private property"*; And that of *having arms for their defence* he tells us is "a public allowance, under due restrictions, of the *natural right of resistance and self-preservation,* when the sanctions of society ad laws are found *insufficient* to restrain the *violence of oppression."*[152]

Another edition of the "Journal of the Times" (April 13, 1769) again defended the private right to bear arms:

> "Instances of the licentious and outrageous behavior of the military conservators of the peace still multiply upon us, some of which are of such a nature, and have been carried to so great lengths, as must serve fully to evince that a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defence, was

[151] ibid., 61.
[152] ibid., 90.

a measure as prudent as it was legal."[153]

Boston had become the epicenter of protest against British rule.

II. The Boston Massacre Trials

A precursor to the events of the Boston Massacre can be seen a year earlier. On April 19, 1769, a British impressment gang boarded a Marblehead fishing vessel off the coast of Massachusetts. In response to the attack, seaman Michael Corbett drew a line in salt, proclaiming, "If you step over the line, I shall consider it as proof that you are determined to impress me, and by the Eternal God of Heaven, you are a dead man!"[154] The British officer fired a pistol; in response, the leader of the sailors, Michael Corbett, harpooned the officer, killing him. The trial of Corbett portended arguments that would be made in the Boston Massacre trial: he had a natural right of self– defense and could kill the officer in response to a threat to his and others personal safety.

Corbett and three other sailors were defended by John Adams and James Otis. Drawing on English common law authority, Adams argued that the attempted impressment was illegal and, therefore, the killing of the British officer constituted justifiable homicide – Homicide *se defendo.* Adams cited Sir William Hawkins' principle that:

> The killing of dangerous Rioters, by any private Persons, who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private Person seems to be authorized by the Law to arm himself for the Purposes aforesaid… I can see no Reason why a Person, who without provocation is assaulted by another in any Place whatever, in

[153] New York Journal, April 13, 1769, appearing in Halbrook, *The Founders Second Amendment,* 21.
[154] L. H. Butterfield, ed., *Legal Papers of John Adams,* (Cambridge: The Belknap Press of Harvard University Press, 1965): 326.

> such manner as plainly shews and Intent to murder him, as by discharging a Pistall or pushing at him with a drawn sword, may not justify killing such Assailant.[155]

"In these Circumstances what was his Duty?," Adams asked the judges. "He had an undoubted Right, not merely to make a push at Lt. Panton, but to have darted an Harpoon, a dagger thro the Heart of every Man in the whole Gang."[156] The court found sufficient grounds for justifiable homicide because the defendants had the right to defend themselves where the impressment was illegal. Although this case did not entail the use of firearms, that issue would be dealt with by the courts in the coming months.[157]

The pleas in the Boston Massacre trial brought together the right of self-preservation, the rights of an armed citizen, and one hundred years of English common law and political precedent in one courtroom. British troops had been quartered in Boston since 1768, culminating in the events of March 5. Following the shooting, a Grand Jury indicted British Captain Thomas Preston and eight soldiers for murder. Preston had unsuccessfully sought the assistance of defense counsel; after repeated rejections, John Adams and Josiah Quincy agreed to defend him and the soldiers. The prosecution was led by Samuel Quincy and assisted by Robert Treat Paine. A decision was made to sever the trial of the officer from that of the soldiers because of the

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[155] Special Court of Admiralty, Boston, June 1769, "Adams Argument and Report," "The Founding Era Collection, The Adams Papers Digital Edition, https://rotunda-upress-virginia-edu.libproxy.wustl.edu/founders (accessed April 2, 2019).

[156] ibid., 5.

[157] In a case immediately preceding the Boston Massacre trials, Rex v. Richardson, the Suffolk Superior Court dealt with the issue of the use of a firearm in self-defense. A man had fatally shot a boy. A crowd had chased the customs commissioner to his house and hurled rocks at his house. He fired into the crowd killing a boy. Tried for murder, his defense was predicated on the fact that a mob had attacked him in his house and endangered his life. He was therefore entitled to protect himself by killing the assailants. The defendant was convicted, but ultimately pardoned after the Boston Massacre trials, by the crown upon request by Acting Governor Hutchinson. *Legal Papers of John Adams, vol. 2.*

concern that a joint trial would result in mutual "finger-pointing" resulting in a verdict of guilty. Therefore, Preston was tried separately from the soldiers, William Wemms, James Hartigan, William McCauley, Hugh White, Matthew Kilroy, William Warren, John Carrol and Hugh Montgomery.[158] At the urging of General Thomas Gage, Commander of British troops in America, the trials were deferred until the fall of 1770 to allow time for emotions to cool.

The trial of Preston began on October 24, 1770 and lasted 6 days. It centered on the question of whether he had ordered the soldiers to shoot. The prosecution failed to prove its case as a result of conflicting witness testimony, and he was acquitted. The trial of the soldiers, *Rex v. Wemms*, began on November 27, 1770 and would become the most celebrated criminal trial of the period. One hundred years of English common law and natural rights theory were summoned in support of the right of self-defense.

Both the prosecution and the defense agreed that the colonists had the right to arm themselves in self- defense. Samuel Quincy noted that when the soldiers came out "with clubs, cutlasses, and other weapons of death; this occasioned a general alarm; every man therefore had a right, and very prudent it was to endeavor to defend himself if attacked…"[159] Robert Treat Paine, co-prosecutor amplified the point: "The Inhabitants had for a Long while been fully sensible of the ill disposition and Abusive Behavior of many of the Soldiers towards them and the most peaceable among us had found it necessary to arm themselves with heavy Walking Sticks or Weapons of Defence when they went abroad."[160] He contended that the behavior of the

[158] Adams Papers Digital Edition, "Massachusetts Historical Society," Legal Papers of John Adams, vol. 3, https://www.masshist.org/publications (accessed May 25, 2019).
[159] John Adams, *Legal Papers*, vol. 3, 149.
[160] Legal Papers of John Adams, vol. 3 https://www.masshist.org/publications (accessed May 25, 2019.

crowd was justified, as they were actions of "a free People Oppressed and galled with the ravaging of an ungoverned Soldiery."[161] Adams also acknowledged the right of Bostonians to arm themselves: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence, that distinction is material and must be attended to."[162]

The crux of the defense was that the soldiers right of self-preservation justified the killing. We may glean the arguments from the copious notes of the trial kept by John Adams, who summarized the common law and natural law foundation of the right of self-defense:

> self-love, which is not only our indisputable right, but our clearest duty, by the laws of nature, this is interwoven in the heart of every individual… It is the first, and strongest principle in our nature, Justice *Blackstone* calls it "The primary canon in the law of nature." A man is authorized therefore by common sense, and the laws of England, as well as those of nature, to love himself better than his fellow subject… The rules of the common law therefore, which authorize a man to preserve his own life at the expense of another's, are not contradicted by any divine or moral law.[163]

He then presented the jury with the legal basis for the claim of self- defense, citing English jurists for support:

> I shall now, read to you a few authorities on this subject of self-defence. Foster 273 in the case of justifiable defence, "The injured party may repell with force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth with violence, or surprise, to commit a known felony upon either." In these cases he is not obligated to retreat, but may pursue his adversary, till he findeth himself out of danger, and in a conflict between them he happeneth to kill, such killing is justifiable.[164]

Citing Sir William Hawkins, he stated:

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[161] ibid, 6.
[162] ibid., 5.
[163] ibid., 3.
[164] ibid., 3.

> Yet it seems that a private person, a *fortiori*, an officer of justice, who happens unavoidably to kill another in endeavoring to defend himself from, or suppress dangerous rioters, may justify the fact, in as much as he only does his duty in aid of the public justice. And I can see no reason why a person, who without provocation is assaulted by another in any place what-soever, in such manner as plainly shews an intent to murder him, as by dis-charging a pistol, or pushing at him with a drawn sword, &c. may not justify killing such an assailant, as much as if he attempted to rob him.[165]

Later, again citing Hawkins, he argued: "And so perhaps the killing of dangerous rioter, may be justified by any private persons, who cannot otherwise suppress them, or defend themselves from them; in as much as every private person seems to be authorized by the law, to arm himself for the purpose aforesaid."[166] In his peroration, he proclaimed the supremacy of the law, quoting Algernon Sydney:

> To use the words of a great and worthy man, a patriot, and an hero, and enlightened friend of mankind, and a martyr to liberty: I mean ALGERNON SYDNEY, who from his earliest infancy sought a tranquil retirement under The shadow of the tree of liberty, with his tongue, his pen, and his sword, "The law, (says he,) no passion can disturb. 'Tis void of desire and fear, lust and anger.[167]

On the day before, his co-counsel, Josiah Quincy, had addressed the jury regarding the natural right of self- defense, using arguments that recalled John Locke; "The law indulges no man in being his own avenger. Early, in the history of jurisprudence, we find the sword taken from the party injured, and put into the hands of the magistrate."[168]

> Let it not be apprehended, that I am advancing a doctrine, that a soldier may attack an inhabitant, and he not allowed to defend himself. No Gentlemen! If a soldier rush violently through the street and presents a weapon of death, in a striking posture; no doubt the person assailed may defend himself, even

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[165] ibid., 5.
[166] ibid., 5.
[167] ibid., 22.
[168] Josiah Quincy's Argument for the Defense, December 3, 1770, The Adams Papers Digital Edition, https://rotunda-upress-virginia-edu.libproxy.wustl.edu/founders (accessed February 20, 2019).

> to taking the life of the assailant….it is, I say, upon the right of self- defence and self-preservation we rely for our acquittal.[169]

At the conclusion, he again quoted Locke:

> I beg leave to read to you a passage from a very great, theoretic, writer: a man whose praises have resounded through all the known world, and probably will, through all ages… I mean the sagacious Mr. *Locke*; He Will tell you, Gentlemen, in his Essay on Government "That *all manner of force without right* puts man in a state of *war* with the *aggressor;* and of consequence, that, being in such a state of *war,* he may LAWFULLY KILL him, who put him under this *unnatural* restraint.[170]

In its charge to the jury, the crown acknowledged that the law supports a natural right of self-defense, even for soldiers, "A man by becoming a soldier, doth not thereby lose the right of self-defence which is founded in the law of nature. Where anyone is, without his own default, reduced to such circumstances, as the laws of society cannot avail him, the law considers him, "as still in that instance under the protection of the law of nature." [171] The charge also reaffirmed the right of private citizens to carry arms: "It is the duty of all persons (except women, decrepit persons, and infants under fifteen) to aid and assist the peace officers to suppress riots & c. when called upon to do it. They may take with them such weapons as are necessary to enable them effectually to do it."[172] The jury acquitted six of the soldiers and found two guilty of manslaughter. It was a vindication of one hundred years of English common law and natural law theory, firmly establishing an individual right of self-defense through the use of firearms.

In the aftermath of the Boston Massacre, a committee headed by James Bowdoin protested the episode as proof of the dangers of a standing army. Their narrative of the events

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[169] ibid., 3.
[170] ibid., 9.
[171] John Adams, *Legal Papers,* vol. 3, 299.
[172] ibid., 299.

was widely disseminated throughout the colonies. In November 1772, Boston adopted a proclamation asserting the right of self-defense in opposition to tyranny. In words taken from Locke and Blackstone, the *Rights of Colonists* stressed the natural right of self-preservation; "Among the Natural Rights of the Colonists are these First, a right to Life, Secondly to Liberty; thirdly to Property; together with the Right to support and defend them in the best manner they can – Those are evident Branches of, rather than deductions from the Duty of Self Preservation, commonly called the first Law of Nature."[173]

The years leading up to the revolution were marked by the quartering of British troops in Boston and repeated efforts by the authorities to disarm the colonists. Thus, Boston presented the very threat of a standing army and tyrannical government that Whig political theorists had warned for a century. Josiah Quincy's, *Observations On The Act Of Parliament*, borrows freely from the theories of James Harrington and John Trenchard:

> No free government was ever founded, or ever preserved its liberty, without uniting the characters of citizen and soldier in those destined for the defence of the state. The sword should never be in the hands of any but those who have an interest in the safety of the community, who fight for their religion and their offspring,- and repel invaders that they may return to their private affairs and the enjoyment of freedom and good order. Such are a well-regulated militia composed of the freeholders, citizens, and husbandmen, who take up arms to preserve their property as individuals, and their rights as freemen.[174]

[173] Samuel Adams, *The Rights of the Colonists, A List of Violations of Rights and a Letter of Correspondence,* in Harry Alonzo Cushing, ed., *The Writings of Samuel Adams,* (New York: G. P. Putnam's Sons, 1904): vol. 2, 351.
[174] Josiah Quincy, *Memoir of the Life of Josiah Quincy (1825),* Seton Hall Law Rodino Library, "HeinOnline," https://heinonline.org/HOL/License (accessed March 17, 2019).

Colonists armed themselves and organized militias in order to preserve their property and their liberties, as individuals.

Chapter 4: The Development of a Constitutional Right

I. State Constitution Antecedents

At the outbreak of the Revolution, some of the newly drafted constitutions, directly patterned after the English Bill of Rights, contained guarantees of the right to bear arms. Virginia adopted a Declaration of Rights on June 12, 1776 which contained a guarantee of the right to bear arms in its Article VII: "That a well- regulated Militia, composed of the Body of the People, trained to Arms, is the proper, natural, and safe Defence of a free State; that standing Armies, in Time of Peace should be avoided, as dangerous to liberty,"[175] Jefferson then authored a draft constitution for Virginia which, among other rights and liberties, guaranteed that: "No freeman shall be debarred the use of arms [within his own lands or tenements]"[176] As the Declaration of Rights was already enacted, Jefferson's proposal was not used. Pennsylvania's constitution, enacted in September 1776, also guaranteed the right to bear arms, explicitly providing for both an individual and collective right: "That the people have a right to bear arms, for the defence of themselves"[177] Delaware and Maryland did not deal with the right to bear arms.[178] New Jersey did not contain a specific bill of rights, as it was thought that the common law protected them. The New York constitution, passed in 1777, did not specifically provide for a right to bear

[175] Halbrook, *The Founders' Second Amendment,* 129.
[176] ibid., 131.
[177] "A Declaration of the Rights of the Inhabitants of the State of Pennsylvania," *Accessible Archives,* http://www.accessible.com.ezproxy.shu.edu (accessed January 28, 2019).
[178] Halbrook, *The Founders' Second Amendment,* 142-144.

arms.[179] In Massachusetts, the constitution included a Declaration of Rights which provided that:

> The people have a right to keep and bear arms for the common defence. And as, in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.[180]

While the Massachusetts provision explicitly referred to bearing arms for "common defence," it conveyed this right to "the people."

Several historians have found in these constitutional provisions support for their view that the right to bear arms was collective rather than individual. Saul Cornell has placed particular emphasis on the fact that the Massachusetts constitution expressly associated the right to bear arms with the "common defence." This argument, while superficially attractive, ignores the fact that the drafters were living in a culture where gun ownership was common; where the right to possess firearms was so basic to the rights of citizenship, that it was assumed without need for explicit reference. Tellingly, there is no record of any demand to limit an individual right to bear arms.

This culture of gun ownership was thought to be a virtue of American society; one that insured that liberties would be protected. For Jefferson,

> …the constitutions of most of our states assert that all power is inherent in the people; that they may exercise it by themselves, in all cases to which they think themselves competent, or they may act by representatives, freely and equally chosen; *that it is their right and duty to be at all times armed*; that they are entitled to freedom of person; freedom of religion; freedom of property; and freedom of the press. (emphasis added)[181]

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[179] ibid., 153.
[180] ibid., 158.
[181] Correspondence from Thomas Jefferson to John Cartwright, June 5, 1824, "Founders Online-National Archives," https://founders.archives.gov (accessed March 18, 2019).

The clear meaning of the text is that the right to bear arms was an individual one. Elsewhere, he wrote, "What country before ever existed a century and half without a rebellion? And what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms."[182] Madison extoled the virtues of an armed population in *Federalist 46*:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of. 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.[183]

II. The Constitution and Bill of Rights

A Constitutional Convention convened in the summer of 1787 to formulate a new framework of government to consolidate federal power. The Articles of Confederation had severely limited federal power; most power was retained by the states. The federal government could not raise taxes, could not regulate interstate commerce, and was significantly hindered in its ability to enforce its own laws. This flaw was highlighted in 1786, when both the federal and state governments had proved ineffective in dealing with a revolt of Revolutionary War veterans

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[182] *The Papers of Thomas Jefferson Digital Edition,* ed. James P. McClure and J. Jefferson Looney. Charlottesville: University of Virginia Press, Rotunda, 2008-2019 http://rotunda.upress.virginia.edu.libproxy.wustl.edu/founders (accessed February 15, 2019).

[183] *The Papers of James Madison Digital Edition,* J.C.A. Stagg, ed. Charlottesville: University of Virginia Press, Rotunda, 2010. http://rotunda.upress.virginia.edu.libproxy.wustl.edu/founders (accessed February 12, 2019).

in Western Massachusetts, "Shays's Rebellion." The fact that local militias had taken up arms against the government raised alarms. John Adams especially worried:

> To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defence, or by partial orders of towns, counties, or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty could be enjoyed by no man – it is a dissolution of the government.[184]

The founders would focus on the right to bear arms and the proper role of a militia in a free society in the ensuing constitutional debate.

The Constitution enacted by the Convention in September 1787 did not contain a bill of rights. The framers recognized that the militia would play an important role in a free society, and much of the debate centered on how the authority over the militia would be allocated between the state and federal government. In its final draft, Article I, Section 8 of the Constitution would allocate this authority, delegating to Congress the power:

> To provide for calling forth the Militia to execute the Laws of the Union suppress Insurrections and repel Invasions
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress…[185]

Under the Constitution, the power was divided between Congress, the President, and the states; Congress had the power to raise and support armies and to declare war, the President was the

[184] John Adams, *A Defence of the Constitutions of Government of the United States of America (1787-1788)* vol. 3, 475 in Halbrook, *The Founders' Second Amendment,* 189.
[185] The Constitution of the United States. (United States: National Center for Constitutional Studies, 2012).

commander and chief of the army and militia, when called upon, and the states retained the power to train and appoint militia officers. Yet the Constitution did not contain a bill of rights.

Why not? Defenders of the Constitution argued that there were two primary reasons. First, the powers delegated to the federal government were specifically defined. Second, an armed population defending liberties against an oppressive government obviated the need for a bill of rights. This justification was noted in several tracts written by Federalists in support of ratification of the Constitution. In Federalist No. 46, Madison responded to the argument that the federal government could raise a standing army that would threaten liberties:

> To [this] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.[186]

Alexander Hamilton argued that there was no need for a bill of rights given that the Constitution did not convey any power to the federal government to infringe upon fundamental liberties, including freedom of speech and the right to bear arms, which were retained by the people:

> Bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservation of rights not surrendered to the prince…They have no application to constitutions professedly founded upon the power of the people…the people surrender nothing; and as they retain everything they have no need of particular reservations.[187]

Hamilton had earlier maintained that the fundamental right of self- defense was the ultimate defense against a tyrannical government:

> If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpation

[186] Federalist 46, *The Federalist Papers by Alexander Hamilton, James Madison and John Jay,* (New York: Bantam Books, 1982): 237.
[187] Federalist 84, *ibid*., 434.

> of the national rulers, may be exerted with infinitely better prospect of success than against those of the rulers of an individual state…[188]

Noah Webster authored the first political pamphlet in support of the Constitution. In it, he stressed the importance of an armed population in a manner that echoed the words of Viscount Molesworth almost a hundred years before:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in 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 pretence, raised in the United State. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the power, and jealously will instantly inspire the inclination, to resist the execution of a law which appears to them unjust and oppressive.[189]

The Federalist Trench Coxe reiterated this point: "The unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people."[190] Notwithstanding these assurances, anti-federalists persisted in demanding that the new constitution contain a bill of rights.

In the state ratification conventions that followed, anti-federalists again voiced concerns regarding the lack of a bill of rights. In January 1788, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut ratified the Constitution without a bill of rights. In some of the conventions, certain amendments were proposed specifically addressing the right to bear arms.[191]

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[188] Federalist 28, ibid., 134.
[189] Noah Webster, *An Examination of the Leading Principles of the Federal Constitution* (Philadelphia, 1787),43 in Halbrook, *The Founders' Second Amendment,* 177.
[190] *Pennsylvania Gazette, February 20, 1788* in Halbrook, *The Founders Second Amendment,* 198.
[191] For example, in Pennsylvania, it was proposed "That the people have a right to bear arms for the defence 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

None of these proposed amendments were adopted. Yet the margin in favor of ratification had been so close that the Federalists agreed to include a Bill of Rights after ratification was assured.

The language of the Second Amendment reads: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed"[192] These cryptic words have been the source of considerable debate over the years, as historians and lawyers seek to divine the original intent of the framers. Much of the conjecture is attributable to the fact that the legislative history surrounding the enactment of the Second Amendment is relatively sparse. Madison initially assumed the responsibility to craft a bill of rights. He surveyed all of the proposed amendments produced by the various state conventions, consolidating some, and revising others. The goal was to produce language that would be as succinct as possible and at the same time garner sufficient votes to be enacted. His first draft of the second amendment provided that: "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."[193] The House of Representatives appointed a committee to consider the amendments, which changed a "free country" to a "free state," and moved "a well- regulated militia" to the front of the clause addressing the right to bear arms. The resulting language provided that "A

committed, or real danger of public injury from people.." In New Hampshire, "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." In Virginia, "That the people have a 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 defence of a free state…", and in New York, "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 defence of a free state." Halbrook, *The Founders' Second Amendment,* 239.

[192] Amendment II, *The Constitution of the United States.*

[193] Halbrook, *The Founders' Second Amendment,* 253.

well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."[194]

The House of Representatives did not debate the infringement of the right to keep and bear arms. Rather, the discussion almost entirely centered on the question of granting an exemption to conscientious objectors. Elbridge Gerry was concerned that the exemption could be used by the government to destroy the constitution:

> This declaration of rights, I take it, is intended to secure the people against the mal-administration of the government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.[195]

He viewed an armed population as the principal line of defense against an oppressive government. Representative Thomas Scott of Pennsylvania also opposed the conscientious objection clause, stating: "you can never depend on your militia. This will lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, as in this case you must have recourse to a standing army."[196] The amendments were then sent to the Senate for its consideration.

The Senate met in secret and there is no record of its debates. An amendment to limit the ability of the government to maintain a standing army was proposed but defeated. The language

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[194] ibid., 262.
[195] House of Representatives, Amendments To The Constitution, 17, 20 Aug. 1789, in Kurland and Lerner, *The Founders' Constitution,* 210.
[196] ibid., 211.

excluding the requirement to bear arms on religious grounds was removed from the House version, perhaps because the amendments were addressing "rights" of individuals rather than duties. A proposal to add "for the common defence" after "bear arms" in the language of the Second Amendment was also rejected.[197] The reasoning for the rejection does not survive, but it is interesting to note that a hundred years earlier, a similar revision to the language of Article VII of the English Bill of Rights was also rejected.[198] Saul Cornell thinks the removal of the clause in terms of concern over federal overreach: "If placed in the Bill of Rights this phrase might have provided unscrupulous leaders with a pretext for prohibiting the militia from defending the states or localities from external or internal threats."[199] It is odd that he finds such significance in the common meaning of this phrase in the Massachusetts constitution, yet dismisses it when it was removed from the federal Bill of Rights. The Senate revisions to the House Bill are reflected in the final version of the Second Amendment.

The Second Amendment has been exhaustively, indeed exhaustingly, parsed by historians to discern the exact relationship between the first clause specifying a well- regulated militia and the second calling for the right to keep and bear arms. Some argue that the right is collective in that the first clause specifies the purpose for establishing the right. Nowhere in the sparse legislative history of the amendment, they say, is there any debate regarding the right of the individual to keep and bear arms for non-military purposes, including self-defense and hunting. But the one hundred fifty- year history of the development of the right suggests otherwise. It was so obvious to the political leaders of the day that the issue was never even raised. Everything we

[197] Halbrook, *The Founders Second Amendment*, 277.
[198] See footnote 54.
[199] Cornell, *A Well-Regulated Militia, 62.*

know of how contemporaries wrote and spoke about the right suggests that it was assumed. George Washington, in a speech before Congress, stated: "To be prepared for war, is one of the most effectual means of preserving peace. A free people ought not only to be armed, but disciplined; to which end, a uniform and well digested plan is requisite."[200] Thomas Jefferson wrote: "all power is inherent in the people… that it is their right and duty to be at all times armed; that they are entitled to freedom of person; freedom of religion freedom of property; and freedom of the press."[201] Joseph Story summarized the Second Amendment as follows:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[202]

That view, expressed in his 1833 *Commentaries on the Constitution of the United States,* remains compelling. An armed population was viewed by the founders as the greatest defense of American liberties against an oppressive government. No subsequent jurisprudence has seriously dislodged an individual right to bear arms that long predated the birth of the nation.

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[200] Shalhope, "The Ideological Origins of the Second Amendment," 611.
[201] "From Thomas Jefferson to John Cartwright, 5 June 1824," *Founders Online,* National Archives, https://founders.archives.gov/documents/Jefferson, (accessed January 18, 2019).
[202] Joseph Story, *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution* (3 vols., Boston, 1833): 746-47, appearing in Shalhope, "The Ideological Origins of the Second Amendment," 612.

Conclusion

The historical basis for interpreting an individual right to keep and bear arms is deeply rooted in both English common law and the development of English political and legal philosophy over the course of one hundred and fifty years. The drafters of the U.S. constitution lived in a society in which gun ownership for a multitude of purposes was quite common. It was one in which the right to use arms in self- defense was assumed.

From where was this right derived? As the records of Boston Massacre trials demonstrate, the English common law and natural rights theory firmly established a fundamental right of self-preservation, which under the exigencies of the situation might be exercised through the use of firearms. Hobbes, Locke, and a long line of English jurists stressed that the right was possessed by the individual, the residue of those ceded to society in the state of nature. Their works were readily accessible and frequently cited by both the political elite and the ordinary person in colonial America. Inspired by the works of Whig political theorists, the founders were inculcated with the idea that it was incumbent upon each individual citizen to possess arms as a bulwark against the threat to liberties posed by a tyrannical government. This is repeatedly demonstrated by the multiple references in pre-revolutionary political literature and the commentary surrounding the drafting of the constitution.

The language of the Second Amendment is admittedly opaque and its legislative history sparse. Those who advocate for a collective view of the right to keep and bear arms primarily base their position on the fact that the record of debate centered on the role and governance of the militia and lacked any discussion of the rights to bear arms for non-military purposes. This argument implies that the founding fathers sought to limit the rights granted in the English Bill of

Rights, rather than expand them. Yet the drafters of the constitution lived in a society where gun ownership was quite common, where a firearm was used just as readily for hunting and defending oneself as for service in a militia. They contemplated an individual right to bear arms, to protect themselves, their property, and if necessary, in the common defense. This right was self-evident and noncontroversial.

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