# Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment

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On April 19, 1775, the town of Concord, Massachusetts was the scene of an interesting confrontation. After the militia of Concord and the surrounding towns had driven the British back from the North Bridge, some of the militiamen began to disperse. The wife of Nathan Barrett, captain of one of Concord's militia companies, spotted one of her husband's men skedaddling home. She went out of her house to confront him, and when he explained that he was feeling ill, she responded that he must not take his gun with him. When he replied simply, "Yes, I shall," she exclaimed, "No, stop, I must have it." The militiaman refused and began to walk off. Mrs. Barrett gave chase, but her quarry was too quick.[1]

The confrontation between Mrs. Barrett, speaking for the community of Concord, and the militiaman captures the clash of community obligation, public safety, private interests, and individual rights that lies at the heart of the legal and historical debate over the meaning of the Second Amendment. For Mrs. Barrett, the militiaman's gun represented his duty to join with his neighbors and bear arms in the collective defense of the community. The militiaman did not dispute that obligation: he had turned out with his neighbors to defend the town and headed home only after his

1. On the confrontation between Mrs. Barrett and the militiaman, see Robert A. Gross, *The Minutemen and Their World* (New York: Hill and Wang, 1976), 126.

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company had dispersed. But in his eyes the right to retain possession of the gun transcended its importance in allowing him to meet his communal obligation. The gun was his, and he believed he had a right to keep it.

The confrontation highlights many of the questions central to discerning the meaning of the right to keep and bear arms in early America: Who had the right? What was the relationship between the right to keep and bear arms and the obligation to serve in the militia? How might the state regulate the right? Under what circumstances might an individual be disarmed? Did Americans understand this right differently from their British counterparts?

In the fifteen years since the publication of Sanford Levinson's "Embarrassing Second Amendment," the academic literature focused on these questions has grown voluminously.[2] Recent court decisions on the Second Amendment have identified four or five different interpretations in this secondary literature.[3] Nevertheless, the bulk of this scholarly literature can be subsumed within the collective rights and individual rights frameworks. Collective rights scholars argue that the Second Amendment protects the right of states to arm and maintain their militias. Individual rights scholars insist that the amendment protects an individual citizen's right to own and use guns for a variety of purposes, public and private, subject to little government regulation.[4]

Recently a group of legal historians has offered a fresh approach to answering these questions. Expressing frustration with a seemingly intractable debate between the collective rights and individual rights interpretations of the Second Amendment, these scholars, including Saul Cornell, H. Richard

2. Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 637–59.

3. See the discussions of recent scholarship in *United States v. Emerson,* 270 F.3d 203 (2001), and *Sylveira v. Lockyer,* 312 F.3d 1052 (2002).

4. For individual rights interpretations, see Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge: Harvard University Press, 1994); Robert J. Cottrol, *Gun Control and the Constitution: Sources and Explorations on the Second Amendment* (New York: Garland Publishing, 1994); Stephen Halbrook, *That Every Man Be Armed* (Albuquerque: University of New Mexico Press, 1984); Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (1983): 204–73; and the contributions to the special Second Amendment issue of the *Tennessee Law Review* 62 (Spring 1995). For collective rights and statist interpretations, see Garry Wills, "To Keep and Bear Arms," *New York Review of Books* 42 (1995): 62–73; Saul Cornell, "Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory," *Constitutional Commentary* 16 (1999): 221–45; Carl T. Bogus, "The Hidden History of the Second Amendment," *University of California at Davis Law Review* 31 (1997): 309–408; and the contributions of Michael Bellesiles, Jack Rakove, and Paul Finkelman to the "Symposium on the Second Amendment," *Chicago-Kent Law Review* 76 (2000).

Uviller and William G. Merkel, and David Konig, have sought a "new paradigm." Proponents of the "new paradigm" view the right to keep and bear arms as the right of persons, exercised collectively, and inextricably linked to the civic obligation of service in a "well regulated militia." In the words of Saul Cornell, the right to keep and bear arms should be understood as a "civic right."[5]

This "civic rights" interpretation offers an advance over earlier scholarship, not least because it offers an insight into the confrontation between Mrs. Barrett and the militiaman. If the militiaman's claim to a right to keep and bear arms was bound to his civic obligation to defend the community, then his right expired at the moment that he retired from the field. This is the essence of Mrs. Barrett's challenge: "You must not take your gun with you." But if the value of the new interpretation lies in its explanation of one side of this confrontation, its limitations lie in its failure to explain the outcome: Mrs. Barrett didn't get the gun.

One might simply view the militiaman's refusal to surrender his gun as an act of plebeian resistance to a well-understood, "mainstream" legal norm. Saul Cornell and David Konig have both gestured in this direction.[6] The purpose of this essay is to offer a more compelling explanation of the militiaman's refusal and to suggest that the civic rights model will more fully capture the right to keep and bear arms in early America if it takes both sides of this confrontation seriously.

The explanation of the militiaman's behavior lies in the development of the law of keeping and bearing arms in early America. In British North America the law departed from English precedent by mandating gun ownership by all free white men. Colonial law required almost all free men to participate in regular military training, with their own arms, for much of their adult lives. These militia laws also incorporated a language that described the "keeping" of arms as a practice incumbent upon every in-

5. For recent attempts to create a new paradigm for the interpretation of the Second Amendment, see Saul Cornell, "Don't Know Much About History: The Current Crisis in Second Amendment Scholarship," *Northern Kentucky University Law Review* 29 (2002): 657–81; H. Richard Uviller and William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* (Durham: Duke University Press, 2002); and David Thomas Konig, "The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'the Right of the People to Keep and Bear Arms,'" *Law and History Review* 22 (2004): 119–59.

6. Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828* (Chapel Hill: University of North Carolina Press, 1999), 207–10; and David Thomas Konig, "The Persistence of Resistance: Civic Rights, Natural Rights, and Property Rights in the Historical Debate over the 'Right of the People to Keep and Bear Arms,'" Symposium: The Second Amendment and the Future of Gun Control, *Fordham Law Review* 73 (2004): 539–47.

dividual member of the body politic. Colonial legislatures did occasionally exercise their military powers to impress guns at moments of public emergency, but the practice of impressment was on the wane by the end of the eighteenth century. Most important, at no time between 1607 and 1815 did the colonial or state governments of what would become the first fourteen states exercise a police power to restrict the ownership of guns by members of the body politic. In essence, American law recognized a zone of immunity surrounding the privately owned guns of citizens. Thus, like most free white men in early America, Mrs. Barrett's militiaman was accustomed to keeping guns. What's more, in American legislators' respect for the practice, he perceived a right to keep arms.

Over the last fifteen years, several scholars interested in the Second Amendment, including Joyce Malcolm, Michael Bellesiles, and Saul Cornell, have examined the legal regulation of the ownership and use of guns in England and America.[7] From this work on gun regulation, three central conclusions have emerged. On the whole, these scholars have portrayed an early America in which guns were subject to pervasive regulation.[8] Further, Malcolm and Bellesiles have concluded that English precedent played an influential role in shaping the early American law of keeping and bearing arms, and David Konig has recently joined in this conclusion.[9] Finally, Bellesiles and Cornell have asserted that in America the colonial and early state governments acted to disarm citizens and non-citizens alike under the exercise of their police powers.[10]

7. Malcolm, *To Keep and Bear Arms;* Bellesiles, "Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794," *Law and History Review* 16 (1998): 567–89; and Cornell, "Commonplace or Anachronism." For a recent contribution, see Saul Cornell and Nathan DeDino, "A Well Regulated Right: The Early American Origins of Gun Control," Symposium: The Second Amendment and the Future of Gun Control, *Fordham Law Review* 73 (2004): 487–528.

8. Malcolm, *To Keep and Bear Arms,* chaps. 6–8; Bellesiles, "Gun Laws," 585–86; Cornell and DeDino, "Well Regulated Right," 500–502. Malcolm asserts that the right to keep and bear arms was recognized in England and America as an individual right, but also discusses a variety of regulatory legislation on both sides of the Atlantic.

9. Though they take markedly different stances on the meaning of the Second Amendment and the content of English legal precedent, Malcolm, Bellesiles, and Konig all conclude that American law conformed to English precedent. See Malcolm, *To Keep and Bear Arms,* chap. 8; Bellesiles, *Arming America: The Origins of a National Gun Culture* (New York: Knopf, 2000), chap. 1; Bellesiles, "Gun Laws," 567–77; and Konig, "Missing Transatlantic Context," 153–59. For the impact of this conclusion on Second Amendment scholarship, see the contributions of Robert J. Cottrol, Gregg Carter, and Robert Spitzer to "Gun Laws and Policies," *Focus on Law Studies* 18 (Spring 2003):1–20.

10. Bellesiles, "Gun Laws," 576 and 586; Saul Cornell, "Commonplace or Anachronism," 228–31; Saul Cornell, "To Keep and Bear Arms," in *Whose Right to Arms Did the Second Amendment Protect?* ed. Saul Cornell (New York: Bedford/St. Martin's, 2000), 13; Cornell,

The present reconsideration is based on a full survey of printed session laws pertaining to gun regulation in the thirteen colonies and Vermont between 1607 and 1815.[11] That survey bears out the first of these assertions. Hundreds of individual statutes regulated the possession and use of guns in colonial and early national America. Yet the presentist assertion that "gun control legislation" made a common appearance on colonial and early national statute books, if taken alone, offers a distorted understanding of the nature and extent of gun regulation in early America. A close examination of that legislation suggests that Malcolm, Bellesiles, and Konig have underappreciated the distinctiveness of the universal militia as a colonial institution that had no corollary in the post-medieval British experience. That universal militia fostered in the American colonies an experience of keeping and bearing arms that was distinct from Great Britain in terms of practice, language, and law. Further, in attributing to the colonial and early state governments a broad police power to restrict the ownership of guns, Bellesiles and Cornell have confused the military powers of the state with its police powers and misunderstood the basis on which different categories of inhabitants might be disarmed. They have thus misinterpreted the reach of the police power as exercised in British North America.

This essay first explores the body of colonial and early national militia law as the source of the practice, obligation, and language of keeping arms. The second section compares the legal regulation of gun ownership under the emergency military powers and the civil police powers of the colonial and early national state. It concludes by considering the use of the police power to regulate the use of guns. Finally, the essay considers the significance of this colonial and early national legal context for contemporary understandings of the Second Amendment.

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"Don't Know Much About History," 671; and Cornell, "Beyond the Myth of Consensus: The Struggle to Define the Right to Bear Arms in the Early Republic," in *Beyond the Founders: New Approaches to the Political History of the Early American Republic,* ed. Jeffrey L. Pasley et al. (Chapel Hill: University of North Carolina Press, 2004), 251–73, at 256 and 259–60.

11. As noted below, I have included in this survey comprehensive published collections of individual state laws, such as Hening's *Statutes at Large,* where they are available. For states without such collections, I consulted two microform collections. For the years 1775–1815, I surveyed the series of state session laws published on microfilm as part of the *Records of the States of the United States of America* (Washington, D.C., 1949). For the colonial period through 1775, I consulted the microfiche edition of *Colonial Session Laws* (Buffalo: William S. Hein & Co., 1987). In the notes below, laws drawn from these two collections are identified by title, year, and state. Finally, I also surveyed John D. Cushing's volumes of the earliest printed laws of the thirteen colonies.

## I. The Militia and the Duty to "Keep" Arms in England and America

In 1788, Tench Coxe wrote a series of essays defending the ratification of the Constitution of the United States under the pseudonym "A Pennsylvanian." In the third essay of the series he responded to the complaint by Pennsylvania Anti-Federalists that the Constitution had given the federal government absolute control over the "power of the sword," a metaphor for the military powers of the state. To this charge Coxe answered, "it is not so, for the powers of the sword are in the hands of the yeomanry of America from 16 to 60. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be irresistible. . . . Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birthright of an American."[12] In describing arms as the "birthright of an American," Coxe underlined a critical distinction between British and American understandings of the right to keep and bear arms. As Coxe pointed out, that distinction had its origin in the American transformation of the institution of the militia.

As a colonial institution, the American militia was based on English legal precedent but departed from it in several material aspects. From the late sixteenth century onward, English law divided the militia into two distinct formations. These laws required all able-bodied men from sixteen to sixty to appear at a "general muster" for the purpose of enrollment and selection. Such musters took place infrequently and played little role in the actual military training of the militia. Of the total pool of military manpower assembled at the general muster, county officers selected a small "trained band" composed of the most reliable men (socially, politically, and religiously) for actual military training. In the Hundred of Edwinstry in the English county of Hertfordshire, for example, 182 men were selected for service with the trained band, 14 percent of the total able-bodied population of 1302 men "viewed" at the general muster of 1587.[13]

Once county militia officers had selected the trained band, the responsibility for arming the militiamen fell on men of property and on the community as a whole. A series of parliamentary statutes mandated that

12. Tench Coxe, "A Pennsylvanian, No. 3," *Pennsylvania Gazette,* February 20, 1788.

13. On the English Militia, see Lois Schwoerer, *No Standing Armies: The Antiarmy Ideology in Seventeenth-Century England* (Baltimore: Johns Hopkins University Press, 1974), 14–15; A. Hassell Smith, "Militia Rates and Militia Statutes, 1558–1663," in *The English Commonwealth, 1547–1640,* ed. Peter Clark et al. (Leicester, U.K.: Leicester University Press: 1979): 93–110; and Ann J. King, ed., *Muster Books for North and East Hertfordshire, 1580–1605* (Hertfordshire Record Society, 1906), 50–82 and 88–96.

property holders within certain wealth and property classifications contribute prescribed sets of arms and armor for the use of the trained band. In addition, each parish was taxed to provide additional arms. In contrast with American colonial practice, in England, those who kept arms were not required to bear them in person. Those selected to actually bear arms did not keep them.[14]

This division of responsibility continued throughout the seventeenth and eighteenth centuries. When England modernized its militia laws to meet the burden of the Seven Years War, it retained key aspects of early modern practice. The Militia Act of 1757 ordered the listing of all men from eighteen to fifty except public officers, teachers, clergy, mariners, and apprentices. Of this total population, which probably numbered over a million, only 30,000 were chosen by lot to serve a term of three years. Those chosen could provide substitutes. Those actually serving in the militia trained eighteen days a year. The Crown provided arms and uniforms, which the militiamen drew from central stores for training days only.[15]

By contrast, the militias of the thirteen colonies took on a distinct institutional form, at least by the eighteenth century. In most of the colonies, the militia enrolled all able-bodied free white men between sixteen and sixty. The laws exempted public officers, clergy, and practitioners of certain key professions from training, but required them to possess guns and turn out for service in an alarm.[16] There were some exceptions to this general insti-

14. Ibid.; 4 & 5 Philip and Mary, c. 2 (1557); "An Act for Ordering the Forces in the Several Counties of this Kingdom," 13 & 14 Charles I, c. 3 (1662); and "An Act for making the Militia in that part of Great Britain called England more useful," 1 George I, Stat. 2, c.14 (1714).

15. "An act for the better ordering of the militia forces in the several counties of that part of Great Britain called England," 30 George II, c. 25 (1757).

16. For colonial militia statutes mandating universal militia training, see *The General Laws and Liberties of Connecticut Colonie* (1672), 49–51; "An Act for Regulating the Militia," 1693, Massachusetts Session Laws; "An Act for Regulating the Militia," 1717, New Hampshire Session Laws; "An Act, Regulating the Militia in this Colony," 1718, Rhode Island Session Laws; "The Duke of York's Laws, 1665–75," John D. Cushing, ed., *The Earliest Printed Laws of New York, 1665–1693* (Wilmington: Glazier, 1978), 153; "An Act for Regulating the Militia of the Colony of New York," 1755, Charles Z. Lincoln et al., eds., *Colonial Laws of New York* (Albany: James B. Lyon, 1894), 3:1051; "An Act for the Settling the Militia in this Province," 1704, Bernard Bush, ed., *Laws of the Royal Colony of New Jersey, 1703–1745* (Trenton: New Jersey State Library, 1977), 2:15; "An Act for Establishing a Militia within this Government," 1742, Delaware Session Laws; "An Act for the Better Regulating the Militia of this Government," 1746, North Carolina Session Laws; "An Act for the Better Settling and Regulating the Militia, and Appointing Look Outs," 1703, David J. McCord, ed., *The Statutes at Large of South Carolina* (Columbia: A. S. Johnston, 1841), 9:617; and "An Act for the Better Ordering the Militia of this Province," 1765, Georgia Session Laws.

tutional form. Some states, such as Rhode Island, mandated training only between the ages of sixteen and fifty.[17] Pennsylvania's Quaker party refused to organize a compulsory militia for the colony until the Revolution.[18] Maryland permitted county officers to choose those eligible for training, a legal device that allowed them to exclude Catholics.[19] Seventeenth-century militia records from Virginia indicate that in that colony some version of the English system of selecting some in the colony to provide arms and others to train persisted until the Militia Act of 1705 established the militia on the same universal footing as other American colonies.[20]

This legislative mandate, subjecting almost all free white men to military training, distinguished the colonies of British North America from England, Ireland, and the British Caribbean.[21] The 1755 Rhode Island census, which reported the total population, the able-bodied adult male population and the membership of the trained band, illustrates the contrast. Rhode Island's trained band enlisted 5265 men aged sixteen to fifty in 1755, 64 percent of the able-bodied white men aged sixteen to sixty in the colony. Of the remaining third of the able-bodied men in the colony, most had either served prior to reaching the age of fifty or had declined service on grounds of conscience.[22]

17. As the eighteenth century progressed, different colonies began to exempt their oldest and youngest men from the obligation to train. Still, the vast majority of men in colonial society participated in training for the bulk of their adult lives. For Rhode Island, see "An Act, Regulating the Militia in this Colony," 1718, Rhode Island Session Laws.

18. Pennsylvania passed a voluntary militia law during the French and Indian War. See "An Act for the Better Ordering and Regulating such as are willing and desirous to be united for Military Purposes within this province," 1755, James T. Mitchell et al., eds., *The Statutes at Large of Pennsylvania from 1682 to 1801* (Harrisburg: William Stanley Ray, 1896), 5:197. Pennsylvania's first universal militia statute came in 1777. See "An Act to Regulate the Militia of the Commonwealth of Pennsylvania," 1777, ibid., 9:75.

19. "An Act for the ordering and regulating the Militia of this Province for the better defense and security thereof," 1704, Maryland Session Laws. Maryland repealed this exclusion in 1777. See "An Act to regulate the militia," 1777, Maryland Session Laws.

20. See the Middlesex County, Virginia militia list, William Armstrong Crozier, ed., *Virginia Colonial Militia, 1651–1776* (New York: Genealogical Association, 1905), 98. For Virginia's first universal militia statute, see "An Act for settling the Militia," 1705, William W. Hening, ed., *The Statutes at Large, Being a Collection of all the Laws of Virginia* (Richmond: Franklin Press, 1809–1823), 3:335.

21. For comparison, see, in addition to the above cited English statutes, "An Act to make the Militia of this Kingdom more useful," 2 George I, c. 9 (Ireland, 1715), *The Statutes at Large passed in the Parliaments of Ireland* (Dublin: George Grierson, 1786), 4:333; and "An Act for the Settlement of the Militia of this Island," 1702, *Acts of Assembly Passed in the Island of Barbadoes, from 1648 to 1718* (London: John Baskett, 1721), 175. For a Caribbean statute that does appear to mandate universal militia service, see "An Act for settling the Militia," 1681, *Acts of Assembly Passed in the Island of Jamaica, from 1681 to 1737* (London: John Baskett, 1738), 29.

22. In the census of 1755, the colony reported 5265 "soldiers" and 2997 additional able-

In every colony of British North America, militia laws required that these militiamen provide their own arms unless they were too poor to do so. Taken together, probate inventories and extant militia returns and gun censuses demonstrate that most white men in America owned guns and that outside of Quaker-dominated regions most militiamen came armed to muster. The Rhode Island census discussed above tallied guns as well as persons. It shows that Rhode Islanders owned enough guns to arm 61 percent of the able-bodied men in the colony and 95 percent of the trained band. Most studies of colonial probate records find guns in at least two thirds of white male estates. Militia returns from the era of the American Revolution and from 1810 show that over two-thirds of northern militiamen came armed to muster.[23]

In contrast with English law and practice, then, most free white men in colonial America owned guns and trained with them in the militia. Colo-

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bodied men on the alarm list out of 9177 white men. The trained band thus incorporated 64 percent of able-bodied men from sixteen to sixty, even though in Rhode Island men were exempt from training after the age of fifty. Colonial officials estimated that one-eighth of the white male population of the colony was Quaker. See "Account of the People in the Colony of Rhode Island, Whites and Blacks, with the quantity of Arms and Ammunition in the hands of Private Persons," December 24, 1755, Board of Trade Journals, 1675–1782, Volume 64, Historical Society of Pennsylvania.

23. Ibid. The census reported 5023 privately owned "small arms," 2418 swords and 614 pistols in the colony. In 1996, Michael Bellesiles asserted that gun ownership was exceptional in early America. After Bellesiles reiterated this assertion in *Arming America,* published in 2000, his scholarship came under intense criticism. For Bellesiles' original analysis and more recent work on gun ownership and rates of militia armament that refute his claim that gun ownership was rare in early America, see Bellesiles, "The Origin of Gun Culture in the United States, 1760–1865," *Journal of American History* 83 (1996): 424–53; James Lindgren and Justin Heather, "Counting Guns in Early America," *William and Mary Law Review* 43 (2002): 1777–1842; and Robert H. Churchill, "Gun Ownership in Early America: A Survey of Manuscript Militia Returns," *William and Mary Quarterly,* 3d ser., 60 (2003): 615–42. For additional findings on the presence of guns in colonial probate inventories, see Kevin Sweeny, "Guns along the River: The Possession and Use of Firearms in Western Massachusetts, 1660–1800," paper presented at the 2004 annual meeting of the Organization of American Historians (cited with permission of the author); Amy Cox, "Evaluating the Place of Guns in Early America," paper presented at the 2004 annual meeting of the Organization of American Historians (cited with permission of the author); Gloria Main, "Many Things Forgotten: The Use of Probate Records in *Arming America,*" *William and Mary Quarterly,* 3d ser., 59 (2002): 211–16; and Judith A. McGaw, "'So Much Depends upon a Red Wheel Barrow': Agricultural Tool Ownership in the Eighteenth-Century Mid-Atlantic," in *Early American Technology: Making and Doing Things from the Colonial Era to 1850,* ed. Judith A. McGaw (Chapel Hill: University of North Carolina Press, 1994), 332. Kevin Sweeny finds a sharp decrease in gun ownership in Hampshire County, Massachusetts during and after the American Revolution. That decline does not appear in contemporary militia returns. There is an abundance of anecdotal evidence of local shortages of arms throughout the period under consideration. Nevertheless, the available statistical evidence strongly points to widespread gun ownership among free adult white men.

nial militia laws used a specific language to describe the legal obligation of gun ownership imposed on every individual free white man. In New Jersey, for example, the legislature ordered that every militiaman should "be provided" with arms and ammunition "in his house or place of abode" and imposed a fine whenever "said persons shall be deficient in keeping the arms and stores aforesaid." South Carolina and Georgia ordered that "every person liable to appear and bear arms . . . shall constantly keep one gun or musket fit for service" as well as ammunition.[24]

While some states limited this individual duty of keeping arms to those subject to militia training, others did not. Connecticut's earliest militia law ordered that all persons exempt from militia duty "shall yet in all respects provide, keep and maintain in constant readiness, compleat arms." In 1684, New York passed a similar provision, ordering that all persons "freed from training by the law, yet that they be obliged to keep convenient arms and ammunition in their houses as the law directs to others." Delaware law ordered that "every freeholder and taxable," even those exempt from training, provide himself with arms and "shall be obliged to keep such arms and ammunition by him." Virginia's militia law provided that "every person" exempt from mustering "shall always keep in his house or place of abode such arms, accoutrements, and ammunition, as are by the said act required to be kept by the militia of this colony."[25]

The language of "keeping arms," then, had a colloquial meaning that applied to individuals outside of the context of militia service. North Carolina's 1741 slave code, for example, ordered that "no slave shall go armed with gun, sword, club, or other weapon, or shall keep any such weapon." In 1756, Virginia ordered that no one refusing to take an oath of allegiance "shall or may have or keep in his house or elsewhere . . . any arms, weapons, gun powder or ammunition." The first proposal to form a volunteer militia in Pennsylvania also demonstrates how common both the practice and the language of "keeping" arms had become. The author, writing in the *Pennsylvania Gazette* in 1747, noted that most Pennsylvanians had "a firelock of some kind already in their hands." He went on to advise that

24. "A Supplementary Act to the Act entituled, an Act for better settling and regulating the Militia of this Colony of New Jersey," 1757, Bush, *Laws of the Royal Colony,* 3:503; "An Act for the better regulating the Militia of this Province," 1747, McCord, *Statutes at Large,* 9:645; "An Act for the Better Ordering the Militia of this Province," 1765, Georgia Session Laws.

25. *New Haven's Settling in New England and some Laws for Government* (London, 1656), 64; "Bill for the Settlement of the Militia," 1684, Lincoln, *Laws of Colonial New York,* 1:161; "An Act for Establishing a Militia within this Government," 1742, Delaware Session Laws; and "An Act for Amending and further continuing the act for the better regulating and disciplining the Militia," 1762, Hening, *Statutes at Large,* 7:534.

"those who on account of their age or infirmities ought to be excused from the common exercises, yet will do well to keep arms and ammunition in their houses, that when occasion calls, they may either use them if they can or lend them to those who happen to be unprovided."[26] This language of keeping arms continued into the early national period, though it was not incorporated into the federal militia act of 1792.[27]

In creating the institution of the universal militia, American colonial legislatures fostered the emergence of a populace that was, in Tench Coxe's words, "accustomed" to owning guns. They also codified a language that described the individual ownership of guns and ammunition as the "keeping" of arms. As we shall see, the manner in which these legislatures approached the regulation of guns may have contributed to the notion, also articulated by Coxe, that Americans were not just accustomed to keeping arms, but "entitled" to do so.

## II. The Power to Disarm: Discerning the Limits of the Military and Police Powers of the Colonial State

In December 1775, the loyalist inhabitants of Queens County, New York published a memorial in which they responded to rumors that the patriot authorities preparing the defense of New York City planned to disarm them. The inhabitants protested that they meant their "neighbors, countrymen, and fellow subjects" no harm and that they had armed themselves out of fear "for the safety of ourselves, our families and our property." Having exercised "the essential privileges of freemen," they challenged their neighbors to deny the propriety of their actions: "We call upon every man

26. "An Act concerning Servants and Slaves," 1741, North Carolina Session Laws; "An Act for Disarming Papists and Reputed Papists, refusing to take the oaths to the Government," (1756), Hening, *Statutes at Large,* 7:35; and "Form of an Association into which Numbers are daily entering, for the Defence of this City and Province—With Remarks on each Paragraph," *Pennsylvania Gazette,* December 13, 1747.

27. For post-colonial examples of this usage, see "An Act for the regulating, training, and arraying of the Militia," 1781, New Jersey Session Laws; "An Act for forming, regulating, and conducting the Military Force of this State," 1782, Connecticut Session Laws; "An act for amending the several laws for regulating and disciplining the militia and guarding against invasions and insurrections," 1784, Hening, *Statutes at Large,* 11:476; "An Act for regulating and governing the Militia of the Commonwealth of Massachusetts," 1793, Massachusetts Session Laws; "An act for regulating and governing the Militia of this state," 1797, Vermont Session Laws; and the Speeches of John Rhea and Ezekiel Bacon on the bill for arming the militia, December 1807, *Annals of Congress: The Debates and Proceedings in the Congress of the United States,* 42 vols. (Washington, D.C.: Gales and Seaton, 1834–1856), 17:1036 and 1042.

who values himself upon the inheritance of an Englishman, to say what he would do in such a case. Would he suffer himself to be disarmed, and tamely confess himself an abject slave? Certainly no. Can any one then, who feels the spirit of liberty, impose that on us which he had rather die than submit to himself?"[28]

As loyalists, the inhabitants of Queens were especially disposed to attribute their liberties to their inheritance as "Englishmen." Nevertheless, they articulated a particularly American conception of a right to keep arms. As Lois Schwoerer and Michael Bellesiles have pointed out, English statutes allowed officers of the Crown broad powers to disarm Englishmen on the basis of faith, class, or perceived "dangerousness."[29] The key to understanding the loyalists' declaration, then, lies not in an inheritance derived from metropolitan law but in their experience of colonial law.

### *The Military Power of Impressment*

In order to understand how and when early Americans experienced the state's power to disarm, we must first draw a distinction between the exercise of the state's civil police powers and the exercise of its military powers. Michael Bellesiles, discussing the impressment of arms in 1998, erroneously identified impressment as a facet of the state's police power.[30] In Anglo-American law, the state may exercise extraordinary powers and even abridge basic civil liberties like the right to a trial, at moments of military emergency. The practice of impressment is, like the suspension of the writ of *habeas corpus,* an application of the state's military power.[31] Impressment, or the commandeering of private property for public use in moments of military necessity, was established in English law as an attribute of the state's military powers by at least the middle of the seventeenth century. Parliamentary ordinances during the English Civil War gave county lieutenants the power to seize carts, horses, and other transport

28. "Declaration of the Inhabitants of Queen's County, New York," December 6, 1775, *Calendar of Historical Manuscripts Relating to the War of the Revolution in the Office of the Secretary of State* (Albany: Weed, Parsons, and Company, 1868), 1:200–201.

29. Bellesiles, "Gun Laws," 567–73; and Lois Schwoerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76 (2000): 27–60.

30. Bellesiles, "Gun Laws," 586.

31. For examples of the close linkage between impressments, martial law, and the suspension of *habeas corpus,* see "An Act for giving certain powers to the governor and council, and for the punishing of those who shall oppose the execution of the laws," 1781, Hening, *Statutes at Large,* 10:413; "An Act to indemnify such Persons as have acted in Defense of the State, and for the Preservation of Peace during the late War, from vexatious Suits and Prosecution," 1783, North Carolina Session Laws; and "An Act for settling the Militia," 1681, *Acts of Assembly in Jamaica,* 31.

for forces moving through the countryside and also to seize arms from those refusing to contribute them to the parliamentary cause. The English Militia Act of 1662 codified the impressment of transport by giving county lieutenants the power to compel the contribution of "carts, wagons, wains, and horses for the carrying of powder, match, bullet, and other materials." Given its origin in the application of martial law, this power was only operative in time of "invasion, insurrection, or rebellion."[32]

In the American colonies, the power to impress expanded to encompass consumable provisions and the persons and tools of key artisans. Colonial legislatures also codified the impressment of privately owned arms for the first time. Though this might suggest a longer regulatory reach in America, it is probably due to a simple social reality: in America the vast majority of guns lay in private hands. For example, in 1675, the Massachusetts General Court ordered that guns and ammunition be impressed from those exempt from training in order to create town stocks of arms. The breadth of colonial impressment statutes also reflects a greater concern to establish civil supervision over the exercise of military power. Thus colonial statues went into far greater detail concerning the list of items subject to impressments, the procedures to be followed by the military officers impressing them, the local civil officers whose warrants were required before military officers could act, and the rules for appraisal and compensation in case of loss. Virginia's 1677 "Act Restrayning the Impresse of Tymber, etc." was an early example of the extensive civil oversight associated with impressment in the colonies.[33]

Despite this concern to legislate the details of civil oversight, impressment retained its close association with martial law and, like the impressment of seamen, served as a profound catalyst of popular resentment. The Virginia Assembly noted in 1684, for example, that many militiamen were refusing to arm themselves "for that their arms have been imprest and taken from them." In December 1775, Nathanael Greene heard similar complaints about George Washington's order for the impressment of the private arms

32. *A Declaration and Ordinance of the Lords and Commons Assembled in Parliament, for the Associating of the Several Counties of Norfolk, Suffolk, Essex, Cambridge, Isle of Ely, Hertford, and County of the City of Norwich* (1642); *A Declaration and Ordinance of the Lords and Commons assembled in Parliament for the Better Securing and Settling of the Peace of the County of Kent* (1643); "An Act for Ordering the Forces in the Several Counties of this Kingdom," 13 & 14 Charles I, c. 3 (1662); and "An Act for the Better Ordering of the Militia Forces in the Several Counties of that part of Great Britain called England," 30 George II, c. 25 (1757).

33. "Several Laws and Orders made at the General Court," 1675, *The Colonial Laws of Massachusetts* (Littleton, Colo.: Fred B. Rothman and Co., 1995), 288; and "An Act Restrayning the Impresse of Tymber, etc.," 1677, Hening, *Statutes at Large,* 2:415.

of the soldiers about to leave the siege of Boston. According to Greene, the soldiers, mostly from New England, denounced the impressment as "tyrannical and unjust." Washington himself later complained that those whose arms had been impressed had "in a manner by stealth borne them away" and that new recruits for the army were refusing to bring their own guns into service. Later in the war an officer from Mecklenburg County, Virginia warned that "the frequent impressment of arms from the people has well nigh disarmed the County. . . .The people hide their arms, and say they will risk their lives, rather than give up what few remain."[34]

As a consequence of this public resentment, colonial legislators approached the impressment of firearms with discernable wariness. Several colonial legislatures carved out special exemptions concerning the impressment of arms. Virginia wrote such an exemption into the Militia Act of 1705, declaring that arms and ammunition "provided and kept in pursuance of this act . . . be free and exempted at all times from being impressed upon any account whatsoever." The 1704 militia law of Maryland similarly ordered that "no . . . person whatsoever shall presume at any time to seize press or carry away from the inhabitants residents in this province any arms or ammunition of any kind whatsoever." Both provisions continued in effect until shortly before the Revolution. Under the impressment statutes of these colonies, neither an individual's person nor any other article of property was similarly exempt.[35]

With the onset of the total military effort required by the American Revolution, the impressment of transport and provisions became routine. American provincial and state governments still hesitated, however, before impressing arms, and acted to limit the scope of the practice where they could. The Connecticut Assembly initially applied the impressment of arms only to "householders and other persons not on the militia roll." The

34. "An Act for the Better Supply of the Country with arms and ammunition," 1684, Hening, *Statutes at Large,* 3:13. For the reaction to impressments in Massachusetts, see Nathanael Greene to Samuel Ward, Sr., December 31, 1775, Richard K. Showman, ed., *Papers of General Nathanael Greene,* 10 vols. (Chapel Hill: University of North Carolina Press [for the Rhode Island Historical Society], 1976–1996), 1:173; and George Washington to the Massachusetts General Court, January 13, 1776, Philander D. Chase et al., eds., *Papers of George Washington, Revolutionary War Series,* 9 vols. to date (Charlottesville: University of Virginia Press, 1985–1998), 2:77. For later resistance in Virginia, see Colonel Richard Elliot to Governor Jefferson, November 7, 1780, *Calendar of Virginia State Papers* (Richmond: James E. Goode, 1881), 1:385.

35. "An Act for Settling the Militia," 1705, Hening, *Statutes at Large,* 3:335; and "An Act for the Ordering and Regulating the Militia of this Province for the Better Defense and Security Thereof," 1704, Maryland Session Laws. For the Virginia law governing the impressments of other types of property and the persons of artisans, see "An Act for reducing the several acts and for making provision against invasions and insurrections into one act," 1757, Hening, *Statutes at Large,* 7:106.

Massachusetts Provincial Congress considered impressing arms in 1775, but decided instead to "most earnestly advise" residents to sell their spare arms to the state. In New York, the Provincial Council likewise balked at impressing arms, instead imploring inhabitants "to sell such muskets and firelocks as they can spare, retaining arms for their own use."[36]

Most state governments refrained from impressing arms until the onset of actual invasion. New York finally authorized the impressment of arms a month after the British fleet arrived in New York harbor. Massachusetts delayed its authorization until the fortunes of the Patriot cause were collapsing in November 1776. In the same month Pennsylvania authorized the impressment of arms when raising battalions to defend the state from the British army then marching across New Jersey toward its border. Connecticut cited an invasion that "may be daily expected" in extending impressments to militiamen in 1777. During the Revolution, Virginia also dropped the statutory language exempting arms from impressment, but stipulated that arms might be impressed only if "the invasion or insurrection be so near and pressing as not to allow the delay" required to mobilize the militia.[37]

State governments, then, approached the impressment of arms with far greater reluctance than the impressment of persons or other property. Nevertheless, the exigencies of the war forced the measure on most states at some point during the Revolution. The rapid demise of the practice after the Revolution is thus all the more remarkable. Of ten states that practiced the impressment of arms during the Revolution, eight appear to have permanently discontinued the practice by 1787. Rhode Island, New Jersey, Virginia, and North Carolina, which had placed language authorizing the

36. On the decision against impressments in Massachusetts, compare the resolutions of the Massachusetts Provincial Congress on June 15 and 17, 1775, in William Lincoln, ed., *The Journals of Each Provincial Congress of Massachusetts* (1838), 336 and 350. For Connecticut and New York, see "An Act for Assembling, Equipping, etc., a Number of the Inhabitants of this Colony for the Special Defense and Safety thereof," April, 1775, J. H. Turnbull et al., eds., *The Public Records of the Colony of Connecticut* (Hartford: Brown and Parsons, 1850–90), 14:417; and the order of the New York Provincial Council, May 21, 1776, Berthold Fernow, ed., *New York in the Revolution* (Albany: Weed, Parsons and Co., 1887), 1:103.

37. Order of the New York Provincial Council, August 10, 1776, Fernow, *New York in the Revolution,* 1:122; "An Act for Raising and Equipping a Body of Minutemen," May, 1776, Turnbull, *The Public Records of the Colony of Connecticut,* 15:290; and Order of the Pennsylvania Council of Safety, *Pennsylvania Gazette,* November 27, 1776. Pennsylvania authorized the practice again during a 1781 invasion scare that prompted the legislature to prepare to evacuate the entire city of Philadelphia. See "An Act to Make Effectual Provision for the Defense of this State," 1781, Mitchell, *Statutes at Large,* 10:361. For the tight limits on impressment in Virginia, see "An Act for Providing Against Invasions and Insurrections," 1777, Hening, *Statutes at Large,* 9:291.

practice in their militia statutes, repealed or modified that language in the 1780s.[38] New York, Massachusetts, Connecticut, and Pennsylvania, which had authorized the practice as part of specific orders to raise bodies of troops during the war, had all discontinued the practice by 1781. None of them authorized the impressment of arms when raising large bodies of militia for service in 1787, 1794, 1797, 1808, or during the War of 1812.[39] The authority to impress arms remained on the statute books of South Carolina and Georgia, but Georgia repealed it in the first full post-1786 revision of its militia laws, which took place in 1803.[40] The impressment of arms made a brief revival in the Confederacy during the Civil War. After the war, a Tennessee impressment statute was declared in violation of the Tennessee Constitution's provision protecting "the right to keep and bear arms for the common defense." More significantly, the Supreme Court of Tennessee referred to the impressment statute as "the first attempt, in the history of the Anglo-Saxon race, of which we are apprised, to disarm the

38. Rhode Island authorized the impressment of arms for the fitting out of privateers in its colonial militia laws. There is no mention of the practice in the state's post-1793 militia laws. Because the state's revolutionary laws are not published, I cannot pinpoint the end of the practice precisely. See "An Act, Regulating the Militia in this Colony," 1718, Rhode Island Session Laws; and "An Act to Organize the Militia of this State," 1794, ibid. For the legislation that first dropped the authority to impress arms in New Jersey, Virginia, and North Carolina, see "An Act for the Regulating, Training, and Arraying of the Militia, and for Providing more effectually for the Defense and Security of the State," 1781, New Jersey Session Laws; "An Act for Amending the Several Laws for Regulating and Disciplining the Militia, and Guarding against Invasions and Insurrections," 1784, Hening, *Statutes at Large,* 11:476; and "An Act for Establishing a Militia in this State," 1786, North Carolina Session Laws.

39. This conclusion is based on my review of the Massachusetts session laws and legislative resolutions, 1775–1815, New York Session Laws, 1775–1815, Pennsylvania Session Laws, 1775–1815, and Connecticut Session Laws, 1780–1815 contained in the *Records of the States of the United States;* Hugh Hastings, ed., *The Public Papers of Daniel D. Tompkins, Governor of New York, 1807–1817* (Albany: J. B. Lyon, 1902); and *The Public Records of the State of Connecticut,* 17 vols. (Hartford: Case, Lockwood, and Brainard, 1896–), vols. 1–17 (1776–1815).

40. Georgia was unusual in that it did not make a full revision of its militia laws after the passage of the federal militia act of 1792. Instead, the Georgia Militia Act of 1793 is a partial amendment of existing law and does not mention impressment. Only when making a full revision in 1803 did Georgia drop arms from the list of items liable to impressment. See "An Act to Revise, Amend, and Consolidate the Several Militia Laws of this State, and to adapt the Same to the Acts of Congress of the United States," 1803, Georgia Session Laws. South Carolina inserted the impressment of arms into its militia law for the first time in 1794 and did not make another full revision of its militia laws until the 1830s. See "An Act to Organize the Militia throughout the State of South Carolina in Conformity with the Act of Congress," 1794, South Carolina Session Laws.

people by legislation." The decision suggests that by 1866 the colonial practice of impressing guns lay in a distant and unremembered past.[41]

In the eighteenth century it is clear that colonial and state governments did exercise their emergency military powers in a manner that effectively disarmed citizens. Nevertheless, they did so with evident reluctance, probably due to the strong public resentment against such measures. Furthermore, the vast majority of the states appear to have abandoned the impressment of arms in the decade prior to the framing of the Constitution. This general repudiation of the state's claim on privately owned guns in times of military emergency is itself an important aspect of the legal context of the Second Amendment.

### *Gun Ownership and the Police Power in Early America*

In 1992 William Novak described the police power as "the most far reaching of the state's reserved powers, and that which comes closest to the essence of governing." Novak explored the common law roots of the police power and its use in America to promote the public safety, comfort, welfare, health, and morals even at the expense of private rights.[42] Three weeks before describing the right to keep and bear arms as the "birthright of an American," Tench Coxe wrote an equally expansive description of the police powers reserved to states under the Constitution.[43] Though Coxe and Novak agreed that the police power was both theoretically broad and vigorously applied in early America, some aspects of social behavior remained beyond its regulatory reach. The keeping of arms by members of the body politic was one such behavior.

When considering the reach of the state's police power to restrict gun ownership in the American context, one must confront its limits in comparison with English practice. In England, Parliament granted officers of the Crown the power to disarm any person they judged "dangerous to the peace of the Kingdom." Parliament also enacted permanent game laws restricting gun ownership on the basis of wealth. Finally, in 1688, Parliament prohibited any Catholic subject from keeping arms unless they publicly

41. *Smith v. Ishenhour,* 43 Tenn. 214 (1866), at 217.

42. Wiliam J. Novak, "*Salus Populi:* The Roots of Regulation in America, 1787–1873" (Ph.D. dissertation, Brandeis University, 1992). See also Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

43. Tench Coxe, A Freeman No. 2, *Documentary History of the Ratification of the Constitution,* 18 vols. to date (Madison: Wisconsin State Historical Society, 1976–2000), 15:508–11.

renounced the doctrine of transubstantiation, thus disarming Catholics solely on the basis of faith.[44]

In considering the transfer of this police power to disarm to the American colonies, it is important to note the absence from the colonial context of both game laws limiting the right of gun ownership and the blanket authority to disarm found in English statutes. What took their place in British North America were laws disarming groups on the basis of race and servitude. Almost thirty years ago, Edmund Morgan observed that white Virginians excluded African-Americans, Indians, and indentured servants from the body politic and denied them the most fundamental of rights. In 1998, Michael Bellesiles applied this observation to the issue of gun ownership, demonstrating that most colonial jurisdictions denied these groups the right to keep weapons.[45]

In the conclusion to his 1998 article on gun regulation in early America, Bellesiles offered the disarmament of slaves and other groups outside the body politic as a precedent that might reasonably be applied today to all Americans, including citizens. As a matter of constitutional law, this argument seems overbroad, as it might be applied to any basic right of citizenship. But Bellesiles and Saul Cornell made a much more significant contribution to the Second Amendment debate by identifying American legislation that employed the state's police power to disarm Catholics, Quakers, and non-associators, populations of free white men entitled to the presumption of membership in the body politic. They concluded that the colonial and early national state's police power to restrict gun ownership applied to citizens and non-citizens alike, and that conclusion has been broadly accepted in recent scholarship on the Second Amendment.[46]

44. "An Act for Ordering the Forces in the Several Counties of this Kingdom," 13 & 14 Charles I, c. 3 (1662); and "An Act for the Better Securing the Government by Disarming Papists and reputed Papists," 1 William and Mary, c. 15 (1688). The latter act ordered justices of the peace to disarm all those who refused the oath prescribed in "An Act for the more effectual Preserving the Kings Person and Government," 30 Charles II, stat. 2, c. 1 (1677). That Act required members of Parliament to repudiate the doctrine of transubstantiation, the mass, and the cult of Mary.

45. See generally Bellesiles, "Gun Laws," 574–84; and Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton, 1975), 316–37 and 363–87.

46. Bellesiles, "Gun Laws," 574–76; Cornell, "Commonplace or Anachronism," 228–31; Cornell, "To Keep and Bear Arms," 13; Cornell, "Don't Know Much About History," 671; and Cornell, "Myth of Consensus," 256–60. Jack Rakove, citing Cornell, has asserted that the power to restrict gun ownership lay within the states' "conventional police powers." Uviller and Merkel, in turn, cited Rakove in support of the same proposition. Paul Finkleman cited Bellesiles to the effect that "every state had gun control legislation on its books." Finally, most recently, David Konig has concluded that "gun ownership would not be considered

In British North America, the history of the use of the police power to disarm does not bear out that conclusion. The colonial and early national states consistently refrained from exercising such a power over citizens. In the one instance in which an American colonial government acted to disarm Catholics, it did so on the basis of allegiance, not on the basis of faith. In 1756 Virginia ordered the disarmament of all those refusing the test of allegiance set out in the Parliament's 1714 "Act for the Further Security of his Majesty's Person and Government." That parliamentary statute required all those claiming membership in the British body politic to swear allegiance to the Hanoverian dynasty and to the Protestant succession and to swear an oath abjuring the ecclesiastical authority of the Pope. While the abjuration of the Pope's ecclesiastical authority touched upon matters of faith, it was consistent with the undivided allegiance to the sovereign that had been the definition of membership in the English body politic since the Reformation. In 1756, Virginia disarmed those individuals refusing this test, exempting only "such necessary weapons as shall be allowed him by order of the justices of the peace at their court, for the defense of his house and person." The act ordered the justices to return the arms of anyone who voluntarily rejoined the body politic by submitting to the test. Thus, in the only colony disarming Catholics, those Catholics willing to swear undivided allegiance to the sovereign enjoyed a right to keep arms denied them in England.[47]

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any less a matter of law left to the states to regulate as they saw fit" than the regulation of any other property. See Rakove, "The Second Amendment: The Highest Stage of Originalism," *Chicago-Kent Law Review* 76 (2000): 103–66, at 127 and 135; Uviller and Merkel, *The Militia and the Right to Arms,* 80; Finkelman, "The Second Amendment in Historical Perspective," *Chicago-Kent Law Review* 76 (2000): 211; and Konig, "Missing Transatlantic Context," 143.

47. See 1 George I, stat. 2, c. 13 (1714); and "An Act for Disarming Papists and Reputed Papists, refusing to take the oaths to the Government," (1756), Hening, *Statutes at Large,* 7:35.

In 1998, Michael Bellesiles claimed that in 1756 the "Maryland Assembly" passed a "law expropriating all the arms and ammunition of Catholics." The assembly did pass a bill to that effect, one that would have disarmed Catholics on purely religious grounds. The bill died at the end of the session, however, and was never enacted into law. The bill, clearly identified as such, was entered into the Assembly Journal as "An Act to Prevent the Growth of Popery within this Province." See Bellesiles, "Gun Laws," 574; and William H. Browne et al., eds., *Archives of Maryland* (Baltimore: Maryland Historical Society, 1883–1972), 52:441. The editor's introduction to that volume describes the bill's passage in the assembly and eventual demise.

There is nothing in the text of 1 William and Mary, c. 15, the 1688 parliamentary act disarming Catholics on the basis of faith, to indicate that it was in force in colonies. When North and South Carolina passed legislation listing the acts of Parliament in force within those colonies, 1 William and Mary, c. 15 was not among the listed acts. One of the first

The history of the disarmament of non-associators during the American Revolution also contradicts the assertions of Bellesiles and Cornell. Cornell has argued that the revolutionary government of Pennsylvania exercised its police powers "to require a political litmus test to own weapons." Citing Pennsylvania's Test Act of 1777, Cornell observes that Pennsylvania acted to disarm almost 40 percent of its citizenry.[48] Unfortunately, Cornell's conclusion is based on a misinterpretation of the Test Act. In fact, when provincial and early state governments disarmed non-associators during the American Revolution, they generally followed the colonial precedent that free white men might be disarmed only if they refused a test of allegiance that defined membership in the body politic.

There is one brief period when this precedent did not hold. Between December 1775 and July 1776, Whig allegiances were in an awkward state of transition. Allegiance to George III was no longer an adequate definition of the body politic, but the colonies had not yet declared themselves to be sovereign states. As a result, there was no new test of allegiance available to provincial legislatures. When called upon by the Continental Congress to disarm non-associators, legislatures enacted a series of measures that

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Justice of the Peace manuals published in the colonies, George Webb's *The Office and Authority of a Justice of the Peace* (1739), cited an English statute, 1 William and Mary, c. 26, as providing for the disarming of "Papists," but the cited statute has no such provision. Webb went on to note that Virginia law prohibited the presence of Catholics in the colony and thus suggested that this parliamentary legislation had no application in the colony. In 1722, New Jersey passed "An Act for the Security of his Majesty's Government of New Jersey," which established an oath of allegiance that included a declaration against transubstantiation. The act further provided that those refusing the oath would "forfeit and be proceeded against, as a popish recusant by all or any the laws of England should forfeit and be proceeded against." But the act did not explain what those penalties were, and the only parliamentary statute cited was 12 William III, c. 2, which does not touch the issue of disarmament. Given the tangle of English law imposing disabilities on Catholics, it is not clear that colonial legislatures were fully informed of English law in the matter, a confusion illustrated by Webb's incorrect citation. See "An Act to put in Force in this Province, the Several Statutes of the Kingdom of England, or South Britain, therein particularly mentioned," 1746, John D. Cushing, ed., *The Earliest Printed Laws of North Carolina, 1669–1751* (Wilmington: Michael Glazier, 1977), 1:293; "An act to put in Force in this Province the several Statutes of the Kingdom of England or South Britain, therein particularly mentioned," 1712, John D. Cushing, ed., *The Earliest Printed Laws of South Carolina, 1692–1734* (Wilmington: Michael Glazier, 1978), 1:236; Webb, *Office and Authority,* 133; and "An Act for the Security of His Majesty's Government in New Jersey," 1722, Bush, *Laws of the Royal Colony,* 2:284.

In sum, there is no clear evidence that 1 William and Mary, c.15 was in force in the colonies.

48. Cornell, "Commonplace or Anachronism," 228; "Don't Know Much About History," 672; and "Myth of Consensus," 259.

ordered the disarmament of those refusing to take up arms against the king. In the absence of any viable test of allegiance, these measures did apply a political litmus test to the keeping of arms. Even so, in the language of these provisions, one can discern an attempt to preserve the connection between the right to keep arms and membership in the body politic. For example, Pennsylvania ordered the disarming of "disaffected" non-associators, but initially balked at ordering "well-affected" non-associators to surrender their arms. Massachusetts ordered the disarming of all those refusing to swear that colonial resistance was "just and necessary," until the general court acted to restore such non-associators to "the Privileges of a good and free Member of this Community."[49]

After the passage of the Declaration of Independence, the shift of allegiance was complete, and the states had a legal basis on which to define new bodies politic. Thereafter, the new state governments returned to colonial precedent and framed their police power to disarm around a test of allegiance. Rather than establishing a political litmus test, Pennsylvania's Test Act of 1777 marks the return to voluntary allegiance as the standard of membership in the body politic. It required all white men over eighteen to swear an oath declaring allegiance to the commonwealth, abjuring all allegiance to the British monarchy, and promising to do nothing injurious to the freedom and independence of the state. The act prohibited those refusing the test from voting, holding office, serving on juries, suing, and transferring land. It also ordered them disarmed. Many Quakers considered the abjuration of the king's sovereignty to be inconsistent with their religious principles and refused the test. Nevertheless, the oath demarcated the most politically inclusive possible definition of Pennsylvania's new revolutionary body politic. When the assembly revised the test law in 1786 to try to meet Quaker objections, it declared that any person taking the

49. On March 14, 1776 the Continental Congress recommended that provincial legislatures disarm all persons "who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies." *Journals of the Continental Congress, 1774–1789* (Washington, D.C.: Government Printing Office, 1906), 4:201–5. It is pertinent to note that Congress acted in response to a report by General Arthur Lee urging Congress to vigorously exercise its emergency military powers to provide for the defense of the city of New York. For examples of states that acted on this recommendation, see "Resolves of Assembly, Agreed to April 6, 1776," Mitchell, *Statutes at Large,* 8:559; and "An Act for Executing in the Colony of Massachusetts, in New England, one Resolve of the American Congress, dated March 14, 1776," 1776, Massachusetts Session Laws. The law from the winter of 1775–1776 that comes closest to establishing a political litmus test for gun ownership was a December 1775 Connecticut statute that ordered the disarmament of any person defaming the acts of Congress or the state assembly. See "An Act for Restraining and Punishing Persons Inimical to the Liberties of the United Colonies," 1775, Connecticut Session Laws.

oath "is hereby declared to be a free citizen of this commonwealth, and intitled to all . . . the rights and priviledges thereof."[50]

Pennsylvania's mode of disarming non-associators by forcing them to voluntarily exclude themselves from the body politic became the standard procedure for using the state's police power to regulate the ownership of guns. Noting that "in every free state, allegiance and protection are reciprocal," Maryland instituted a test oath in 1777 and barred those refusing from the basic civil liberties of voting, holding office, serving on juries, suing, and keeping arms. In 1781, the state promised that those non-jurors who agreed to enroll for actual service with the militia would be "restored to all the rights and privileges of a free citizen of this state without exception." North Carolina followed suit, barring non-testors from basic liberties including the keeping of arms while promising that any who relented would be "held and deemed a good subject of this state, and shall enjoy the privileges thereof." Virginia also barred recusants from basic liberties. Under Virginia law the expulsion of non-associators from the body politic was ritualized by the requirement that they attend militia muster unarmed, an indignity traditionally imposed on free blacks.[51] Almost every state that acted to disarm non-associators after July 4, 1776 did so according to this principle.[52]

50. "An Act Obliging the Male White Inhabitants of this State to Give Assurances of Allegiance to the Same and for other Purposes therein Mentioned," 1777, Mitchell, *Statutes at Large,* 9:111; and "An Act for Securing to this Commonwealth the Fidelity and Allegiance of the Inhabitants thereof, and for Admitting Certain Persons to the rights of Citizenship," 1786, Pennsylvania Session Laws.

51. For Maryland, see "An Act for the Better Security of the Government," 1777; "An Act to prevent and suppress insurrections," 1778; and "An Act to raise two battalions of militia for reinforcing the Continental Army," 1781, Maryland Session Laws. For North Carolina, see "An Act for Directing the Method of Appointing Jurors," 1777, North Carolina Session Laws. For Virginia, see "An Act to Oblige the Free Male Inhabitants of this State above a certain age to give Assurance of Allegiance to the same, and for other purposes," 1777, Hening, *Statutes at Large,* 9:281. Free blacks had been required to attend militia muster unarmed under Virginia's pre-Revolutionary militia laws. See "An Act for the Better Regulation of the Militia," 1738, Hening, 5:17.

52. There are two partial exceptions to this statement: On July 19, 1776, Pennsylvania ordered the blanket disarmament of non-associators, dropping its previous distinction between the disaffected and well affected. This order was repealed in 1778. Also, New Jersey passed a law authorizing the Council of Safety to tender an oath of allegiance to those persons suspected of being "dangerous or disaffected" and to try, imprison, or exile those who refused the oath. A separate provision authorized the council to disarm those "they shall judge disaffected." It is not clear whether this latter provision referred only to those who had refused the oath and on whom the council had passed judgment, or to all persons coming under suspicion. See "An Ordinance Respecting the Arms of Non-Associators," 1776, Mitchell, ed., *Statutes at Large,* 9:11; and "An Act for Constituting a Council of Safety," 1777, New Jersey Session Laws.

Michael Bellesiles and Saul Cornell, in asserting that colonial and state governments "used their police powers extensively" to regulate gun ownership, have thus offered an incomplete and misleading analysis of the legal history of early American gun regulation. Between 1607 and 1815, in clear contrast to English precedent, the colonial and state governments of what would become the first fourteen states neglected to exercise any police power over the ownership of guns by members of the body politic.[53] By 1787 most American states had also repudiated the military power to seize the privately owned firearms of their inhabitants. These limits on colonial and early state regulation of arms ownership outlined a significant zone of immunity around the private arms of the individual citizen. That zone of immunity, from the civil powers and increasingly from the military powers of the state, lent itself to the perception that the right to keep arms was the "birthright" of any American who voluntarily professed his allegiance to the new American states.

### *"Whereas Great Dangers Have Arisen": Early American Applications of the Police Power to Regulate the Use of Guns*

In early America, the legal immunity surrounding the possession of guns by members of the body politic did not extend to their use. Early American militia laws prohibited any use of guns on the day of muster unless expressly ordered by militia officers. They also required militiamen and other householders to bring their guns to the muster field twice a year so that militia officers could record which men in the community owned guns. Some colonies authorized door-to-door surveys of gun ownership.[54] More

53. Such a conclusion must of course remain tentative. My survey of the session laws of the thirteen colonies and Vermont through 1815, while thorough, can never be sufficient to prove an absolute negative. Nevertheless, in searching the extant printed session laws of the first fourteen states year by year for the period 1607 to 1815, I have not identified a single instance in which these jurisdictions exercised a police power to prohibit gun ownership by members of the body politic. Nor, for the reasons I have discussed above, did Michael Bellesiles or Saul Cornell accurately identify such an exercise in their analyses of the subject.

54. For an example of attempts to control the use of guns on muster day, see "An Act for regulating and governing the Militia of the Commonwealth of Massachusetts," 1793, Massachusetts Session Laws. The federal militia act of 1792 mandated that state militia officers make returns of the state of the arms of their units, and that state adjutants general collate and submit statewide returns to the Secretary of War. The act codified what had been a haphazard practice during the Revolution. See "An Act more effectually to provide for the National Defense, by establishing an Uniform Militia throughout the United States," 1792, in *Laws of the United States of America* (Philadelphia: Richard Folwell, 1796), 2:92. For examples of colonial legislation authorizing door-to-door surveys of arms, see the order of the Governor and Council, March 28, 1667, in John Russell Bartlett, ed., *Records of the Colony of Rhode Island and Providence Plantations* (Providence: A. Crawford Greene and

important, colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used their guns.

Colonial governments expressed particular concern over the firing of guns after dark, in part because the traditional method of raising the alarm of an attack after dark involved the firing of several guns in succession. Thus, an amendment to New Hampshire's militia law prohibited the firing of guns after sunset during "time of war or watch." Connecticut and Georgia enacted similar measures. North Carolina was more concerned with the dangers to lives and property stemming from the use of guns in night-time hunting, a practice that it banned. New York and Pennsylvania, noting that "great dangers have arisen and mischief been done," prohibited the firing of "guns, rockets, squibs, and fireworks" to celebrate the new year. These legislatures probably hoped to avoid fires caused by raucous night-time celebrations in built-up settlements. Rhode Island responded to similar fears of "accidental death" and the "firing of the towns" when prohibiting the firing of guns and lighting of fireworks within any town after dark. For its part, Virginia cracked down on celebratory gunfire while "drinkeing Marriages and funerals only excepted." The commonwealth also prohibited gunfire on the Sabbath.[55]

American jurisdictions also regulated the places in which guns could and could not be used. By 1770, the shooting of guns was prohibited in the cities of Philadelphia, New York, and Boston. The colonies of Pennsylvania and New York extended this prohibition to all other towns and boroughs. Delaware also prohibited the firing of guns within built-up areas,

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Brother, 1857), 2:196; "An Act for the better regulating of the Militia of this Province," 1747, McCord, *Statutes at Large,* 9:645; and "An Act for the regulating, training, and arraying of the Militia," 1781, New Jersey Session Laws. I have found evidence that house-to-house gun censuses were actually conducted in New Hampshire in 1775 and Rhode Island in 1757 and 1775.

55. "An Act in Addition to the Act for regulating the Militia," 1718, New Hampshire Session Laws; *Acts and Laws of his Majesties Colony of Connecticut in New England* (1702), 5; "An Act for Regulating the Watch in the Town of Savannah," 1759, Allen D. Candler, *The Colonial Records of the State of Georgia* (Atlanta: The Franklin Printing and Publ. Co., 1904–16), 18:295; "An Act to prevent the pernicious Practice of hunting with a Gun in the Night by Fire Light," 1774, North Carolina Session Laws; "An Act to Prevent firing of guns and other firearms within this State, on certain days therein mentioned," 1785, *Laws of the State of New York* (Albany: Weed, Parsons, and Co., 1886), 2:152; "An Act to suppress the disorderly practice of firing guns, etc.," 1774, Mitchell, *Statutes at Large,* 8:410; "An Act for Preventing Mischief being done in the town of Newport, or in any other town in this Government," 1731, Rhode Island Session Laws; 6 Commonwealth, c. 12 (Virginia, 1655–56), Hening, *Statutes at Large,* 1:401; and 18 Charles I, c. 35 (Virginia, 1642), ibid., 1:261.

but made an exception for "days of public rejoicing." Colonial legislatures also tried to protect the highways from stray gunfire. Massachusetts banned the shooting of guns on Boston Neck. Rhode Island banned the placement of shooting ranges lying across a public highway. Pennsylvania banned gunfire "on or near any of the King's highways." The legislature noted, however, that the fine did not extend "to any person carrying a gun on the public highway." New Jersey also explicitly protected the carrying of guns on the highways.[56]

Though American legislatures did not use game laws to restrict gun ownership, they did regulate hunting. Massachusetts tried to protect the population of waterfowl by cracking down on hunters approaching nesting grounds by boat. New Jersey, Pennsylvania, and Virginia all prohibited hunting on enclosed land without permission of the owner and banned the practice of fowling in the streets of major cities. To enforce the ban, these laws fined anyone carrying a gun on such land. Colonial legislatures also attempted to restrict access to unenclosed and common lands. South Carolina banned hunting more than seven miles from one's residence. New Jersey and Pennsylvania restricted hunting on unenclosed land to those qualified to vote in the province.[57]

Finally, colonial and state legislatures placed certain uses of guns completely out of bounds. New Jersey forbade the setting of gun traps triggered by a trip wire and prohibited "all shooting matches for lucre of gain except on days of public training." Maryland fined militiamen who used public arms for "hunting, gunning, or fowling." Massachusetts regulated the manner of keeping arms as well as the manner of using them. As a precaution

56. "An Act for preventing accidents that may happen by fire," 1721, Mitchell, *Statutes at Large,* 5:252; "An Act to prevent Hunting with Firearms in the City of New York, and the liberties thereof," 1763, Lincoln, *Colonial Laws of New York,* 4:748; "An Act to prevent firing of guns charged with shot or ball in the town of Boston," 1746, Massachusetts Session Laws; "An Act for the more effectual Preventing Accidents," 1750, Mitchell, *Statutes at Large,* 5:108; "An Act to Prevent the firing of guns," 1771, Lincoln, *Colonial Laws of New York,* 5:244; "An Act to prevent the discharge of firearms within towns and villages," 1812, Delaware Session Laws; "An Act to Prohibit Shooting or Firing off Guns near the Road or Highway on Boston Neck," 1715, Massachusetts Session Laws; "An Act to Prevent Shooting with Guns and Pistols across Highways," 1768, Rhode Island Session Laws; "An Act to prevent the hunting of deer and other wild beasts," 1760, Mitchell, *Statutes at Large,* 6:46; and "An Act for the Preservation of Deer, and other Game, and to prevent trespassing with Guns," 1771, New Jersey Session Laws.

57. "An Act for the better Regulation of Fowling," 1717, Massachusetts Session Laws; "An Act to prevent the Killing of Deer out of Season," 1722, Bush, *Laws of the Royal Colony,* 2:293; "An Act to Prevent the Killing of Deer out of Season," 1721, Mitchell, *Statutes at Large,* 3:254; "An Act Against Shooting on Other Men's Lands," 1657–58, Hening, *Statutes at Large,* 1:437; and "An Act for the Preservation of Deer," 1769, McCord, *Statutes at Large,* 4:310.

against the accidental wounding of firefighters, the state prohibited the storage of loaded guns in any house within the town of Boston.[58]

At least some of these laws, including the prohibition of storing loaded guns in Boston, provided for the confiscation of the gun as penalty. North Carolina and New Jersey both acted to prevent trespasses by hunters and to preserve their game populations by levying steep fines for abusive hunting practices. Each colony also provided that hunters without a "settled habitation" or residence in the colony would forfeit their guns. While these laws might in fact disarm individuals, they did not, strictly speaking, regulate gun ownership. Furthermore, offenders who could prove stable residence in the colony, an essential criterion of membership in the body politic, were exempt from this additional penalty.[59]

Colonial and state governments thus did not hesitate to regulate the use of guns in order to promote public safety and to protect private property. This robust use of the colonial and early national states' police power to regulate the use of guns both conforms to Novak's vision of the police power and stands in stark contrast to the refusal over the course of two centuries to use that power to regulate the ownership of guns by members of the body politic. Faced with clear threats to public order and safety, state legislators did not hesitate to curb "dangerous" uses of guns.

How then do we explain their refusal to curb the ownership of guns by "dangerous" citizens? Clearly English law supplied ample precedent. Furthermore, popular unrest such as Bacon's Rebellion, the Regulator movements, New Jersey's anti-rent riots, and half a century of tenant unrest in the Hudson Valley must have illustrated the threat to public order posed by widespread gun ownership.[60] Two centuries of consistent legislative restraint lends itself to the suggestion, though it does not conclusively prove, that colonial and early national legislators did not see the regula-

58. "An Act for the Preservation of Deer, and other Game, and to prevent trespassing with Guns," 1771, New Jersey Session Laws; "A Supplement to the act, entitled, An act to regulate and discipline the militia of this state," 1798, Maryland Session Laws; and "An Act in addition to the several Acts already made for the prudent storage of Gun Powder within the Town of Boston," 1783, Massachusetts Session Laws.

59. "An additional act to an act, intitled, An act, to prevent killing deer at unseasonable times, and for putting a stop to many abuses committed by white persons, under pretense of hunting," 1745, North Carolina Session Laws; and "An Act for the Preservation of Deer, and other Game, and to prevent trespassing with Guns," 1771, New Jersey Session Laws.

60. On Bacon's Rebellion, see Morgan, *American Slavery, American Freedom,* Book III. On the Regulators, see Marjoleine Kars, *Breaking Loose Together: The Regulator Rebellion in Pre-Revolutionary North Carolina* (Chapel Hill: University of North Carolina Press, 2002). On New Jersey and New York, see Edward Countryman, "'Out of the Bounds of Law': Northern Land Rioters in the Eighteenth Century," in *The American Revolution,* ed. Alfred F. Young (Dekalb: Northern Illinois University Press, 1976): 37–69.

tion of the gun ownership of citizens as a legitimate exercise of the police power.[61] The history of early American gun regulation thus demonstrates a sharp departure from English law and practice and strongly suggests the emergence in America of a legal right to own guns.

## Conclusion: Understanding the Second Amendment in Context

Proponents of the "new paradigm" for understanding the Second Amendment have dubbed the right to keep and bear arms a "civic right." Such a right is, in the words of Saul Cornell, "inextricably linked to the obligation to participate in communal defense as part of a well-regulated militia." Uviller and Merkel's formulation similarly describes "a personal liberty that has meaning and substance only in the social context of civic obligation carried out within a public organization." For his part, David Konig argues that the Second Amendment embodies "an eighteenth-century individual right exercised collectively."[62] While Cornell describes the right as belonging to citizens, proponents of the civic rights model maintain that the right might be withheld from significant portions of the body politic on the basis of property qualifications, perceived "dangerousness," or a lack of "virtue."[63]

The link between the militia and the right to keep and bear arms that civic rights proponents seek to underline is consistent with some eighteenth-century evidence and also with some nineteenth and twentieth-century legal precedents interpreting the Second Amendment. It is reflected in Tench Coxe's assertion that it is the militia who are "entitled and accustomed to their arms." It explains the special protections against impressment given

61. The first law restraining gun ownership by citizens mentioned in the secondary literature is New York's 1911 Sullivan Law, which prohibited the ownership of concealable arms without a police permit. This raises the possibility that the legislative restraint discussed here continued for a third century, giving way only to the Progressive Era reevaluation of the police power. See Robert J. Cottrol and Raymond T. Diamond, "Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence," *Chicago-Kent Law Review* 70 (1995): 1307–35.

62. Cornell, "Comment: A New Paradigm for the Second Amendment," *Law and History Review* 22 (2004): 161–67, at 165; H. Richard Uviller and William G. Merkel, "Comment: Scottish Factors and the Origins of the Second Amendment: Some Reflections on David Thomas Konig's Rediscovery of the Caledonian Background of the American Right to Arms," *Law and History Review* 22 (2004): 169–77, at 172; and Konig, "Missing Transatlantic Context," 153.

63. Konig, "Missing Transatlantic Context," 153; Cornell, "Don't Know Much About History," 672; and Cornell, "Myth of Consensus," 256–60.

to the arms of militiamen by Virginia and Connecticut. Finally, it serves to highlight the ambiguous connection between the right to keep and bear arms and the "preservation and efficiency of a well-regulated militia" articulated in *United States v. Miller.*[64]

Nevertheless, the civic rights model as articulated by Cornell, Uviller and Merkel, and Konig, requires modification. Where civic rights proponents would assert that service in the militia defines those who enjoy a right to keep and bear arms, early American law recognized a right to keep arms that transcended this "inextricable linkage." Early American law imposed an obligation to keep arms on every adult male, even those exempt from militia service. From this obligation emerged a right to keep arms that extended to all citizens, defined as free white men willing to swear allegiance as a test of their voluntary membership in the body politic. At no time during the period under examination was the right subject to property qualification or actual membership in the militia.[65] The right belonged to those citizens individually, and, in America, they exercised it individually.

Evidence from the Revolutionary period indicates that Americans had come to view the right to keep arms as one of the rights of citizenship. In the Revolution-era Test Acts one can discern a consistent association between the right to keep arms and other basic civil rights: the right to vote, the right to hold office, the right to sit on a jury, the right of access to the civil courts, the right to practice licensed professions, and the right to buy or sell property. The acts described these rights as the "privileges of a good and free member of this community," the "privileges of citizenship," the "immunities and privileges" of a "free subject," and the "rights and privileges of a free citizen." At the time of the framing of the Second Amendment, then, Americans understood the right to keep arms not only as a civic right in the sense of its being connected to a civic obligation, but also as a basic right of citizenship.[66]

The right to keep arms commanded legislative respect in early America because it facilitated the public purpose of collective self-defense. Thus, the eighteenth-century understanding of the right was distinct from the fully libertarian right of citizens to "keep and carry arms where ever they went" recognized by the United States Supreme Court in *Dred Scott v. Sanford.*[67] When Saul Cornell suggests that the right to bear arms, like the right to sit on a jury, "required citizens to act in a collective manner for

64. *United States v. Miller et al.,* 307 U.S. 174 (1939).

65. Saul Cornell acknowledges that the right to keep and bear arms belonged to citizens as a class that excluded aliens. He has not, however, acknowledged that the right to keep arms extended to *all* citizens. See Cornell, "New Paradigm," 165.

66. See above, notes 48 and 49.

67. *Scott v. Sanford,* 60 U.S. 393 (1857).

distinctly public purposes," he is correct about the connection to a public purpose. But the right to keep arms, as distinct from bearing them, did not require collective action. Nor was the right carried out within a public organization, as suggested in Uviller and Merkel's formulation.[68] Finally, the guns qualifying for this legal immunity were not limited to those specified under law as required for militia service. Throughout early American history, militiamen routinely came to muster with hunting weapons of all kinds. Muskets, rifles and fowling pieces, and "smooth bored guns or firelocks," were commonly recorded on official reports of militia armament, and Revolutionary militiamen often went into battle with whatever weapons came to hand. The keeping of all such "firelocks" by individual citizens was a private act rendered immune from state interference because it facilitated the public act of collective self-defense.[69]

The preceding analysis also demonstrates the need for caution when placing the American right to keep and bear arms in a transatlantic context. Leading proponents of the civic rights interpretation have grounded the Second Amendment in the context of transatlantic political philosophy, with a particular emphasis on contributions from England, Scotland, and Italy.[70] Most recently, David Konig examined one such context, James Burgh's *Political Disquisitions.* In this 1774 tract, Burgh complained that the people of Scotland had been disarmed and denied the right to organize a militia for their defense.[71] Konig traces particular arguments during the ratification debate in New Hampshire, North Carolina, and Virginia to these

68. Cornell, "New Paradigm," 165; and Uviller and Merkel, "Scottish Factors," 172.

69. The keeping of arms was strongly encouraged by the penalties imposed under state militia laws, and the state measured compliance by mandating an annual public display of arms. Where the state ordered those outside the militia to keep arms, it generally required them to participate in the annual "viewing" of arms. Thus at certain moments the private act of keeping arms at home became public. The Militia Act of 1792 laid down detailed specifications for militia muskets of standard dimensions and caliber. Nevertheless, militiamen brought rifles, shotguns, and fowling pieces to muster well into the nineteenth century, and the practice was officially tolerated. For an assertion that only standard militia muskets fell within constitutional protection, and a rebuttal, see Saul Cornell, "Myth of Consensus," 261–62, and James Henretta, "Collective Responsibilities, Private Arms, and State Regulation," Symposium: The Second Amendment and the Future of Gun Control, *Fordham Law Review* 73 (2004): 529–37, at 535–36. For examples of militia returns counting all types of weapons, see "Return of the Arms of the State of Pennsylvania," 1812, *Pennsylvania Archives* (1852), ser. 6, 7:929; and "Abstract from the Annual Returns of the Militia of North Carolina for the Year 1809," AG 1, Letters, Orders, Returns, etc., 1807–1812, Records of the Adjutant General's Department, North Carolina State Archives.

70. See Uviller and Merkel, *The Militia and the Right to Arms,* chap. 2; and the contributions to the "Forum: Reconsidering the Second Amendment," *Law and History Review* 22 (2004): 119–82.

71. Konig, "Missing Transatlantic Context," 139–57.

earlier Scottish complaints. His analysis demonstrates the manner in which attentiveness to the transatlantic context can add materially to our understanding of particular moments in the ratification of the Constitution.

Regrettably, the conclusion of Konig's essay serves as a cautionary example of giving the transatlantic "republic of letters" more than its due. Konig takes note of Federalists and Anti-Federalists who argued that the maintenance of the universal militia and a broad conception of the right to keep and bears arms was necessary to the preservation of American liberty. Yet in interpreting the Second Amendment, he subordinates their voices to that of William Blackstone and defines the amendment within the narrow context of the right to bear arms as understood in English common law: the "auxiliary right of the subject . . . of having arms for their own defence, suitable to their condition and degree, and such as are allowed by law." Emphasizing the "proper eighteenth-century context of British law and transatlantic politics," Konig slights the development over almost two centuries of a distinctly American common law governing the right to keep and bear arms.[72]

Though citizens in late eighteenth-century America had become "accustomed" to a right to keep arms, at no point in this period did the various provincial, state, or national governments issue an explicit constitutional guarantee of a "right to keep arms" free of reference to bearing them. Nevertheless, some early Americans believed that the legal immunity enjoyed constitutional protection under the Second Amendment, and, over the course of the republic's first half century, that reading of the amendment became authoritative.

Concern for a constitutional guarantee of the right to keep arms is reflected in the amendments submitted during the ratification debate of 1787–88. Ratifiers in Pennsylvania, New Hampshire, and Massachusetts proposed amendments to the Constitution that recognized an individual right to keep arms. New Hampshire's proposed language, "Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion," provided the broadest protection, suggesting that the right to keep arms expired only when an individual committed an overt act of levying war. The Massachusetts and Pennsylvania proposals were slightly narrower, recognizing the power to disarm criminals and those engaged in riot, affray, and other breaches of the peace. The dissenting minority of the Pennsylvania convention proposed "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people, or any of them, unless for crimes committed, or real danger of public injury

72. Ibid., 152–57.

from individuals." In Massachusetts, Samuel Adams proposed to that state's ratifying convention that "the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."[73]

Though these provisions were clearly concerned with the right of citizens to keep arms, they probably had less influence over American constitutional thought than a second set of texts that recognized a right to "keep and bear arms." These include, in chronological order, the Massachusetts Constitution of 1780, proposed amendments to the Constitution of the United States issued by the ratifying conventions of New York, Virginia, and North Carolina, and early drafts of the Second Amendment itself.[74] From contemporary interpretations of this language emerged an authoritative interpretation of the Second Amendment as protecting an individual right to keep arms.

The first interpretation of the meaning of the "right to keep and bear arms" came in a discussion of the rights recognized by the Massachusetts Constitution of 1780. The seventeenth article of that constitution's declaration of rights declared in part that "the people have a right to keep and bear arms for the common defense." When the constitution was sent to the towns for ratification, the inhabitants of Northampton and Williamsburg raised objections to this formulation. The inhabitants of Northampton complained that the article "is not expressed with that ample and manly openness and latitude which the importance of the right merits." They suggested that the article be altered to read "The people have a right to keep and bear arms as well for their own as the common defense." The inhabitants of Williamsburg offered almost identical language, but explained their objections at greater length: "that we esteem it an essential privilege to keep arms in our houses for our own defence and while we continue honest and lawful subjects to government we ought never to be deprived of them." They warned that without more explicit protection of their right to keep arms, the legislature might mandate the public storage of guns.[75] Of 225 towns ratifying the Constitution of 1780, only these two expressed reservations over article seventeen. The constitution was declared ratified without further amendment.

Uviller and Merkel have interpreted this episode as evidence of the

73. Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York: Oxford University Press, 1997), 181–82. Adams later withdrew his proposed amendment.

74. Ibid., 169–82.

75. Oscar Handlin and Mary Handlin, eds., *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Cambridge: Harvard University Press, 1966), 446, 575, and 624.

isolation of those early Americans who were concerned with a "private right to arms."[76] But these initial petitions were not the only public comments on the meaning of the Massachusetts declaration of rights provision. In the winter of 1786–1787, prompted by a dispute over the propriety of Maine's Portland Convention, "Scribble Scrabble" and "Senex" debated the meaning of the right to arms recognized in the Massachusetts declaration of rights. Scribble Scrabble asserted that the security provided by the declaration for "the right to keep and bear arms for the common defense" did not imply a degradation of the natural right of individuals to use those arms for other purposes such as hunting. Senex responded that the article in question did indeed imply limitations upon the natural rights of the people, asking, "have they a right to bear arms against the common defense?" He urged his opponent to consider the purpose behind the article: "The idea, that Great-Britain meant to take away their arms, was fresh in the minds of the people; therefore in forming a new government, they wisely guarded against it." Scribble Scrabble reiterated that "in the state of nature individuals have a right to keep arms—say muskets: these they may use to kill game, fowl, or in self defence, or in defence of their fellow creatures. Now, the 17th article says, the people have a right to keep and bear arms in the common defence. Does this security of arms, in this instance, in the people, take away the right they originally had to kill game or fowl with their muskets?" Scribble Scrabble conceded that such subsidiary uses of arms might fall within the legislature's police power. Nevertheless, he and Senex both read the declaration of rights as affording individuals a constitutional "security" against having their arms "taken away."[77]

In his defense of the Portland Convention, Scribble Scrabble subscribed to a strain of plebeian constitutionalism analyzed at length by Saul Cornell. Cornell and David Konig have both acknowledged that a broad individual rights understanding of the right to keep and bear arms existed within an extra-legal culture of insurgents and vigilantes cut off from "the mainstream of the Anglo-American constitutional tradition."[78] Though that description may well apply to Scribble Scrabble, Senex cannot be so easily dismissed. Nor is he the only early American who understood the "right to keep and bear arms" to incorporate an individual citizen's right to keep arms. In 1793, Jedidiah Morse, an ardent Massachusetts Federalist, interpreted the Massachusetts declaration of rights provision as declaring that "every subject . . . may keep arms."[79]

76. Uviller and Merkel, *The Militia and the Right to Arms,* 82.

77. *Cumberland Gazette,* December 8, 1786, January 12 and 26, and March 18, 1787.

78. Konig, "Persistence of Resistance," 540–45.

79. Jedidiah Morse, *The American Universal Geography* (Boston: Isaiah Thomas and Ebenezer T. Andrew, 1793), 1:379.

Taken together, these commentaries on the Massachusetts declaration of rights offer an alternative explanation for the lack of response to the petitions of Williamsburg and Northampton. Senex, Scribble Scrabble, and Morse demonstrate that concern over the right to keep arms was expressed by Federalists, Anti-Federalists, and plebeians alike. If most citizens of Massachusetts similarly understood article seventeen to afford constitutional protection to their individual right to keep arms, then their silence in 1780 is easily explained. The residents of Northampton and Williamsburg were isolated not by their concern for individual liberties but by their exaggerated suspicions of distant authority.

In June 1789, Tench Coxe published an analysis of a text even more closely related to the Second Amendment. Writing in support of the passage of the Bill of Rights, Coxe attempted to explain Madison's original draft of what would become the Second Amendment: "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." Coxe interpreted that passage as follows: "As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed in the next article in their right to keep and bear their private arms."[80]

Collective rights interpreters have rightly noted that Coxe's interpretation may not have reflected the intent of the framers and that he was not commenting on the final draft of the amendment.[81] Still, confronted with a text describing the right of the people to keep and bear arms, Coxe, like his counterparts in Massachusetts, interpreted it as affording constitutional recognition to the legal immunity surrounding the keeping of arms.

Later that summer the House of Representatives produced its own draft of the Second Amendment: "A 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."[82] In response, a supporter of Samuel Adams interpreted the House draft as a vindication of Adams's proposal that the Constitution be amended to prevent Congress from disarming the "people of the United States who are peaceable

80. Tench Coxe, "A Pennsylvanian," Philadelphia *Federal Gazette,* June 18, 1789. For Madison's text of the Bill of Rights, see "Amendments to the Constitution, June 8, 1789," in Charles F. Hobson et al., eds., *The Papers of James Madison,* 17 vols. (Charlottesville: University Press of Virginia, 1962–1991), 12:196–210.

81. See Cornell, "Don't Know Much About History," 668–70; and Rakove, "Highest Stage of Originalism," 123, n. 48.

82. Cogan, *Complete Bill of Rights,* 170.

citizens."[83] Here again, the inclusion of the phrase "the right of the people to keep and bear arms" seems to have suggested to contemporaries that the amendment functioned, at least in part, to protect an individual right to keep arms.

We have very few eighteenth-century commentaries on the meaning of the final draft of the Second Amendment. In 1796 a letter to two commissioners appointed to negotiate a treaty with the Creek Indians complained of regulations they had issued declaring that "no citizen is to be in arms" in the neighborhood of Coleraine, Georgia, where the negotiations were conducted. The author of the letter denounced this regulation as rendering the Second Amendment and the militia laws "mere nullities." He insisted that "No captain of militia, could have mustered his men, and must have disarmed his company, and thereby violated the constitution and laws of his country." The author clearly framed his discussion of the Second Amendment within the context of the militia, but he also expressed concern that the people of the neighborhood would be disarmed.[84]

In 1798, a Democratic-Republican styling himself "A Citizen" published a letter "To the Freemen of Kentucky" in the *Kentucky Gazette.* He wrote in defense of a set of resolutions passed at a large public meeting of the citizens of Fayette and the adjacent counties. That meeting had resolved that "A well organized militia are the proper, and the only safe defenders of our country; that for that purpose the general and state governments ought to provide them with arms and ammunition; that as they have neglected to do this, every freeman ought to consider it his duty to provide both for himself."[85] In response to Federalist criticism that the resolution was seditious, "A Citizen" explained that "being armed for their defense, is the greatest privilege a free people can enjoy, because it is the only real security of any privilege." He argued that the right to be armed was unequivocally declared in the Second Amendment and the Constitution of Kentucky: "It is therefore not only your right but your indispensable duty also to be armed."[86]

Neither of these early commentaries was authoritative and neither discusses a right to keep arms wholly unconnected from service in the militia. But each suggests that the authors saw in the Second Amendment a protection for the possession of arms as a distinct and urgent concern. In Georgia, the author noted that the commissioners' regulations would render

83. Boston *Independent Chronicle,* August 6, 1789.

84. *Federal Gazette and Baltimore Daily Advertiser,* September 6, 1796.

85. Resolutions of the Citizens of Fayette and the Adjacent Counties, Kentucky, *Kentucky Gazette,* August 15, 1798.

86. "To the Freemen of Kentucky," ibid., September 19, 1798.

the militia inoperative, but it was the disarming of the militia, which the author considered as equivalent to disarming the citizens of the district, that nullified the Second Amendment. In Kentucky, the only operation of the Second Amendment described by the author was its guarantee of the right "to be armed."

That understanding of the Second Amendment as acting in part to secure an individual right to keep arms is also reflected in St. George Tucker's discussion of the Constitution of the United States and its relationship to English common law. In 1803, Tucker, a Virginia Anti-Federalist, discussed several strains of meaning attached to the Second Amendment. In his discussion of the militia clauses of the Constitution, he noted that the Second Amendment protected the right of the states to arm and organize their militias. But in his discussion of the text of the amendment itself, and in his commentary on Blackstone's discussion of the right to bear arms in England and the operation of the English game laws, Tucker interpreted the amendment as protecting a right to keep arms. In these passages, Tucker noted with clear disapproval that the English Bill of Rights had failed to protect the people of England from the game laws "whereby the right of keeping arms is effectually taken away." In contrast, he expressed his hope that in America, "the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty."[87] Tucker's attention to the right to keep arms as a distinct concern is clear.

Tucker's interpretation was authoritative. It served to inform constitutional commentary on the Second Amendment throughout the nineteenth century. Writing in 1829, William Rawle followed Tucker's lead in contrasting the security of the right to keep arms in America with its "disgraceful" infringement by the English game laws. Rawle described the amendment's protection of the right to keep and bear arms as a "corollary" of the desirability of a well-regulated militia. He declared that the amendment acted as a "prohibition" on any attempt by the Congress or a state legislature to "disarm the people."[88]

The Tennessee Supreme Court offered the fullest discussion of the contours of the "right to keep and bear arms" in the 1840 case *Aymette v. State*.[89] The case concerned the constitutionality of a Tennessee statute prohibiting the carrying of concealed knives. The court began by discussing the disarming of the English population under the game laws and the

87. St. George Tucker, *Blackstone's Commentaries* (Philadelphia: William Young Birch and Abraham Small, 1803), 1:272–74 and 300, 2:143, and 3:414.

88. William Rawle, *A View of the Constitution of the United States of America* (Philadelphia: Philip H. Nicklin, 1829), 125–26.

89. *Aymette v. the State,* 21 Tenn. 154 (1840).

quartering acts imposed by James II. The Second Amendment and the corresponding provision of the Tennessee Bill of Rights were framed, the court declared, to redress these deficiencies in English law. Having followed Tucker and Rawle's analysis of the purposes for which the right to keep and bear arms was protected in the state and federal constitutions, the court engaged in lengthy analysis of the meaning of the phrase:

> As the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence,* so the *arms,* the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. . . . The citizens have the unqualified right to *keep* the weapon, it being of the character before described, as being intended by this provision. But the right to *bear arms* is not of that unqualified character. The citizens may bear them for the *common defence;* but it does not follow, that they may be borne by an individual, merely to terrify the people, or for purposes of private assassination.[90]

On this basis, the court upheld the statute prohibiting the carrying of concealed weapons, and the case has thus been cited as a precedent favorable to gun control.[91] But the court also identified within the state and federal constitutions two distinct rights: to keep arms and to bear them collectively for the common defense. The court thus provided the fullest articulation for an interpretation first offered by Scribble Scrabble and Senex half a century before. The court found within the constitutional right to keep and bear arms an individual citizen's right to own guns, grounded in an American rejection of English precedent.

There is little evidence that the framers of the Second Amendment were concerned with recognizing an individual right to keep arms. On the whole I concur with David C. Williams in his assertion that the framers of the amendment were concerned primarily with the constitutional organization of political violence rather than individual rights.[92] Nonetheless, an informed American citizenry accustomed to a legal right to keep arms appears over time to have fashioned its own interpretation of the amendment's text. Given the evidence presently available, it is not possible to determine how widely such an interpretation was held. Nevertheless, the evidence presented

90. Ibid., 158–60.

91. See, for example, Bellesiles, "Gun Laws," 587; and Cornell, "To Keep and Bear Arms," 16. In 2004, Saul Cornell and Nathan DeDino acknowledged that the court in *Aymette* made a distinction between keeping and bearing arms, but suggested that the distinction was novel in 1840 and that it did not significantly influence Second Amendment jurisprudence. See "A Well Regulated Right," 516–17.

92. David C. Williams, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* (New Haven: Yale University Press, 2003).

here is sufficient to support three historical conclusions: An interpretation of the Second Amendment as securing in part an individual right to keep arms was contemporaneous with the amendment's framing. That interpretation was recognized as authoritative early in the nineteenth century. Finally, the early American proponents of that interpretation transcended region, partisan affiliation, and any reasonable measure of plebeian consciousness. Lawyers, backwoodsmen, Federalists, and Democrats, they believed, like Mrs. Barrett's militiaman, that they had a right to keep arms.

# Arms and the Man: What Did the Right to "Keep" Arms Mean in the Early Republic?

DAVID THOMAS KONIG

Just as Virgil linked "arms and the man" in his epic history of Rome's origins,[1] Americans have linked the bearing of arms with their own national origins. Regardless of other uses to which his image has been put, the Minuteman who stands guard at Concord reminds us that he stood his ground in 1775 to stop British regulars from seizing assembled weapons at Concord and disarming the Middlesex County militia. Robert Churchill provides us with an entertaining anecdote of a young man to illustrate his claim that such men actually believed that they were protecting their personal right to keep and bear arms. Asserting that he had become ill, the militiaman was "skedaddling home" after his company's engagement with British regulars at Concord in 1775. Though his captain's wife told him that "you must not take your gun with you," he retorted, "Yes, I shall." His refusal to yield his gun, explains Churchill, "transcended its importance in allowing him to meet his communal obligation. The gun was his, and he believed he had a right to keep it."[2] But this anecdote, though charming, demands closer examination. Like much in Churchill's essay, it reveals that items or statements taken out of context can be misinterpreted and misleading.

Though the militiaman justified his flight from battle with the excuse of illness, he never invoked any legal "right to keep" his firearm distinct from any natural right of self-preservation. Nevertheless, Churchill uses

1. "Arma virumque cano" ("I sing of arms and the man"), Virgil, *Aeneid,* line 1.

2. Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment," *Law and History Review* 25 (2007): 139–40, citing Robert A. Gross, *The Minutemen and Their World* (New York: Hill and Wang, 1976), 126.

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the Concordian's panicked remark as illustrating how "American law recognized a zone of immunity surrounding the privately owned guns of citizens."[3] We would do well to investigate just what the "keeping" of arms meant in the Early Republic, for we should not allow this supposedly legalistic young militiaman to have the last word. He was not expressing an authoritative legal opinion specific to firearms. More to the point was the lament of Lieutenant Joseph Hosmer about what had happened that day. Hosmer complained that the militia's scattering had turned victory into an uncoordinated fracas. Of the men seen dispersing to save their own skins or wreak vengeance on the intruders, Hosmer ruefully observed, "Every man was his own commander."[4] Far from condoning it, a standard military manual of the period—a text written by a British officer but published in Philadelphia—addressed such behavior and assailed it as among "those panics and disorders, to which the frailty of the human heart often drives the soldier. . . ."[5] Context—transatlantic, provincial, and local—matters when we seek to come to terms with the law. It is a task not made any easier by the contradictions within Churchill's argument, by the way he states the strong position of his argument and then qualifies it into a much weaker one, or by his stating claims that are not supported by the footnoted materials.

In the time since I saw and commented on an early version of this article,[6] Churchill has expanded his study of gun laws with a much more extensive examination of post-Revolutionary legislation to reinforce his argument about the right to keep firearms unrelated to any collective military service. Central to this argument is the claim that "most" post-Revolutionary states "repudiated the military power to seize the privately owned firearms of their inhabitants. These limits on colonial and early state regulation of

3. Churchill, "Gun Regulation," 142.

4. Gross, *Minutemen,* 126. The commonplace distinction between a state of nature and civil society is another context that we cannot ignore despite Churchill's argument that the militiaman's statement asserted "a right to keep arms." Compare Locke's distinction between a state of nature and that of political society: in the former, "everyone in that state being both Judge and Executioner of the Law of Nature, men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own cases; as well as negligence, and unconcernedness, to make them too remiss, in other mens." John Locke, *The Second Treatise of Government. An Essay Concerning the True Original, Extent, and End of Civil Government,* sec. 125, in *Two Treatises of Government,* ed. Peter Laslett (New York: Cambridge University Press, 1963), 396.

5. Thomas Simes, *The Military Guide for Young Officers* (Philadelphia, 1776), cited by Allen French, *The Day of Concord and Lexington* (Boston: Little, Brown, 1925), 197.

6. "Gun Regulation in Early America: Taking Another Look at the Legal Context of the Second Amendment" (10 September 2003), comments for which I am acknowledged in the present article.

arms ownership outlined a significant zone of immunity around the private arms of the individual citizen."[7] Though he has made a solid contribution to our understanding of the pervasive extent of colonial arms regulation through the police power, his argument concerning post-Revolutionary matters remains unpersuasive, especially when stated in its strong version. Without putting too fine a point on Churchill's language, his use of "repudiated" and "limits" expresses an intent as well as a constitutionally charged implication that the change reflected ideas about legally recognized rights—what he attributes to Tench Coxe as a "legal immunity surrounding the keeping of arms."[8] This strong version of his thesis is argued more strongly by Churchill's insistence that this protection was unique among other property rights.

Though strongly worded, however, these points are only weakly supported. The first problem is that they rely heavily on reasoning from negative evidence: though he demonstrates the absence of post-Revolutionary weapons impressment laws, such silence did not constitute a "repudiation" of a previous practice.[9] To be sure, without further context or other explanatory evidence, it might be so interpreted. Ample context and evidence exist, however, to suggest a plausible alternative explanation for such silence: namely, states no longer had any need to impress arms, and their inaction on impressments reflected not a "repudiation" but rather a turn to other methods of obtaining militia weapons. Pennsylvania, for example, did not impress weapons for the militia service in the years Churchill cites after the Revolution,[10] but not because of any "zone of immunity" established around them. Though state law required militiamen to appear at call-up with their own weapons, the legislature already had made provision for those who could not procure their own firearms. Like other states, it had established repositories for the collection and storage of firearms purchased at public expense.[11]

This shift was driven by the events and subsequent changed attitudes after the end of fighting in 1781—what Jack Rakove calls the "'lessons of

7. Churchill, "Gun Regulation," 161.

8. Ibid., 171.

9. For "repudiation," see Churchill, "Gun Regulation," 155. The power to impress arms for militia use, moreover, can hardly be called an exercise of "emergency military powers in a manner that effectively disarmed citizens." Ibid. The term "disarm" is misapplied if used to describe the mobilization of resources against external enemies; it was a means for the sovereign to suppress internal opposition, such as Roman Catholics or Jacobites in Britain, or Tories in the new republic.

10. Churchill, "Gun Regulation," 154.

11. An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania" (1807), ch. MMDCCCXLII, secs. 15, 37.

experience' or inferences and attitudes that participants might have drawn and derived from their own involvement in events."[12] Ignoring the history of the early national militia, which demonstrated the shortage of weapons among the militia-eligible population as well as the need for a standardized uniformity of weaponry, Churchill overlooks the fact that many states now provided the weapons needed for militia service. With Independence the "universal militia" ideal existed as no more than that—an ideal. Churchill's claim that historians have "underappreciated the distinctiveness of the universal militia as a colonial institution that had no corollary in the post-medieval British experience"[13] therefore carries little interpretive weight for his argument, because after the Revolution many state militias came to replicate that British experience. As occurred with the British militia tradition he dismisses, Americans who did not wish to serve could avoid service. Pennsylvania explicitly allowed "any person called to perform a tour of duty to find a sufficient substitute" and established arsenals from which publicly purchased "arms shall not be taken from their place of deposit except on the days appointed by this act, for the exercise and discipline of the militia, or when they shall be called into actual service."[14] Though not directly hiring "substitutes," citizens could—and did—effectively force substitutes to serve in their places by choosing to pay fines for nonappearance for duty.[15] Similarly, just as "[t]he Crown provided arms and uniforms," Massachusetts in 1793 enacted that for any militiaman "unable to arm and equip himself" towns were required to furnish "arms and equipments, which shall remain the property of the town."[16] Militiamen in Danvers, for example, received their weapons when they arrived at training day and returned them when they left at the end of the day.[17] Americans were, indeed, "entitled and accustomed" to keeping and bearing arms, as Tench Coxe said, "for the powers of the sword are in the hands of the yeomanry of America from 16 to 60." But we must remember how he explained that it was "[t]he militia of these free commonwealths"

12. Jack N. Rakove, "Words, Deeds, and Guns: *Arming America* and the Second Amendment," *William and Mary Quarterly* 59 (2002): 208.

13. Churchill, "Gun Regulation," 143.

14. An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania" (1807), chap. MMDCCCXLII, sec. 38.

15. John K. Mahon, *The American Militia: Decade of Decision, 1789–1800* (Gainesville: University of Florida Press, 1960), 47–48.

16. Report to Congress, 1794, *Annals of Congress,* House of Representatives, 11th Congress, 2nd Session, 70. The report also noted that North Carolina had the same procedure. Connecticut did the same in 1782, specifying that "all Arms and Accoutrements thus provided, shall be the property of such Town" paying for them. *Acts and Laws* (1782), p. 592.

17. Mahon, *American Militia,* 42.

that were so "entitled and accustomed."[18] Like Coxe, Congress viewed such "accustomed" right as a militia one: its Uniform Militia Act of 1792 acknowledged existing militias that would not be incorporated into the uniform militia: they were to "retain their accustomed privileges, subject, nevertheless, to all other duties required by this act, in like manner with the other militia."[19]

Contradicting his rejection of the "new paradigm" offered to describe an individual right to keep and bear arms as participation in the civic act of militia service, Churchill provides ample information to support what he rejects. Though he denies that keeping arms was a "right carried out within a public organization," he concludes the same paragraph by stating what is very close to the model he denies: "The keeping of all such 'firelocks' by individual citizens was a private act rendered immune from state interference because it facilitated the public act of collective self-defense."[20]

The story of the collapse of the enrolled militia after the Revolution is a commonplace of the historiography of the early republic,[21] yet its meaning for the way Americans thought about keeping and bearing arms is absent from Churchill's analysis. With Independence, questions and concerns were raised about government provision of militia weapons, but they concerned the role of the federal government as supplier. It was, that is, a states' rights question and not a matter of keeping personal arms. The Uniform Militia Act of 1792 required all enrolled militiamen to provide their own weapons,[22] but the futility of such a requirement quickly became obvious. In 1798, therefore, Congress enacted that the federal government should supply "thirty thousand stand of arms" to be deposited for sale to state governments; if unsold, they were to remain available for delivery to the federalized militia when needed.[23] The states recognized the scarcity of private weapons—indeed, Churchill acknowledges that almost a third of militiamen came to muster without weapons[24]—but they feared entrusting the federal government with the responsibility of being the sole

18. Churchill, "Gun Regulation," 144.

19. 2nd Congress, 2nd Session, ch. 33 (1792), sec. 11.

20. Churchill, "Gun Regulation," 167.

21. Mahon, *American Militia,* 42. See also Marcus Cunliffe, *Soldiers and Civilians: The Martial Spirit in America, 1775–1865* (Boston: Little, Brown, 1968); William H. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* (Washington, D.C.: Public Affairs, 1957), 28–30.

22. 2nd Congress, 2nd Session, ch. 33 (1792).

23. 5th Congress, 2nd Session, ch. 66 (1798). Congress acted again in 1808. 10th Congress, Session 1, chap. 55 (1808).

24. "Militia returns from the era of the American Revolution and from 1810 show that over two-thirds of northern militiamen came armed to muster." Churchill, "Gun Regulation," 147.

source of firearms, and many resorted to building and stocking their own armories.[25]

But a second major point he presents is of more dubious validity: the *nonmilitary* keeping of weapons that Churchill insists continued as an obligation after the Revolution. The newly independent state governments, he argues, required even those men not enrolled in the militia to "keep" arms: "While some states limited this individual duty of keeping arms to those subject to militia training, others did not."[26] Unfortunately, the evidence Churchill adduces does not at all refer to states, but rather to colonies; the latest statute cited dates from 1762.[27] After presenting other colonial statutes to illustrate how "[t]he language of 'keeping arms,' then, had a colloquial meaning that applied to individuals outside of the context of militia service," he quotes a Pennsylvania newspaper in 1747 illustrating the connection between keeping arms and military use, urging "those who on account of their age or infirmities ought to be excused from the common exercises" to "keep arms and ammunition in their houses, *that when occasion calls, they may either use them if they can or lend them to those who happen to be unprovided.* This language of keeping arms continued into the early national period, though it was not incorporated into the federal militia act of 1792."[28]

I have quoted this passage in full because it asserts the continuation of colonial "language" as the basis for a legally recognized post-Revolutionary right. But what "language" "continued into the early national period"? If he means language that required those not enrolled in the militias to keep arms for collective action "when occasion calls," he provides no evidence of such in any post-Revolutionary statutes. If, as seems more likely from the topic sentence of the paragraph and his general argument about the keeping of arms unrelated to militia service in the early republic, his evidence likewise supports nothing of the sort. The "post-colonial examples of this usage," cited in his note 27, all pertain to militia matters—not a single post-Revolutionary example he cites imposes this obligation on those exempted from service or on those not enrolled. To the contrary, every citation adduced clearly attaches the obligation of keeping arms to

25. Vermont and South Carolina had to send purchasing agents to Europe in search of guns. Cunliffe, *Soldiers and Civilians,* 185. The *Connecticut Journal* observed that Virginia had stored arms in its own armory "because it was proper for the state of Virginia to keep in her possession the means of arming the militia, rather than depend for her supply on contracts which the U.S. might stop." Virginia had begun appropriating funds for its militia in 1797. *Connecticut Journal,* 18 February 1817, 2.

26. Churchill, "Gun Regulation," 148.

27. Sources cited in ibid., n. 25.

28. Ibid., 149 (emphasis added).

those enrolled in the militia. The word "keep," in fact, is in every instance a militia matter.[29]

Despite Churchill's denial, owning and keeping firearms did not constitute any special constitutional or legal "zone of immunity" in the period examined here, when individuals possessed a common law right to own *anything,* even other human beings. To have questioned the right to own and keep weapons would have defied all logic and law and certainly would have intruded on any right reserved to the states by the federal constitution. Americans of the colonial and early national periods regarded the right to own firearms as no different from—and certainly as no less than—the other property rights they defended zealously, and the language they used in its defense demonstrates this longstanding common law concept of property rights rather than any unique "zone of immunity" for firearms. State control over a militiaman's firearms was not challenged as a violation of any special "zone of immunity," that is, but rather as a taking of his property controlled by the requirement of compensation. It was for this reason, for example, that a Pennsylvania militia colonel in 1792 insisted that those of his men using their own weapons were entitled to additional pay for such use,[30] or the belief that the cost of purchasing cartridges expended by volunteer companies in their drills should be paid by the state.[31]

The ideal of every man supplying his own weapon thus involved matters other than a right to keep arms unrelated to militia service. To understand this distinction requires, however, that we undertake Jack Rakove's injunction to do the "laborious task" of immersing ourselves in the policy debates of the era rather than relying on statutes[32]—and in this case, inferences drawn from statutory silences. If we do so, we find one stated reason for the demand that militiamen provide their own weapons to be the belief that such a policy constituted a tax to provide weapons for those who failed to supply their own. In 1810, objecting to the distribution of federally purchased firearms directly to volunteer militiamen, Congressman Samuel

29. See ibid., 149, n. 27, and references cited. Two sources adduced are speeches in Congress urging "the people" to "keep their arms in their hands" to maintain the independence of the nation (Rhea) and supporting measures "that every citizen shall furnish and constantly keep at his own expense those arms which might be necessary for his defence against external force and internal oppression" (Bacon). New Jersey's law refers to "Ammunition to be kept by each Man" in the militia. Those of Connecticut (1782), Virginia (1784), Massachusetts (1793), and Vermont (1797) use "keep" in this same way, in militia statutes.

30. "Col. John Wilkins to Col. Clement Biddle," Pittsburgh, 21 December 1792, *Pennsylvania Archives,* ser. 2, vol. 4 (1876), 742.

31. W. A. Newman Dorland, "The Second Troop Philadelphia City Cavalry," *Pennsylvania Magazine of History and Biography* 45 (1921): 371.

32. Rakove, "Words, Deeds, and Guns," 208.

Dana challenged the practice as a direct tax on those who already had purchased their own weapons for militia service, and who were thereby being "required to contribute property; which contribution being unequally levied was so far not conformable to the spirit of the Constitution." No unique "right" concerning a "zone of immunity" was involved here, but rather the constitutional requirement that direct taxes be apportioned according to population.[33] Congressman Timothy Pitkin protested that such distribution served to "tax them to purchase arms for those who had neglected their duty" of providing their own weapons.[34] Even Ezekiel Bacon, cited by Churchill for his insistence on the individual obligation to keep arms for militia service, opposed federal financing of state arms purchases on the principle that Massachusetts should not be paying for other states' militias.[35] Alternatively, it was argued that requiring all men to provide their own weapons raised legal problems, and that the Second Amendment required the federal government to provide arms to all. According to a writer in *The National Intelligencer and Washington Advertiser,* the individual obligation to provide weapons "operates very unequally, as it lays the same burden on the poor as on the rich—it is a kind of *poll tax.*"[36]

Churchill concludes by qualifying and weakening his thesis so severely that little remains of its stated "strong" version. He finds "within the constitutional right to keep and bear arms an individual citizen's right to own guns, grounded in an American rejection of English precedent," but he also admits that "[t]here is little evidence that the framers of the Second Amendment were concerned with recognizing an individual right to keep arms." What distinction can be made between these two rights? Churchill's answer is that "[a]n interpretation of the Second Amendment as securing in part an individual right to keep arms was contemporaneous with the amendment's framing." Well might we ask what it means that a right was secured "in part," and what its legal significance was as "contemporaneous" with the Second Amendment. Many competing notions of rights existed at the nation's founding, with many competing versions of rights "contemporaneous" with the framing of the Bill of Rights. What it meant to "keep" arms meant different things to different people in different places, and Churchill is correct that we lack sufficient evidence to know what popular notions of the Second Amendment swirled around its ratified

33. *Annals of Congress,* 11th Congress, 2nd session (March 1810), 1571. Dana was referring to Article I, Section 9, Clause 4 of the federal Constitution.

34. *Annals of Congress,* 11th Congress, 2nd Session (March 1810), 1567.

35. Bacon's speech of 5 December 1808 was published in *The Pittsfield Sun; or, Republican Monitor,* 9 January 1809.

36. *The National Intelligencer and Washington Advertiser,* 8 February 1812. From this association with a poll tax, the "civic" nature of bearing arms might be inferred as well.

constitutional text, and to know how widely any such alternative ideas were held. Churchill is surely going well beyond his evidence, however, when he claims his impressions of statutory silences to be "authoritative" in the years he examines. We must be careful when we assert what "keeping arms" meant as a "legal" or "constitutional right." We must be careful, that is, to distinguish between what a political community chose to elevate to the level of a legal or constitutional protection and what it did not. Like his militiaman, Churchill confuses the legal and the constitutional with the "colloquial" or with unenacted tenets of natural law. Such popular ideas must be given their due, of course, for they provide valuable insight into the popular legal culture of the times and can illuminate the boundaries of the law. When we make such distinctions rigorously, and analyze them with full attention to their context, we will have made great strides in understanding what it meant to "keep" arms in the Early Republic.

# Mandatory Gun Ownership, the Militia Census of 1806, and Background Assumptions concerning the Early American Right to Arms: A Cautious Response to Robert Churchill

WILLIAM G. MERKEL

In "Gun Ownership in Early America," published in the *William and Mary Quarterly* in 2003,[1] Robert Churchill drew on probate inventories and militia records to make the case that arms ownership was pervasive in late colonial, revolutionary, and early national America. Churchill concluded with the observation that "[i]t is time to ponder what these guns meant to their owners and how that meaning changed over time."[2] In his substantial contribution to this volume of *Law and History Review,*[3] Churchill takes up that challenge himself and advances the claim that widespread arms ownership engendered a sense of possessory entitlement, and that this notion of right informed constitutional sensibilities respecting guns and the Second Amendment. He acknowledges that a civic republican understanding focused on the militia was central to the framers' conception of the right to arms, but urges that another stream of discourse—individualistic, personal, and divorced from militia linked obligations—was present from the beginning. By the early nineteenth century, Churchill argues, this purely private view of the right to arms had become ascendant.

1. Robert H. Churchill, "Gun Ownership in Early America: A Survey of Manuscript Militia Returns," *The William and Mary Quarterly,* 3d ser., 60 (2003): 615.

2. Ibid., 642.

3. Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment," *Law and History Review* 25 (2007): 139–75.

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Churchill's most intriguing claim is that arms possession (in large measure because of its alleged ubiquity) acquired an aura of immunity against at least some assertions of government power during the period in which the Constitution and Bill of Rights were drafted and ratified. In colonial times, says Churchill, provincial and imperial military authority extended to seizure of guns for purposes of arming militia and ensuring security, but by the 1780s, these statist claims against privately held weapons were abating, never to return. The police power still allowed civil authorities to regulate firearms usage to preserve safety in towns and on public roads, promote public decorum, and protect the population of game, but assertions of governmental power to seize (rather than merely regulate) guns rapidly petered out in the new nation. Perhaps like other royal prerogatives that died a death of desuetude in the Whigish narrative of English history, the abeyance of governmental authority to confiscate arms begat a negative liberty against gun seizure, and this liberty soon took up a prideful place in the orthodox (or at least popular) understanding of constitutional rights. Churchill's argument is interesting, in several respects novel, and in many ways enlightening. But it is by no means clear that he accurately captures all the evidence on which he relies, or that his thesis can fully account for some important evidence that he glosses over or ignores. In fact, vital material Churchill misreads or omits points squarely back to the civic-republican focused reading of the constitutional right to arms he aims to play down or read away.

Consider, for instance, Congressional inquiry into the arming of the militia. On April 2, 1806, Joseph Varnum, then a six-term Republican Congressman from Massachusetts and major general in the Commonwealth's militia, presented a report from the "committee instructed to inquire what measures are necessary to be adopted to complete the arming of the militia of the United States" to the House of Representatives.[4] The report, partly reprinted below, is difficult to reconcile with Churchill's findings concerning gun ownership among militia members in the revolutionary and early national periods, on which his argument that the Second Amendment protected a private as well as a militia-focused right to arms largely depends. Congressman Varnum drew on data familiar to the committee and reprinted in the Militia Census of 1806, a document officially communicated to Congress by the president nine days later on April 11, 1806.[5] The results of that census, and the question of how they square with Churchill's ac-

4. *American State Papers,* 5, *Military Affairs,* 1:198–99. For information on Varnum, see the entry in *American National Biography* 22:278–79 by Edward W. Hanson of the Massachusetts Historical Society.

5. *American State Papers,* 5, *Military Affairs,* 1:199.

count, are taken up next. In the report itself, Varnum's committee informed Congress

> [t]hat, by the laws of the United States, each citizen enrolled in the militia is put under obligations to provide himself with a good musket or rifle, and all the other military equipments prescribed by law. From the best estimate which the committee have been able to form, there is upwards of 250,000 fire arms and rifles in the hands of the militia, which have, a few instances excepted, been provided by, and are the property of, the individuals who hold them. It is highly probable, that many more of the militia would have provided themselves with fire arms in the same way, if they had been for sale in those parts of the United States where the deficiencies have happened; but the wars in Europe have had a tendency to prevent the importation of fire arms from thence into the United States, which, together with the limited establishments for the manufacture of that implement in the United States, has rendered it impossible for individuals to procure them.[6]

The committee went on to say that the number of stands of public arms in the arsenals of the various states had not been ascertained, that there were about 120,000 fire arms fit for use and 12,000 in need of repair in the magazines of the United States, and that the committee was of the opinion that further public monies ($62,100 to be exact) should be set aside for manufacture of fire arms in the armories of the United States "to provide for the exigency of war."[7]

The Militia Census listed the total numbers of men enrolled for each state rank by rank and the total numbers of rifles and muskets each state reported. Assuming that privates and noncommissioned officers but not officers were expected to carry long guns as required by the Militia Act of 1792, the percentages of militia members each state reported as armed with rifles or muskets are as follows:[8]

6. Ibid., 199.

7. Ibid., 198–99.

8. These are my rough calculations; I have left out sergeant majors and quartermaster sergeants because of their insignificant numbers and my uncertainty as to whether they were expected to muster with long guns. I have also omitted the reports for the District of Columbia, Mississippi Territory, and Indiana Territory, whose militia were few in number. The Orleans and Louisiana territories did not report. For the raw numbers see *American State Papers,* 5, *Military Affairs,* 1:202–3. For Churchill's important reservations about reading too much into these numbers see Churchill, "Gun Ownership in Early America." Churchill makes the case that the census should not be taken at face value; instead, he maintains, it is important to look at the documents generated at the brigade level on which the census was based. By failing to do so, Churchill cautions that historians will be mislead because the census undercounts by measuring guns brought to muster, not guns held at home. But if this were a serious problem, one would expect Major General Varnum, with thirty years militia experience, to have been aware of it. He reported "upwards of 250,000 firearms and

New Hampshire Infantry: 19,100 privates and 1,108 sergeants, 12,500 muskets; or 61.9 percent armed.
Massachusetts Infantry: 53,316 privates and 1,108 sergeants, 46,218 muskets and 397 rifles; or 85.7 percent armed.
Rhode Island Infantry: 4,414 privates and 302 sergeants, 3,052 muskets; or 64.7 percent armed.
Connecticut Infantry: 13,952 privates, 1,144 corporals, 1,293 sergeants, 15,085 muskets; or 92.0 percent armed.
Vermont Infantry: 13,708 privates, 1,011 sergeants, 8,824 muskets; or 59.9 percent armed.
New York Infantry: 63,744 privates, 3,885 sergeants, 39,919 muskets and 1,928 rifles; or 61.9 percent armed.
New Jersey Infantry: 21,742 privates, 1,142 sergeants, 12,423 muskets and 86 rifles; or 54.7 percent armed.
Pennsylvania Infantry and Riflemen: 80,061 privates, 2,881 sergeants, 3,352 riflemen, 20,000 muskets, 3,352 rifles; or 27.1 percent armed.
Delaware, not reporting.
Maryland, not reporting.
Virginia Infantry: 61,962 privates, 3,388 sergeants, 10,490 muskets, 2,734 rifles; or 21.3 percent armed.
North Carolina Infantry: 37,871 privates, 1,774 sergeants, 16,571 muskets, 2,343 rifles; or 47.7 percent armed.
South Carolina Infantry, Riflemen, and Light Infantry: 29,082 privates and rank and file, 245 pioneers, 165 corporals, 1,245 sergeants, 5,916 muskets, 5,731 rifles; or 37.9 percent armed.
Georgia Infantry and Riflemen: 16,650 infantry and rank and file, 835 sergeants, 1,782 muskets, 1,955 rifles; or 21.4 percent armed.
Kentucky Infantry: 29,386 privates, 1,679 sergeants, 3,966 muskets, 15,567 rifles; or 62.9 percent armed.
Tennessee Infantry: 14,285 privates, 308 corporals, 308 sergeants, 4,647 muskets; or 31.2 percent armed.
Ohio Infantry: 8,031 privates, 456 sergeants, 277 muskets, 3,238 rifles; or 41.4 percent armed.

Varnum's report points to the committee's concerns over a national militia less than fully armed and then proposes to rectify this problem by Congressional spending on arms production in federal arsenals for distribution (via the market? state purchase and resale? loan? outright grant?) to unarmed militia members. As the numbers above make clear, the census he and the committee consulted in reaching this decision indicated that

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rifles in the hands of the militia"; the census lists by my count some 204,200 muskets and 52,900 rifles, suggesting strongly that it provided the basis of Varnum's figures. If Varnum knew of systemic undercounting, he failed to tell Congress, and mislead his colleagues in the process. See *American State Papers,* 5, *Military Affairs,* 1:199.

the New England militia was substantially armed and that the middle state militia (except in Pennsylvania, home to large populations of Quakers and other conscientious objectors) was above half armed. But serious problems arose in the South and West (excepting Kentucky), and these problems were nowhere as acute as in Virginia. Churchill, however, argues that that disarmament there was more apparent than real. The census, he claims, counted only state owned arms (and not privately owned arms) in Virginia and several other states. Yet the committee reported that it did not know how many arms were held in the arsenals of the states, and this is very hard to incorporate into Churchill's interpretation of the census, unless his point is that Virginians who had been issued state owned arms kept them at home and brought them to muster where these guns (unlike the guns still in the arsenals) were counted.

Churchill's main thrust on this issue is that most Virginia militia members actually owned their own guns (why would they have so many fewer than their northern compatriots?), but refused to bring them to muster in large measure because of a state history of confiscation. Here again Churchill's thesis stumbles over its own inconsistencies. The claim that Virginians were still influenced by expectations of confiscation in 1806 is not wholly in harmony with Churchill's larger argument that the power to seize atrophied in the 1780s even as a sense of immunity against confiscation took hold in the popular mind.

Varnum's report and the census finding of low armament in Virginia is troubling for the Churchill thesis in at least one other sense as well. If Churchill is right that Virginians had guns but did not bring them to muster, it becomes necessary to explain why a Jeffersonian controlled Congress closely tied to the Virginian president was unaware of this issue. This holds particularly for Major General Varnum himself, given his life-long service with Massachusetts citizen soldiery, his national responsibilities for militia oversight, and his personal relations with the president—he became Jefferson's candidate for Speaker of the House in the next Congress and won appointment when former Speaker John Randolph's faction broke with the administration. If the cause of the Virginia militia's seeming unreadiness was as Churchill supposes, it stands to reason that Jefferson's Virginia connections, including the state's three most recent governors—James Monroe (1799–1802), John Page (1802–1805), and William Cabell (1805–1808), all Jefferson loyalists—would have informed the president, and that Jefferson would have passed to word to Varnum, one of his leading New England lieutenants in the House and chair of the committee responsible for supervising arming of the militia. Churchill's assumption is equally hard to square with then Governor Monroe's behavior six years earlier in 1800, when he was called on to consider the

Virginia militia's potential effectiveness as a potential counterweight to a Hamiltonian army unwilling to yield the presidency in the event of a Republican victory in the national elections. Monroe made it a point to order arms from overseas, not to order Virginians to bring their arms out of hiding.[9]

In a cordial email to this reviewer, Churchill has stressed that the assumption of widespread arms ownership that underlies his thesis is the product of his detailed research into a variety of sources, including probate records, and the local militia rolls, which he found formed the basis of state figures included in federal militia censuses. In truth, my disagreements with Churchill have less to do with the prevalence of guns in early national culture (my sense is that the Census of 1806 is about right, his studied retort is that it substantially undercounts) than with the purpose and meaning that Americans attached to their ownership of guns, and the question of how that fed into their thinking (such as there was on this point) about the Second Amendment. And in this respect, Churchill's argument appears based on an oddly ambiguous set of assumptions about statutory compliance. His reasoning relies on two premises. First, Americans complied willingly and broadly with colonial and state level militia-linked requirements to acquire guns. Second, they later followed the federal Militia Act's command that white men of arms-bearing years obtain a musket or a rifle. But he builds on these assumptions to argue that once Americans came into compliance, and became accustomed to a culture of arms bearing, the statutory purposes behind their acquisition of guns were subordinated. Ownership of guns took on an individualistic valence says Churchill, with hostility to gun confiscation reflecting less and less solicitude for the communitarian militia, and more and more a property-focused sense of private immunity. This understanding in turn became imbued with qualities perhaps more readily associated with modern Takings Clause jurisprudence (and its late eighteenth-century precursors), and the sort of "Lockean" rhetoric Locke may not have recognized, than with the anti-army trappings of old Commonwealth Whiggery.

I believe that Churchill reads too much libertarianism and too little republicanism into the problem, and that along the way he smoothes over some important ambiguities that his evidence, fairly read, will not resolve. Once more, the Varnum report is instructive. Varnum suggests that most militia eligible Americans wanted to comply with the Militia Act's requirement of arming themselves, but that many were unable to do so because

9. See William G. Merkel, "To See Oneself as a Target of a Justified Revolution: Thomas Jefferson and Gabriel's Rebellion," *American Nineteenth Century History* 4.1 (2003): 1–31.

guns were scarce. Whether Varnum was too charitable respecting the causes of wide-spread non-compliance (lack of guns as opposed to lack of will), the fact remains that, unless Churchill's largely conclusory surmise that many southerners and westerners were hiding their guns is true, nearly half the militia eligible population was non-compliant. Non-compliance was not an uncommon theme in recent American history. Churchill himself claims that non-compliance with the Act of 1792 (failure to appear armed on muster day) actually explains the alleged undercounting of guns in Virginia. Far more famously, the Sugar Act, Stamp Act, Townsend Duties, and Tea Act come to mind as late colonial statutes generating less than optimal compliance, as do the Whiskey Tax and Window Tax from the Federalist period. To be sure, these were imperial or at least national as opposed to provincial or state laws such as those Churchill cites to support his claim for a wide distribution of arms. But other provincial or state laws, including prohibitions against unlicensed preaching and absenting oneself from the established church in a manner not contemplated in the Toleration Act, were notoriously under-enforced or unenforceable as well.[10]

If Americans were as widely out of compliance with late colonial militia-linked mandatory arming laws as their successors were with the U.S. Act of 1792, then serious problems arise at the beginning of Churchill's chronological chain linking the presumption of wide spread gun possession (required by statute) to familiarity to possessory impulses to claims of right to assertions of immunity to constitutionalization. And it is in the earlier period, where Churchill insists the discourse that ripened into rights talk began, that he relies most strongly on unadorned assumptions of statutory compliance, for the evidence from probate inventories and censuses becomes thicker only as the colonial period ends. If late colonial Americans were as non-compliant in regard to gun ownership as they were respecting tax payment and religious establishment, perhaps they were less obsessed with clinging to guns they did not have for individualistic property-focused purposes than they were animated with pro-militia and anti-army rhetoric for civic and republican ends.

Churchill's essay is problematic not simply for evidentiary reasons. His argument builds principally on the theoretical distinction between military authority to seize and police power to regulate guns, but this theoretical distinction may require substantial rethinking. It is premised at least in part on the assumption that measures relying on military authority were extraordinary and rare, while exercises of the police power were quotidian and norm defining. Even if this were true, however, it would in no way

10. See Rhys Isaac, *The Transformation of Virginia: Community, Religion, and Authority, 1740–1790* (Chapel Hill: University of North Carolina Press, 1982).

undermine the theory that fears of the standing armies and executive usurpation were central to the Second Amendment, for it was in extraordinary times of crises real or imagined or pre-textual that efforts to disarm the militia and set up a corrupt regime buttressed by the army were most to be expected. Churchill's underlying assumption, however, is in fact not true for the generation that experienced the Revolution and the constitutional crisis. As Alan Taylor among others reminds us, imperial wars between Britain and France were more common than not in the late colonial period, and those wars increasingly focused on the North American theater and increasingly mobilized the North American population. A native born American aged fifty when the new national government convened in 1789 had known more years of war than peace.[11] The great imperial and national political debates of that person's lifetime had focused on war, taxes to fund war, and the dangers of a government capable of enacting and enforcing the tax regime required to finance war or hold together a country sufficiently powerful to avoid war.

If war, or fear of war, or the need to pay for or avoid war was the norm for the founding generation, perhaps this does not so much undermine Churchill's principal claim as suggest that national attitudes were bound to change. Fears of undue assertions of military authority subsided in the decades that followed the revolutionary period, with a clearly civilian-controlled Jeffersonian system of governance firmly in place in the substantially demilitarized nation that became the ante-bellum republic. But this does not get Churchill wholly off the hook. His premises remain problematic for the earlier period in which he roots his analysis, and for colonial times, his terminological distinction between military powers and police powers in some respects is itself anachronistic.

The sharp distinction between military and police powers makes much more sense under the system of federalism and separation of powers adopted in the U.S. Constitution of 1788 than it does for the colonial system of governance. The national Constitution conveyed certain specified powers to the United States Congress (such as the power to raise and support armies), rested the Commander-in-Chief power in the federal presidency, and reserved the bulk of unspecified powers to the states, the latter including the general authority inherent in their quasi sovereign status and partly confirmed in the Tenth Amendment to make general policy respecting health, safety, and morals. Whether the distinction between military and police powers will bear as much weight as Churchill would load on it in colonial times is a more doubtful proposition. The constitutional settlement reached during the Glorious Revolution in England left intact the royal prerogatives that Prince William insisted on keeping to make the Crown

11. Alan Taylor, *American Colonies* (New York: Viking, 2001), 420–43.

worthwhile, including those related to war and peace and command of the military. In the eighteenth century, however, these devolved in practice to the cabinet and the prime minister. From 1689, military funding was required to flow from Parliament, and the Bill of Rights spoke of allowing protestant subjects such arms as were allowed by law.[12]

On an ad hoc and imperfect basis, each colony's government of provincial assembly, governor, and council mirrored the British system, and during war time (which was, as mentioned above, as normal as not) military relations between colonial and royal government frequently became complicated and confused by the presence of regulars responsible directly to the Crown under whose commanders colonial militia sometimes served. How meaningful it is in this context to attempt to label weapons seizures for purposes of militia arming (often carried out under imperial pressure to get more local troops in the field) exercises of either police or military powers is difficult to say.[13] The authority behind confiscation appears to have been sometimes imperial, sometimes local, sometimes prerogative, sometimes statutory, and sometimes a matter of ad hoc necessity. It is likewise open to question whether the coming of independence marked any conceptual sharpening of the distinctions between police and military powers respecting the issue of guns, so much as it did a general heightening of the popular preference for militia over regulars, and realization by the revolutionary leadership that regulars were as necessary during war as they were dangerous to peace and to republican principles.

Churchill's essay is engaging and thought provoking throughout. His central insight that power to regulate and power to confiscate are not one and the same is of crucial importance, both to understanding the meaning of the American right to arms at its origins, and to understanding the fevered politics that envelop that right in our own times. I have doubts, however, that Churchill's distinction between authority under police and military powers offers a complete and accurate account of changing attitudes towards the militia and the right to arms in the founding and early national periods. In his contribution to this volume, Saul Cornell has pointed to grave problems concerning Churchill's use of evidence from the constitutional period and from the nineteenth century.[14] My own concerns focus

12. See detailed discussion in Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76 (2000): 27, and in H. Richard Uviller and William G. Merkel, *The Militia and the Right to Arms, Or How the Second Amendment Fell Silent* (Durham: North Carolina Press, 2002), 47–56.

13. See, e.g., Michael A. McDonnell, "The Politics of Mobilization in Revolutionary Virginia: Military Culture and Political and Social Relations, 1774–1783" (Oxford University D.Phil. thesis, 1995).

14. Saul Cornell, "Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence," *Law and History Review* 25 (2007): 197–204.

on Churchill's extrapolations from assumptions perhaps too hastily drawn about the meaning of arms ownership to Americans in the late eighteenth and early nineteenth centuries. While Churchill has raised interesting questions and offered intriguing insights, he has also made generalizations that his evidence is not strong enough to support. In the end, I remain convinced that David Konig, Saul Cornell, and my late friend and mentor Richard Uviller and I were correct to stress the civic, militia-focused meaning of the right to arms that dominated discussion at the time of the Second Amendment's framing, and (as Cornell ably shows in this forum) continued to predominate long into the nineteenth century. There were, to be sure, countervailing voices. To ignore them would be false to the historical record and would wrongly deprive many enthusiastic supporters of a broad right to own guns of a sense of provenance to which they attach much meaning. Churchill is right to take those voices seriously. But in the article discussed here, Churchill exaggerates their importance and forges for them a kinship with the mainstream that a careful reading of the record cannot always confirm.

# Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence

SAUL CORNELL

The scholarly debate over the meaning of the Second Amendment and the scope of gun regulation has been marred by ideological distortions. Michael Bellesiles, an ardent supporter of collective rights theory, argued that state control over weapons was virtually unlimited. Now Robert Churchill, a champion of individual rights theory, stakes out an equally bold position. In his view, a distinct and separate right to keep arms evolved under American law. According to this new variant of individual rights theory, the state might regulate bearing arms, but it was prohibited from regulating the right to keep arms.[1]

In a short response it is impossible to expose all of the problems in Churchill's interpretation. Consider his discussion of the thought of Scrib-

1. Michael A. Bellesiles, "Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794," *Law and History Review* 16 (1998): 567–89. Churchill's primary goal appears to be giving academic legitimacy to the insurrectionary ideology of the modern militia movement; see Robert H. Churchill, "The Highest and Holiest Duty of Freemen": Revolutionary Libertarianism in American History" (Ph.D. diss., Rutgers, 2001). For criticism of law office history on both sides of this debate, see Saul Cornell, "Don't Know Much About History": The Current Crisis in Second Amendment Scholarship," *Northern Kentucky Law Review* 29 (2002): 657–81. Rather than seek a usable past, scholars interested in contemporary gun issues ought to focus their attention on policy questions and jurisprudential issues.

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ble Scrabble, a newspaper essayist who wrote about the meaning of the Massachusetts State Constitution's provision on arms bearing. Scribble Scrabble explicitly discussed the scope of state power over non-military weapons. Churchill claims that "Scribble Scrabble conceded that such subsidiary uses of arms might fall within the legislature's police power." Here is what Scribble Scrabble said about the scope of the state's power to regulate firearms:

> The Bill of Rights secures to the people the use of arms in common defense; so that, if it be an alienable right, one use of arms is secured to the people against any law of the legislature. The other purposes for which they might have been used in a state of nature, being a natural right, and not surrendered by the constitution, the people still enjoy, and [may?] continue to do so till the legislature shall think fit to interdict.

Rather than reluctantly concede that the non-military use of arms might fall within the state's police power, Scribble Scrabble unambiguously asserts that it does.[2] The right to keep arms for civilian purposes was not removed from the sphere of legislative power, it was subject to the full scope of the state's ample police powers. Rather than support Churchill's individual rights view, Scribble Scrabble articulated a civic model of arms bearing. The only weapons singled out for constitutional protection were those connected to militia service.

For those familiar with eighteenth-century modes of legal reasoning and analysis, there is nothing surprising about this understanding of the state's power to regulate firearms. Scribble Scrabble simply asserted a basic principle of common law. Until the legislature acted, citizens were free to keep and use any arms they desired. Once the legislature acted, however, the power to regulate firearms was considerable. The scope of this power was not, as Bellesiles suggested, nearly unlimited. Any law, including firearms regulations, had to be aimed at a legitimate public purpose and had to be consistent with reason. Weapons related to militia service clearly enjoyed greater protection and were not subject to the same level of regulation.[3]

The failure to distinguish between the constitutional right to keep and bear arms and a common law right to own and use firearms is a major flaw in individual rights scholarship, including Churchill's essay. One

2. "Scribble Scrabble," *Cumberland Gazette,* January 26, 1787; "Scribble-Scrabble," ibid., December 8, 1786

3. For a good synthesis describing the importance of the common law to American legal thinking in the Founding era, see Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004). The notion of liberty articulated by Scribble Scrabble is consistent with the account of John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988).

does not need to look hard to find evidence that orthodox legal theory in early America viewed these two concepts as distinct.[4] One can find clear confirmation of this view in the notorious case of *Commonwealth v. Selfridge,* the most important murder trial of the early republic. The right to keep and carry firearms was the central issue in the case. In the course of the trial, Selfridge's lawyer conceded that "every man has a right to possess military arms" and "to furnish his rooms with them." Yet the defense also recognized that the ownership and the use of non-military weapons were not constitutionally protected. Rather than assert a constitutional claim, the defense framed a common law argument on behalf of his client. Selfridge's attorney argued "there is no law written or unwritten, no part of the statute or common law of our country which denies to a man the right of possessing or wearing any kind of arms." Given this fact, it was indisputable that "in every free society a man is at liberty to do that which the law does not interdict, nor can the doing that which is not forbidden be imputed as a crime." The acquittal in the Selfridge case made perfect legal sense. Selfridge had not broken any law.[5]

The interesting question for historians is what happened when legislatures enacted laws that severely limited the right to own and use weapons intended primarily for self-defense. During the Jacksonian era, this is precisely what happened as states reacted to a widespread perception that handguns and bowie knives posed a serious threat to social stability. Legislatures acted on this perception by passing the first comprehensive laws prohibiting handguns and other concealed weapons.[6] Most of the legal challenges to these gun/knife control statutes were dismissed by the courts, including the case Churchill uses as one of the anchors for his argument, *Aymette v. State.* According to Churchill, *Aymette* "found within the constitutional right to keep and bear arms an individual citizen's right to own guns, grounded in an American rejection of English precedent." Once again, Churchill's thesis rests on a misreading of the evidence. *Aymette*'s distinction between a right to keep and bear arms only referred

4. Don B. Kates, "The Second Amendment and the Ideology of Self-Protection," *Constitutional Commentary* 9 (1992): 87–104; Nelson Lund, "The Second Amendment, Political Liberty, and the Right to Self-Preservation," *Alabama Law Review* 39 (1987): 103–30. The distinction between the common law right of self-defense and the political right to have arms for common defense was central to Blackstone; on this point see Steven J. Heyman, "Natural Rights and the Second Amendment" *Chicago Kent Law Review* 76 (2000): 237–90.

5. *Trial of Thomas Selfridge, Attorney at Law, Before the Hon. Isaac Parker, Esq, For Killing Charles Austin. . . .* (Boston, 1806), 41, 137, 128, 149.

6. Saul Cornell and Nathan Dedino, "A Well Regulated Right: The Early American Origins of Gun Control," *Fordham Law Review* 73 (2004): 487–529. This perception may not have been accurate according to Randy Roth, whose forthcoming study of violence in early America will resolve this issue.

to military-style weapons needed for militia service. The court rejected the argument that non-military weapons had any claim to constitutional protection. Churchill's summary of the court's ruling ignores the crucial passage in the court's decision that clearly establishes that the right to keep arms referred to militia-style weapons, not pistols, bowie knives, or other weapons intended primarily for individual self-defense. The court did not mince words when it came to asserting this vital distinction.

> The legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defense. The right to keep and bear arms for the common defence is a great political right. It respects the citizens on the one hand and the rulers on the other. And although this right must be inviolably preserved, yet, it does not follow that the legislature is prohibited altogether from passing laws regulating the manner in which these arms may be employed.[7]

The right to bear military weapons was subject to reasonable regulation. *Aymette* did not establish a general constitutional right to keep arms, it clearly rejected such a right. The unqualified right to keep arms only applied to keeping weapons related to militia service. Limits on non-military weapons were defined by the general scope of the police power. *Aymette*'s conception of the right to keep and bear arms expounded a civic conception of this right, not an expansive individual rights conception.[8]

Churchill's discussion of the constitutional theory of the influential Virginia judge St. George Tucker presents a different set of evidentiary and interpretive problems. Rather than explore the underlying architectonic structure of Tucker's thought, Churchill plucks quotes out of context. One cannot hope to understand Tucker's view of the Second Amendment without reconstructing the whole structure of his constitutional theory. The proper place to begin any analysis of Tucker's thinking about the right to bear arms is his unpublished William and Mary law lectures delivered shortly after the Second Amendment was ratified. Although individual rights scholars have invoked Tucker, they have never consulted his earliest writing on the subject. Here is what Tucker said about the Second Amendment:

> If a State chooses to incur the expence of putting arms into the Hands of its own Citizens for their defence, it would require no small ingenuity to prove that they have no right to do it, or that it could by any means contravene the Authority of the federal Govt. It may be alleged indeed that this might be done for the purpose of resisting the Laws of the federal Government, or of shaking off the Union: to which the plainest answer seems to be, that whenever the States think proper to adopt either of these measures, they will

7. *Aymette v. State,* 21 Tenn (2 Hump) 154 (1840) at 159.
8. Ibid.

> not be with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above-mentioned, would be subversive of every principle of Freedom in our Government; of which the first Congress appear to have been sensible by proposing an Amendment to the Constitution, which has since been ratified and has become a part of it, viz. "That a well regulated militia being necessary to the Security of a free State, the right of the people to keep & bear Arms shall not be infringed.[9]

Tucker viewed the Second Amendment as a concession made to Anti-Federalists to assuage their fears that the state militias might be disarmed. Tucker's comments are not only the earliest known commentary on the meaning of the Second Amendment by an important legal theorist, but they provide one of the most forceful statements of a states' rights conception of this provision of the Bill of Rights. There is nothing in Tucker's earliest writings to support Churchill's claims about an expansive individual right to keep arms.

Tucker's thinking on this issue obviously evolved in the years between writing his law lectures and publishing his monumental study of Blackstone in 1803. In his published work, Tucker greatly expanded his original discussion of the Second Amendment and elaborated his original thinking in light of the constitutional and political developments of the 1790s. Tucker did not abandon his earlier belief that the Second Amendment was a right of the states, but he did develop another aspect of the right to bear arms in conjunction with his evolving views of judicial review. Contrary to the claims of much recent individual rights scholarship, including Churchill, Tucker was not worried about the danger of individual disarmament; he was concerned about the potential threat to the right to bear arms in a well-regulated militia controlled by the states. It was in this context that Tucker developed the notion that one might appeal to the federal courts to protect a right to keep and bear arms in the militia.[10]

The one formulation of the right to bear arms that does not appear in

9. St. George Tucker Notebooks, Box 63, vol. iv, pp. 127–28, Tucker-Coleman Papers, Swem Library College of William and Mary; St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia . . . ,* 5 vols. (1803). For a detailed examination of the role of the Second Amendment in Tucker's evolving constitutional theory, see Saul Cornell, "St. George Tucker and the Second Amendment: Original Understandings, and Modern Misunderstandings," *William and Mary Law Review* 47 (2006): 1123–56.

10. Churchill's use of Tucker replicates the anachronistic readings of many legal scholars; see, for example, Randy E. Barnett, "Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?" *Texas Law Review* 83 (2004): 237–77; David B. Kopel, "The Second Amendment in the Nineteenth Century," *Brigham Young University Law Review* 4 (1998): 1359–545; Randy E. Barnett and D. B. Kates, "Under Fire: The New Consensus on the Second Amendment," *Emory Law Journal* 45 (1996): 1139–259.

Tucker's analysis is the individual rights view that Churchill and others have attributed to him. The fact that Tucker believed that the Second Amendment functioned both as a civic right and a right of the states does not mean that the Virginian was unaware of the importance of the individual right of self-defense. This right continued to be protected by common law. The bulk of Tucker's five-volume treatise, it is worth recalling, was not a study of constitutional law, but common law. Churchill and other individual rights theorists have been so eager to find a constitutional right to keep arms that they have ignored the centrality of the common law to early American attitudes about guns.

Tucker's constitutional theory provides little support for Churchill's central contention that a distinct constitutional right to keep arms evolved separately from the right to bear arms. The one fascinating exception to this general rule was racially based limits on keeping arms. Although they had been constitutionally prohibited from "serving in the militia, except as drummers or pioneers," Tucker noted that "free negroes and mulattoes" were "enrolled in the lists of those who bear arms, though formerly punishable for presuming to appear at muster-field." Race-based restrictions on the use of firearms had a long history in Virginia. Under state law "all but house-keepers, and persons residing upon the frontiers are prohibited from keeping or carrying any gun, powder, shot, club, or other weapon offensive or defensive." Tucker did not describe the situation of blacks on the frontier as an example of keeping and bearing arms; he wrote of "keeping or carrying any gun." Tucker discussed a right to "keep arms" in his plan for emancipation. He recommended prohibiting any "negroe or mulattoe" from "keeping, or bearing arms." This distinction reflected the situation free blacks might face after emancipation. Tucker recommended that they be prohibited from keeping arms in their home, or from appearing at muster and being issued arms. This is the only example in Tucker's voluminous writing in which he adopted a formulation similar to Churchill's idea of a separate and distinct right to keep arms.[11]

It is certainly true that Thomas Jefferson sought something like a separate right to keep arms in his alternative proposal for the Virginia Declaration of Rights. But he failed to have such a right included in the final draft. Indeed, no state constitution in the Founding era asserted a separate right to keep arms. Nor did the Second Amendment cleave the right to keep arms from the obligation to bear them as part of the militia. While citizens

11. St. George Tucker, *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of it, in the State of Virginia* (1796) in St. George Tucker, *View of the Constitution,* ed. Clyde Wilson ( Indianapolis: Liberty Fund, 1999 ), 408–9, 422, 441.

might make use of privately owned militia-weapons for a variety of civilian purposes, the constitutional protection these weapons enjoyed was linked to a specific purpose, the maintenance of a well-regulated militia.[12]

Churchill is certainly right when he asserts that Americans rejected British-style game laws and domestic disarmament. He correctly faults Bellesiles for not appreciating this important difference between British and American thinking on this issue. The rejection of domestic disarmament did not, however, mean that most Americans had embraced a decidedly modern individual rights view of the Second Amendment. The new civic rights model that Churchill challenges was designed to explore the middle ground between these two opposing theories. Churchill's efforts to rehabilitate the individual rights model by conjuring up a separate right to keep arms requires him to consistently twist the evidence to fit his theory. Rather than refute Michael Bellesiles, Churchill has produced a mirror image of his distorted account of the early history of gun regulation. The state's power over guns was not nearly as robust as Michael Bellesiles suggested, nor was it as limited as Robert Churchill maintains. The historical evidence points toward a middle ground. Militia arms, muskets and rifles, were constitutionally protected because they were necessary for a well-regulated militia. In evaluating gun laws, antebellum courts developed a two-tier model of review. The right to keep military-style weapons enjoyed the broadest protection, and the right to bear them was more limited in nature. Pistols, bowie knives, and other weapons with little connection to the goal of creating a well-regulated militia had no special constitutional protections but were subject to the state's robust, but not unlimited, police powers.[13]

The new civic model of the Second Amendment has shattered the simple dichotomy that has governed this debate for too long. Further refinement of this paradigm is certainly needed. Proponents of the civic rights model will need to be aware of the dangers of overstating the hegemonic character of this new paradigm. Although the civic model clearly emerged as the dominant framework for antebellum state jurisprudence, the rival states' rights and individual rights models also continued to be important parts of the constitutional landscape. Future scholarship will need to recognize the existence of multiple constitutional discourses on the right to bear arms in early America. Charting how these different discourses vied for dominance

12. Saul Cornell, "A New Paradigm for the Second Amendment," *Law and History Review* 22 (2004): 161–67.

13. Churchill's essay has convinced me that fowling pieces would probably have been included under the scope of constitutional protection. Hand guns, however, would not have enjoyed any constitutional protection.

and how they evolved over time presents a new set of challenges to those interested in writing a genuinely historical account of the Second Amendment and gun regulation.[14]

14. H. Richard Uviller and William Merkel, *The Militia and the Right to Arms; or; How the Second Amendment Fell Silent* (Durham, N.C.: Duke University Press, 2002) and David Konig, "The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'the Right of the People to Keep and Bear Arms,'" *Law and History Review* 22 (2004): 119–59. For an exploration of the range and evolution of American thinking on the meaning of the right to bear arms, see Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York: Oxford University Press, 2006).

# Once More unto the Breach, Dear Friends

ROBERT H. CHURCHILL

In the 1990s the issue of gun control raised political passions to a fevered pitch. It is perhaps to be expected that some of that passion has spilled over into the scholarly debate about the meaning of the Second Amendment. I see that passion in the visceral responses my work has generated, in Saul Cornell's reflexive impulse to dismiss my work with crude labels, and in David Konig's unwillingness to engage fully the nuances of my thesis, which is neither strong nor weak, but certainly complex. In this context I appreciate William Merkel's courteous engagement of the full complexity of my argument.

My own response to the passions on both sides of the issue has been to dive into the sources and let the evidence speak for itself. To be sure, I have in my essay identified what I see as the essential patterns into which that evidence falls, but I have also identified contrary evidence so that readers may judge these patterns for themselves.

Let me then reiterate the contributions and corrections to the field that I have sought to offer here, while responding to my critics. First, the civic rights school has adopted and indeed reinvigorated earlier assertions of a unified Anglo-American understanding of the right to keep and bear arms. David Konig is the most vigorous proponent of the salience of this "transatlantic context," and defending it is one of the central concerns of his criticism here.

I have never argued that the transatlantic context was irrelevant, and indeed I have mentioned the contributions that Konig's work has made to our understanding of the ratification debates.[1] The problem is that the transatlantic context has lent itself to unwarranted emphasis and misuse. Konig here offers two new illustrations of this tendency. I have not argued that Mrs. Barrett's militiaman was a constitutional authority. Instead, I suggest that scholars need to pay attention to his rights consciousness.

1. See Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment," *Law and History Review* 25 (2007): 141.

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Konig would have us submerge his voice in the metropolitan condescension of the British imperial officer corps, represented by Thomas Simes, merely because Simes's military manual was published the following year in Philadelphia. Contextualism can illuminate, but it can also conceal, depending on the choice of contexts. In this instance, I do not find Konig's choice of contexts compelling.[2]

Konig's discussion of the collapse of the universal militia shows a similar tendency to downplay transatlantic differences. His assertion that the universal militia collapsed "with Independence" is not supported by the secondary texts that he cites.[3] The primary evidence also undercuts his assertions. Enrolled militiamen could indeed hire substitutes to go out on campaign for them, but they were still obligated to muster and exercise with their companies as provided by law. Thus a sizable portion of the post-Revolutionary generation underwent military training for a significant span of their adult lives. In contrast, very few men in England were ever obligated to train. Konig is correct that New England militia laws ordered towns to provide stocks of public arms for the use of poor militiamen. The Massachusetts provision that Konig cites had been law since 1693.[4] But most towns habitually shirked this responsibility. In March 1775, for example, some considerable part of the militia of Massachusetts reported 21,549 guns in their possession. Of this total only 68 guns were returned

2. Somewhat more compelling is the officer's lament that Konig attributes to Joseph Hosmer. The statement cited, however, was not spoken by Hosmer. It is from a post-Revolutionary account of the battle by Thaddeus Blood. Blood was not an officer, but a rank and file militiaman. Nor is the cited observation a lament. In his account, Blood explained that many officers on the field lacked legal commissions, being only "nominally appointed" by the Provincial Congress, "and that all the services performed were voluntary both of officers and men." After the fight at the bridge, Blood observed that the militia divided, and that "everyone appeared to be his own commander. It was thought best to go to the east part of town and take them as they came back. Each took his own station." The misinterpretation of Blood's statement as a lament is common in the secondary literature. The misattribution is Konig's alone. See the "Deposition of Thaddeus Blood regarding April 19, 1775," John Shepard Keyes Papers, 1837–1908, Box 1, folder 2, Special Collections, Concord Free Public Library; and Robert A. Gross, *The Minutemen and Their World* (New York: Hill and Wang, 1976), 126.

3. See David Thomas Konig, "Arms and the Man: What Did the Right to 'Keep' Arms Mean in the Early Republic," *Law and History Review* 25 (2007): 181–82. According to Marcus Cunliffe, for example, the unclassified militia established under the Militia act of 1792 remained a viable institution, albeit one of limited military utility, into the 1820s, before withering under the politicized ridicule of the 1830s and collapsing altogether in the 1840s. William Riker's narrative is entirely consistent with this. See Marcus Cunliffe, *Soldiers and Civilians: The Martial Spirit in America, 1775–1865* (Boston: Little, Brown, 1968), 179–212; and William H. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* (Washington: Public Affairs Press, 1957), 21–40. For a graphic illustration of the gradual process of decline, see Chart I, Riker, *Soldiers of the States,* 25.

4. "An Act for Regulating of the Militia," 1693, Massachusetts Session Laws.

as "town stock," strong evidence that even in this period of grave crisis, the towns had not met their responsibilities.[5] There is no reason to believe that the towns complied in the early national period any better than they had at the outset of the Revolution. In the early national period, contrary to Konig's assertions, most militiamen brought their own arms to muster, at least in the North.

To be fair, Konig has been misled partly by John Mahon's misrepresentation of the records of the Danvers militia. Kevin Sweeney brought the misleading passage to my attention last year, and we each traced it back to the original source, the 1797 return of a Danvers militia regiment published in the *Historical Collections of the Danvers Historical Society.* The return showed that 265 sergeants and rank and file militiamen brought 228 muskets to the muster field. The company thus returned an armament rate of 86 percent, fairly typical for the state. Though Mahon misidentified the document as a selectmen's report and interpreted all of these guns to be public arms, there is no mention of any public arms on the return.[6]

Konig is on more solid ground when he asserts that some states to the south of New England began to purchase, store, and distribute public arms in large numbers at the turn of the nineteenth century. Virginia in particular distributed tens of thousands of public arms in the first decades of the nineteenth century, while New York established large arsenals and also sold arms to individual militiamen. In general, after 1792 the militia did not enroll as high a percentage of the adult male population as it had in the colonial era, and some of those at muster may have borne public arms. Nevertheless, the contrast with England's force of 30,000 militiamen armed entirely from government stores remained stark. Konig's assertion that "many state militias came to replicate that British experience" may describe the 1850s, but it does not capture the early national experience.[7]

Konig also contends that I have over-read what amount to simple changes

5. Warlike Stores in Massachusetts, 1774, William Lincoln, ed., *The Journals of Each Provincial Congress of Massachusetts in 1774 and 1775. . . .* (Boston, 1838), 756. We do not know the number of militiamen covered by this partial return, and thus there were almost certainly additional public guns in towns that made no report. Nevertheless, it is clear from the return that public guns were remarkably scarce.

6. Compare John K. Mahon, *The American Militia: Decade of Decision, 1789–1800* (Gainesville: University of Florida Press, 1960), 42 with "Return of the Sixth Regiment of Militia," *Historical Collections of the Danvers Historical Society* (1913–1987), 3:17. Mahon also mis-cites the source document as found in volume 2, page 17. The material on that page is unrelated.

7. See Konig, "Arms and the Man," 180. The best measure of the viability of the militia during the post-Revolutionary generation is the annual return of the militia of the United States for 1810. For a thorough analysis of this return, see Robert H. Churchill, "Gun Ownership in Early America: A Survey of Manuscript Militia Returns," *William and Mary Quarterly,* 3d ser., 60 (2003): 635–40 and table iv.

in policy, particularly with concern to impressment. It is true that providing arms for the militia was a major concern within the public policy debates of the early republic. Some states chose to maintain large arsenals rather than to rely on impressment to arm the militia in a crisis. It does not follow, however, that impressment remained a viable policy choice. States abandoned the impressment of arms not only because it was inefficient, but also because it was politically untenable. As a result, to the extent that this was a policy choice, it quickly became irreversible. In congressional debates over the arming of the militia, one finds clear indications that the impressment of arms was no longer a viable policy option.

In the debate over the militia bill of 1790, Jeremiah Wadsworth balked at a proposal that the federal government should provide arms for poor militiamen. He asked, "whether there was a man within the walls, who wished to have so large a portion of the community armed by the United States and liable to be disarmed by the government, whenever it should be thought proper?" The same issue was a major theme in the 1807 debate over a bill for arming the militia. Many congressmen objected to the government retaining any property rights in the arms to be distributed, fearing that if the arms remained public property the government would have the power to recall the arms during a crisis. These congressmen insisted that the best course was to grant militiamen property rights in the arms. Congressman Rhea of Tennessee warned that "he would never agree that the militia should hold their arms but as their own property and independent of the United States; and he would never give a vote which should put it in the power of the United States to recall the arms once bestowed." Congressman Fiske argued that "the citizens of this country should not be placed in such a situation that their arms could be taken from them at any time."[8]

The assumption underlying these statements was that private arms were immune from seizure in a crisis. In arguing that the arms would be safe from seizure only if owned by individual militiamen, these congressmen perceived an immunity that transcended any common law or Fifth Amendment right to monetary compensation for the public use of private property.

8. Speech of Jeremiah Wadsworth, December 16, 1790, Linda Grant De Pauw, ed., *Documentary History of the First Federal Congress of the United States of America,* 14 vols. (Baltimore: Johns Hopkins University Press, 1972–1997), 14:76; Speeches of John Rhea and James Fisk on the bill for arming the militia, December 1807, *Annals of Congress: The Debates and Proceedings in the Congress of the United States,* 42 vols. (Washington, D.C.: Gales and Seaton, 1834–1856), 18:2184 and 17:1031. For similar assertions that the arms should be made property of individual militiamen so as to secure them from seizure, see Speech of Ezekiel Bacon, ibid., 17:1041; Speech of James Holland, ibid., 18:2177; Speech of William Ely, ibid., 18:2178; Speech of John Smilie, ibid., 18:2192; and Speech of Joseph Varnum, ibid., 18:2192–93.

Furthermore, they expected that ownership by individual militiamen would shield the arms from seizure in precisely those circumstances in which governments had previously impressed private arms. It is thus difficult to reconcile these statements with a legal, political, and constitutional climate that envisioned the return of impressment as a viable policy choice.

Konig has identified a lapse in writing on page 148, line 9 of my essay. The third word of that sentence should read "colonies." Konig also complains that footnote 27 is deficient. Here, I think he and I brought different concerns to the text. In the last sentence of the text paragraph supported by this footnote I was responding to a reader who asked whether the language of keeping arms in the militia statutes continued into the early republic. Konig read the sentence with a different question in mind. Had I anticipated Konig's particular concern, I would have discussed the 1785 slave code of Virginia, which provided that "no slave shall keep any arms whatever"; the Mississippi slave code of 1822, which provided that "no negro or mulatto shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead"; the Virginia and Maryland slave codes of 1832, which used the same language; the Florida slave code of 1828, which ordered the whipping of slaves "who shall use, carry, or keep any fire arms, ammunition, or any weapon"; and the post–Civil War black codes of Mississippi, which provided that "no freedman, free negro, or mulatto . . . shall keep or carry firearms of any kind, or any ammunition, dirk or bowie knife." I would also have referred Konig to the North Carolina justice of the peace manuals of Francois Xavier Martin (1804) and John Haywood (1808). Xavier describes North Carolina law as providing that "No slave shall go armed with gun, sword, club, or other weapons, nor shall keep such arms." Finally, I would reiterate St. George Tucker's complaint that the English Bill of Rights had been interpreted to authorize game laws enacting "the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game." Under these game laws, Tucker observed, "the right of keeping arms is effectually taken away from the people of England."[9]

9. "An act concerning slaves," 1785, William W. Hening, ed., *The Statutes at Large, Being a Collection of all the Laws of Virginia* (Richmond: Franklin Press, 1809–1823), 12:182; "An Act to reduce into one, the several acts, concerning Slaves, Free Negroes, and Mulattoes," 1822, Mississippi Session Laws; "An Act to amend an act entitled, 'an act reducing into one the several acts concerning slaves, free negroes, and mulattoes, and for other purposes,'" 1832, Virginia Session Laws; "An act concerning Free Negroes and Slaves," 1832, Maryland Session Laws; "An Act Relating to crimes and misdemeanors committed by slaves, free negroes, and mulattoes," 1828, Florida Session Laws; "An Act to punish certain offences therein named and for other purposes," 1865, Mississippi Session

Thus in response to Konig's larger point, the colloquial application of the language of keeping arms to refer to the individual possession of guns outside of the context of militia service remained in common usage as late as the Civil War.

We are left then with Konig's assertion that Americans in the colonial and early national periods did not regard their right to own firearms as different from their right to own any other form of property. I leave it to readers to determine whether that assertion is tenable in view of the evidence I have presented.

Besides probing the use of the transatlantic context, the article contributes by encouraging historians of gun regulation to distinguish between the state's emergency military powers and its everyday civil police powers. William Merkel thus raises the most interesting issue in the three comments when he questions whether I am drawing too neat a line. It is a fundamental question. I cannot but take to heart his observation that colonial governance frequently involved a complex overlap of jurisdictions and legal rationales.

While I described the military powers of the state as extraordinary, I never said that their exercise was rare. Clearly war was a constant presence in colonial America in the mid- and late eighteenth century. It may also be true that the line between the military and the police power was murkier in the seventeenth century than in the eighteenth. Finally, the military power never received the kind of theoretical exposition that Blackstone lent to other areas of Anglo-American law.

Nevertheless, impressment was sufficiently unpopular that officials were forced to justify and limit its use. Thus the power of impressment was limited by statute in England and America to usage in time of war. In North Carolina, acts of impressment, imprisonment without trial, and searches without warrant during the Regulator insurgency and during the Revolution led to legal retaliation against the officials carrying them out. To protect these officials, the legislature passed acts of indemnity in 1771 and again in 1783 to hold state officers harmless for their "diverse acts, which could not be justified by the strict forms of law, and yet were necessary." When Continental soldiers complained of the impressment of their guns at the end of their terms of service in 1775, Nathanael Greene also justified the seizure with a reference to martial law: "Undoubtedly the detaining of arms

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Laws; Francois-Xavier Martin, *The Office and Authority of a Justice of the Peace* (New Bern: Martin and Ogden, 1804), 294; John Haywood, *The Duty and Authority of Justices of Peace, and of Sheriffs, Coroners, and Constables, etc. according to the Laws of the State of North Carolina* (Raleigh: William Boylan, 1808), 247; and St. George Tucker, *Blackstone's Commentaries,* 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), 1:300 and 2:143.

being private property is repugnant to many principles of civil and natural law, and hath disgusted many, but the great laws of necessity must justify the expedient till we can be otherwise furnished."[10] Certainly the exercise of power during time of war was messy. But when pushed to justify their actions, American officials described the impressment of arms as lying within a realm of state action beyond the pale of civil law.

Merkel presents a second concern about the issue of gun ownership, which my essay addressed only briefly. He argues that I have misread the evidence of militia armament in the first decade of the nineteenth century and makes special reference to Virginia as a test case. Let me state first of all that I have never suggested anywhere that Virginia militiamen were hiding their guns from the state in the nineteenth century, though clearly some did so in the Revolution. Nevertheless, I am confident that neither the 1806 return that Merkel reports here nor the 1810 return I discussed in detail in *William and Mary Quarterly* three years ago gives an accurate representation of gun ownership in Virginia. To illustrate the problem, consider the complaint of Samuel Coleman, Virginia's Deputy Adjutant General, at the end of 1809 that on the return he had just completed, "the arms returned are so far short of the number actually issued. What the deficiency actually is cannot at present be ascertained, as many have been issued since the returns from which the enclosed is made up have been received. Our next brigade returns, it is hoped, will in that respect exhibit a more accurate statement." The state had to that point issued 21,767 stands of public arms, but the return showed fewer than 14,000 muskets in the state as a whole. To take the return at face value, we would have to conclude that there were no private arms in Virginia at all and that a third of the public guns had vanished.[11] I stand by the conclusion of my article in the *William and Mary Quarterly* that for a host of reasons the published national returns significantly undercounted militia armament rates.[12]

Merkel protests that I have not accounted for anecdotal evidence that

10. See "An Act for Ordering the Forces in the Several Counties of this Kingdom," 13 & 14 Charles I, c. 3 (1662); "An Act for Providing Against Invasions and Insurrections," 1777, Hening, *Statutes at Large,* 9:291; "An act to indemnify such persons as have acted in defense of Government," 1771, and "An act to indemnify such persons who have acted in defence of the State," 1783, North Carolina Session Laws; and Greene to Samuel Ward, Sr., January 4, 1776, Richard K. Showman, ed., *Papers of General Nathanael Greene,* 10 vols. (Chapel Hill: University of North Carolina Press [for the Rhode Island Historical Society], 1976–1996), 1:177.

11. See Samuel Coleman (D.A.G) to the Governor, December 25, 1809, *Calendar of Virginia State Papers* (Richmond: James E. Goode, 1881), 10:78. The Virginia return for 1809 to which Coleman refers is reported on the Return of the militia of the United States for 1811, *American State Papers,* 1:298–301.

12. Churchill, "Gun Ownership in Early America," 615–42.

supports the Virginia returns. Surely, he suggests, Congressman Varnum's political allies in the Virginia dynasty would have alerted him to any undercount. There are two problems with this assertion. It assumes that information at the top of the reporting chain is more accurate than information at the local level—a highly dubious assumption. If the published national return on which Varnum relied in making his report concealed critical details, reporting gaps, and omissions (which it did), it is not clear that Varnum would be aware of it. Merkel's objection also ignores the politics of the issue. Virginia had embarked on the most ambitious public armament program conducted by any state. That program was expensive and Virginia was looking for federal assistance. The three governors of Virginia mentioned had little incentive to correct Varnum's misapprehension.

Contrary to Merkel's insistence, I have not assumed that militiamen complied with their statutory obligations. Rather, I have measured gun ownership and appearance at muster with a careful and systematic examination of the available evidence. Merkel is no doubt correct that if ownership rates in the colonial period were low, then my assertion that early Americans became accustomed to keeping arms becomes less tenable. The available evidence of gun ownership in colonial probate inventories, however, supports my argument. For example, Kevin Sweeney has found guns in at least two-thirds of probate inventories in Hartford County, Connecticut in the second half of the seventeenth century and similar rates in Hampshire County, Massachusetts from King Philips War to the Revolution. Gloria Main's study of probate inventories covered six Maryland counties from 1650–1720. Main found arms, the vast majority of them guns, in three-quarters of the estates left by young fathers in this period.[13] I stand by my conclusion that colonial Americans were accustomed to keeping arms.

We are left with Saul Cornell's response to the two central questions raised by my work, the reach of the state's police power and contour of the right to keep arms. Cornell and I disagree on Scribble Scrabble and the Selfridge case. Scribble Scrabble describes a constitutional "security of arms" that encompasses both the right to keep them and to bear them for the common defense. The Selfridge case centered on the right of self-defense. The defense's failure to assert a constitutional right to keep arms has no historical significance.

13. Kevin Sweeney, "Guns along the River: Possession and Use of Firearms in the Connecticut Valley from 1640–1800," paper presented at the Boston Early American History Seminar, February 3, 2005 (cited with permission of the author); Gloria Main, "Many Things Forgotten: The Use of Probate Records in *Arming America,*" *William and Mary Quarterly,* 3d ser., 59 (2002): 211–16. The best general survey of probate research on gun ownership is still James Lindgren and Justin Heather, "Counting Guns in Early America," *William and Mary Law Review* 43 (2002): 1777–1842.

Cornell's description of the reach of the police power in Jacksonian America is more important and worth repeating in full:

> The interesting question for historians is what happened when legislatures enacted laws that severely limited the right to own and use weapons intended primarily for self-defense. During the Jacksonian era, this is precisely what happened as states reacted to a widespread perception that handguns and bowie knives posed a serious threat to social stability. Legislatures acted on this perception by passing the first comprehensive laws prohibiting handguns and other concealed weapons. Most of the legal challenges to these gun/knife control statutes were dismissed by the courts, including the case Churchill uses as one of the anchors for his argument, *Aymette v. State.*[14]

In this passage Cornell clearly suggests that multiple states enacted laws that banned the possession of handguns, and that these laws survived judicial scrutiny. He cites his recent article in *Fordham Law Review* in support of this assertion. In that article, Cornell describes state laws banning the carrying of concealed weapons, which he acknowledges were extensions of the colonial practice of regulating the time, place, and manner in which guns could be used.[15] On this we agree. Cornell, however, argues that a "second wave" of statutes went beyond use to regulate possession and sale. He cites the 1837 Georgia statute prohibiting the possession, sale, or carrying of concealable weapons and a "similar" Tennessee statute enacted in 1838.[16]

The problem here is that the Tennessee statute, which was the law at issue in *Aymette,* pertained only to knives.[17] In emphasizing the "Tennessee Model," Cornell minimizes the case directly bearing on gun control, the Georgia decision *Nunn v. State.*[18] The court found the law's ban on the carrying of concealed weapons to be constitutional but rejected the provisions banning the sale, possession, and open carrying of firearms as an unconstitutional infringement of the right to keep and bear arms.[19]

In light of the evidence, Cornell can only reach his conclusion by conflating guns and knives and by leaving the connection between the Georgia

14. Saul Cornell, "Early American Gun Regulation and The Second Amendment: A Closer Look at the Evidence," *Law and History Review* 25 (2007): 199.

15. Saul Cornell and Nathan DeDino, "A Well Regulated Right: The Early American Origins of Gun Control," *Fordham Law Review* 73 (2004): 513–14.

16. Ibid., 514–15.

17. "An Act to suppress the sale and use of Bowie Knives and Arkansas Tooth Picks in this State," 1838, Tennessee Session Laws.

18. "An Act to guard and protect the citizens of this State, against the unwarrantable and too prevalent use of deadly weapons," 1837, Georgia Session Laws; *Nunn v. State,* 1 Ga. 243 (1846).

19. Ibid., 251.

statute and *Nunn v. State* obscure. A full and accurate characterization of the pertinent statutes and case law undermines his conclusion and extends my own findings into the antebellum era: every state except one in this period observed a legislative restraint consistent with a legal immunity surrounding the possession of firearms by citizens. The only legislature to violate that immunity suffered a constitutional rebuke.

Yet, Cornell is correct that, according to the *Aymette* decision, only militarily useful weapons were protected under the right to keep arms. Cornell acknowledges that fowling pieces and other long guns qualified for constitutional protection. I appreciate the concession, but I must nudge him a bit further. In an age in which a brace of pistols was part of the statutory armament of a cavalryman, his assertion that pistols lay outside of this sphere of constitutional protection is untenable.[20] The Georgia statute that he cites illustrates this basic military reality: the law drew a distinction between "horseman's pistols" and concealable pocket pistols. It exempted the former from regulation.[21] So it would be more accurate to say that the logic of *Aymette* suggested that *concealable* pistols *might* lie beyond the protection of the right to keep arms. I would simply add the observation that Tennessee chose not to put that logic to the test, and the only state that did lost in court.[22]

If Cornell and I can reach agreement on the contours of the right to keep arms described in *Aymette,* we will be left with the question of when that right received authoritative constitutional recognition. Cornell sees that recognition coming as the result of the liberal individualism of Jacksonian America. I see it coming significantly earlier and point to St. George Tucker as making the first authoritative connection between the right to keep arms and the Second Amendment. Cornell offers in response the beginnings of an "architectonic" analysis of Tucker's thought. I am willing to be persuaded that we should read these passages differently, and I look forward to Cornell's further contributions on Tucker. My problem with his initial comment here is that, without ever addressing the passages that I cite, Cornell concludes that Tucker's recommendation that emancipated slaves be prohibited from keeping arms "is the only example in Tucker's voluminous writing" in which he discusses a distinct right to keep arms.[23]

20. "An Act more effectually to provide for the National Defense, by establishing an Uniform Militia throughout the United States," 1792, in *Laws of the United States of America* (Philadelphia: Richard Folwell, 1796), 2:95.

21. 1 Ga. 243, at 246.

22. It is possible that if confronted with a statute similar to Georgia's, the Tennessee court would have applied the logic of *Aymette* by drawing a line between keeping firearms and keeping knives, on the basis that all firearms might have some military utility.

23. Cornell, "Early American Gun Regulation," 202.

Cornell does not illuminate or historicize the meaning of the passages of Tucker's edition of Blackstone that comment on the Second Amendment and England's game laws. He simply effaces these texts.

I would add a final word on the scope of our disagreement. Konig cites the following formulation from my essay: "The keeping of all such 'firelocks' by individual citizens was a private act rendered immune from state interference because it facilitated the public act of collective self-defense." He notes that it is very close to the new civic rights paradigm. Cornell asserts that "[t]he unqualified right to keep arms only applied to keeping weapons related to militia service."[24] Again, we seem quite close (perhaps quibbling only over certain types of pistols). It seems to me that the remaining distance is traceable to an ambiguity in the civic rights paradigm concerning who might appeal to this right to keep arms. If my colleagues are arguing that only enrolled members of the militia might assert the right they are describing, then we are indeed far apart. But if they concede that the right to keep arms was guaranteed to all citizens, then we are almost home. There remains disagreement over when this right gained authoritative recognition (1803 or 1840) and over when and how Americans came to believe that they had such a right. On those questions I stand by the modest historical explanation offered here.

24. See Churchill, "Gun Regulation," 167, Konig, "Arms and the Man," 181, and Cornell, "Early American Gun Regulation," 200.