MISREADING THE PAST: THE FAULTY HISTORICAL BASIS BEHIND THE SUPREME COURT'S DECISION IN DISTRICT OF COLUMBIA V. HELLER

CHARLES R. MCKIRDY*

I. INTRODUCTION

Although the Supreme Court's decision in *District of Columbia v. Heller* came down over eight years ago, its holding that the Second Amendment protects an individual's right to keep and bear arms reverberates louder than ever as the nation struggles to cope with one tragic shooting after another.[1] Prior to the Court's decision, the meaning of the Second Amendment had been the subject of loud and bitter contention.[2] The opposing sides of the argument had become carved in stone: is the right protected only a "collective" right to possess and carry a weapon in connection with service in the militia,[3] or is it an "individual" right unconnected with militia service?[4] Not surprisingly, the question was presented to the Supreme Court in these terms, and was considered and answered by the Court accordingly.[5]

The *Heller* majority looked to history to inform them of what those who adopted the Second Amendment meant by the phrase "the right to keep and bear arms."[6] The majority concluded that the founding generation saw the right to arms as a right of long-standing that belonged to individuals *as individuals*.[7] While this conclusion may be correct, its ramifications, at least as the majority seems to envision them, would seem to run counter to anything the founders would have found acceptable. However much they loved liberty, they were, above all else, practical men of reason.[8] It is difficult to accept the premise that they would have grafted onto our fundamental law the guarantee that, unless a majority of the Supreme Court

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* Ph.D., Northwestern University (1969); J.D., Northwestern University School of Law (1974). Member, Illinois Bar, California Bar.

[1] 554 U.S. 570, 635 (2008).

[2] *See* Ian Tarr, *The Second Amendment: Individual or Collective Rights?*, BROWN POL. REV. (Apr. 1, 2014), http://www.brownpoliticalreview.org/2014/04/the-second-amendment-individual-or-collective-rights [https://perma.cc/NW5K-YXDA].

[3] *Heller*, 554 U.S. at 577.

[4] *Id.*

[5] *See id.*

[6] *Id.* at 581–92.

[7] *Id.* at 592.

[8] *See id.* at 651–54.

deigned to conjure up specific exceptions from whole cloth and thin air, every individual—no matter how deranged, demented, malicious, or reckless—has the totally unchallengeable privilege of possessing and carrying around any weapon regardless of how deadly, dangerous, or insidious.

The thesis of this article is that the founders did no such thing. The individual right versus the collective right controversy over the Second Amendment has obscured a fundamental aspect of the right to arms: the degree to which that right was deemed alienable. As understood by the founding generation, could this right, even if an individual right, be restricted, controlled, or even taken away, and if so, by whom and under what circumstances? Again, we must look to history for the answer, but we must do so with an eye unclouded by the smoking remnants of that earlier debate. It is a new quest, one that must be as searching and comprehensive as possible. Sadly (and surprisingly given the credentials of many of those involved), the scholarly debate over the Second Amendment often has been marred by polemics, invective language, and a general want of professionalism on both sides.[9] Hopefully, the following is a fair and civil presentation of my research and conclusions. Such, at minimum, was my intent.

II. DISTRICT OF COLUMBIA V. HELLER (2008)

In late September 1775, about six months after the Battle of Lexington, a correspondent to the *New York Journal* reported on the efforts of a rebel detachment that had been sent to disarm suspected Tories in Fairfield, Connecticut:

> They then proceeded to Mr. Sayre's, and sent for him out; he waited on them, when Mrs. Sayre was immediately taken with fits, so they suffered him to return to her, without any molestation whatever, only assuring him, they would call another time . . . . They intend to disarm him . . . . Poor Mrs. Sayre, I really pity her; but the people must not be blamed, they acted for the good of the whole.[10]

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[9] *See, e.g.*, Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L. REV. 1211, 1227–28 (2009) ("collective right" theory is "pseudointellectual gibberish" that no "honest person" can "seriously propose"); Saul Churchill, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 LAW & HIST. REV. 197, 200, 203 (2007) (proponent of individual rights theory "plucks quotes out of context" and resorts to "conjuring up" a "right" by "consistently twist[ing] [] evidence to fit his theory").

[10] N.Y. JOURNAL, Oct. 5, 1775, at 3.

"The good of the whole," "the public good," "the good of the community," "the common good"—however it was phrased—in classic eighteenth century republican thought, the political thought of the framers of our Constitution, this "good" was the sole acceptable restraint on the exercise of liberty.[11] It was a restraint inherent in their concept of rights, a restraint without which, all liberty, all rights were meaningless.[12]

The Second Amendment to the Constitution references a *right*. It reads as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."[13]

How the amendment reads, or, more particularly, how the amendment was read and understood at the time of its adoption, was considered crucial by the Supreme Court of the United States in reaching its decision in *District of Columbia v. Heller*, the most significant Second Amendment case in history.[14] In *Heller*, by a vote of five to four, the Court struck down a District of Columbia ordinance that, in all but a very few situations, forbid the possession of handguns in the District.[15] The law also required that a lawfully owned firearm, such as a registered long gun, be kept "unloaded and disassembled or bound by a trigger lock or similar device" unless it was "located in a place of business" or was "being used for lawful recreational activities."[16]

Authored by Justice Antonin Scalia, the majority opinion in *Heller* held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that weapon for traditionally lawful purposes such as self-defense within the home.[17] The majority also held that the District's "requirement . . . that firearms in the home be rendered and kept inoperable at all times" made it impossible to use them for the core lawful purpose of self-defense and, therefore, was also unconstitutional.[18] In ruling that the Second Amendment protects an individual right to possess a firearm, the majority in *Heller* rejected the District's position, a position which was espoused by the dissenters, and, which, arguably, had been taken by the Supreme Court of the United States in *United States v. Miller* in 1939—that the amendment protects only the

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[11] *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 553 (1991).

[12] *See id.*

[13] U.S. CONST. amend. II.

[14] District of Columbia v. Heller, 554 U.S. 570, 598 (2008).

[15] *Id.* at 635.

[16] *Id.* at 575.

[17] *Id.* at 576–626.

[18] *Id.* at 630.

people's collective right to keep and bear arms as part of a "well regulated Militia."[19]

In his opinion, Justice Scalia declared that the prefatory words of the Second Amendment—"A well regulated Militia, being necessary to the security of a free State"—merely announce a purpose and does not limit the meaning of the "operative" words that follow—"the right of the people to keep and bear Arms, shall not be infringed."[20] Scalia spent a good deal of time examining these "operative" words. Positing the premise that a correct interpretation of the amendment depends on giving those words the meaning that they had when the amendment was written, he examined the meaning of the phrases "right of the people" and "to keep and bear arms."[21]

Scalia's discussion of the first part of the "operative" clause—"right of the people"—was relatively brief.[22] His comparison of this phrase with the wording of other provisions of the Bill of Rights and the text of the unamended Constitution led him to the "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[23] Scalia based this presumption on his conclusion that when the First, Fourth, and Ninth Amendments use the phrase "right of the people" or a slight variant of it, they use these words to "unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body."[24] He also maintained that nowhere in the Constitution "does a 'right' attributed to 'the people' refer to anything other than an individual right[,]" and that in all six of the other constitutional provisions that mention "the people" in a context other than the exercise or reservation of powers, "the term unambiguously refers to all members of the political community, not an unspecified subset" such as members of a militia.[25]

Starting with his "strong presumption" that the right protected in the Second Amendment is an individual right, Scalia analyzed the "substance of the right: 'to keep and bear arms.'"[26] Referencing period dictionaries, legal treatises, statutes, court decisions, state constitutions, and legislative debates, Justice Scalia concluded that, as used in the Second Amendment's operative clause, the meaning of the word "arms" in the eighteenth century

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[19] United States v. Miller, 307 U.S. 174, 178 (1939).
[20] *Heller*, 554 U.S. at 576 (quoting U.S. CONST. amend. II).
[21] *Id.* at 577–92.
[22] *See id.* at 579–81.
[23] *Id.* at 579, 581.
[24] *Id*. at 579.
[25] *Id.* at 580–81.
[26] *Id.* at 581.

was "no different from the meaning today."[27] The word means weapons, including "weapons that were not specifically designed for military use and were not employed in a military capacity."[28] Scalia also concluded that, at the time that it was written into the Second Amendment, the word "keep" meant "[t]o have in custody."[29] Therefore, "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*."[30]

Establishing the meaning of the phrase "bear arms" proved a bit more problematic.[31] Apparently, at the time of the founding, the phrase often was used in a military context and, in particular, had an idiomatic meaning: "to serve as a soldier, do military service, fight" or "to wage war."[32] Scalia determined that the Second Amendment did not use "bear arms" in the idiomatic sense.[33] Relying heavily on late eighteenth and early nineteenth century state constitutional provisions, in which "[i]t is clear . . . that 'bear arms' did not refer only to carrying a weapon in an organized military unit[,]" as well as on a scattering of other sources, Justice Scalia concluded that, as used in the Second Amendment, the phrase "bear arms" meant "simply the carrying of arms."[34] Then, the result of all of this work: "[p]utting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."[35]

It was only at this point that Scalia turned to the historical background of the Second Amendment. His initial reason for doing so was to confirm that the right guaranteed by the Second Amendment was a pre-existing right and not a right created by the Constitution.[36] On this issue, Scalia was very definite: "it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right, and declares only that it 'shall not be infringed' . . . '[t]his is not a right granted by the Constitution.'"[37] Scalia's conclusion that the right to arms was a pre-existing right, and that it was not tied to militia or military service, left him

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[27] *Id.*
[28] *Id.*
[29] *Id.* at 582–83 (alteration in original).
[30] *Id.* at 583.
[31] *See id.* at 584–92.
[32] *Id.* at 586.
[33] *Id.*
[34] *Id.* at 584–89.
[35] *Id.* at 592.
[36] *Id.*
[37] *Id.* (alteration in original).

and the Court's majority with "no doubt . . . that the Second Amendment conferred an individual right to keep and bear arms."[38]

Justice Scalia also looked to history to demonstrate that the prefatory "Militia" clause is consistent with the majority's interpretation of the operative clause and Supreme Court precedent, and to address the dissents of Justices Stevens and Breyer that were largely grounded on the historical context of the Second Amendment, including the various proposals in the state ratifying conventions.[39] Scalia viewed their approaches as "dubious" means "to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one."[40] He would have profited from a more searching use of this means himself.[41]

As noted earlier, the Court's holding that the "right to keep and bear arms" was deemed a personal right when the Second Amendment was adopted may have correctly answered a critical question about that right, but it left an equally critical question unanswered: if the founding generation did, in fact, view the right to arms as a personal one, what were the parameters of that right? The answer to that question can be found only by a much closer historical analysis than those reflected in either *Heller*'s majority or dissenting opinions.

III. THE DISSENT OF THE PENNSYLVANIA MINORITY

Among the historical sources referenced in *Heller*'s majority opinion was something called "The Dissent of the Pennsylvania Minority."[42] First appearing in the *Pennsylvania Packet* on December 18, 1787, the "Dissent" was a justification of the position taken by Anti-Federalists in opposing the ratification of the federal Constitution at the Pennsylvania ratifying convention in Philadelphia earlier that month.[43] The "Dissent" included a proposed "bill of rights" that the minority had unsuccessfully presented at the convention.[44] Among those proposed rights was the following:

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[38] *Id.* at 595.

[39] *See id.* at 598–600.

[40] *Id.* at 603.

[41] *See id.* Apparently, Justice Alito is cognizant of the importance of careful and comprehensive historical analysis in interpreting the meaning of the Second Amendment. In McDonald v. City of Chicago, 561 U.S. 742, 788 (2010), while standing firm with regard to the court's reasoning in *Heller*, Alito noted that there was "certainly room for disagreement about *Heller*'s analysis of the history of the right to keep and bear arms."

[42] *See Heller*, 554 U.S. at 603–05.

[43] The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents (Dec. 18, 1787), *in* PA. AND THE FED. CONST. 1787–1788, 454 (John Bach McMaster & Frederick D. Stone eds., 1888).

[44] *Id.* at 461–63.

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.[45]

Citing it as "highly influential," Justice Scalia described the Minority's proposal, with its reference to hunting, as "plainly" referring to the "right to bear arms" as "an individual right."[46] In so doing, Scalia echoed a theme sounded by historians, lawyers, and others who hail what they describe as the "unmistakable" individual right nature of the Minority's proposal that, they argue, was "widely publicized" and became "an influential Anti-Federalist document" reflecting "typical republican concerns."[47] They also contend that the proposal "proved particularly influential in spurring the adoption of similar recommendations in the subsequent state conventions," and was "one of the key documents that gave birth to the Second Amendment."[48]

Many of the amicus briefs filed with the Supreme Court in support of the Respondent's position in *Heller v. District of Columbia*, picked up and expanded on this theme. For example, one such brief identified the Minority's proposal as "the most broadly worded proposal" envisioning "an individual right with a self-defense component."[49] Other briefs supporting the Respondent agreed.[50] They stressed the argument that the proposal

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[45] *Id.* at 462 (proposed right offered by the Dissent of Minority at the Pennsylvania Convention).

[46] *Heller*, 554 U.S. at 604.

[47] Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 222 (1983); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 609 (1982); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 60–61 (1996).

[48] Kates, *supra* note 47, at 222; David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1406–07.

[49] Brief for Organizations and Scholars Correcting Myths and Misrepresentations Commonly Deployed By Opponents of an Individual-Rights-Based Interpretation of the Second Amendment as Amicus Curiae Supporting Respondents at 14, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

[50] *See, e.g.*, Brief for Academics for the Second Amendment as Amicus Curiae Supporting Respondents at 25–26, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

became "part of popular understanding [of the right to arms] nationwide,"[51] and that it, like the Minority's other proposed amendments, bore "a direct relation" to what was "ultimately adopted as the federal Bill of Rights."[52] Mr. Heller's brief maintained that the sentiments expressed in the Minority's proposed provision were addressed by James Madison in the Second Amendment.[53]

There definitely is some truth in these assertions. Without question, the Minority Dissent received a lot of play in the colonial press.[54] The Dissent, or portions of it, appeared in newspapers and broadsides all over Pennsylvania, as well as in New York, Massachusetts, Rhode Island, and South Carolina.[55] It has been argued that Samuel Adams relied upon the Minority Dissent when he proposed a resolution to the Massachusetts Ratifying Convention that the "Constitution be never construed to authorize Congress . . . to prevent the people of the United States who are peaceable citizens from keeping their own arms."[56] There is evidence that the Dissent was among the sources that James Madison consulted when he drafted the Bill of Rights.[57] Moreover, it seems clear that many of the other amendments that became part of the Bill of Rights, especially the First, as well as the Fourth, Fifth, Sixth, Seventh, and Eighth included the substance of counterparts proposed by the Pennsylvania Minority.[58]

It also is readily apparent that the Minority's proposal included non-military, personal uses of arms in its description of rights protected in the

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[51] *Id.*

[52] Brief for The Heartland Institute as Amicus Curiae Supporting Respondents at 7, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

[53] Brief of Respondent at 37–38, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290). *See also* Shalhope, *supra* note 47, at 607–08.

[54] *See, e.g.*, FREEMAN'S J. (Philadelphia), Dec. 19, 1787, at 1.

[55] *See id.*; *Miscellaneous Essays,* PENNSYLVANIA MERCURY AND UNIVERSAL ADVERTISER (Philadelphia), Dec. 21, 1787, at 1; THE DAILY ADVERTISER (New York), Dec. 25, 1787, at 1; N.Y. JOURNAL AND DAILY PATRIOTIC REGISTER, Dec. 25, 1787, at 3; CARLISLE GAZETTE (Pennsylvania), Jan. 9, 1788, at 1; UNITED STATES CHRONICLE (Providence), Jan. 10, 1788, at 2; STATE GAZETTE OF SOUTH CAROLINA (Charleston), Jan. 24, 1788, at 3; THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA TO THEIR CONSTITUENTS (Philadelphia Dec. 12, 1787).

[56] 3 WILLIAM V. WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 267 (1865). Adams later withdrew the resolution, when it failed to gain sufficient support. *Id. See also* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 207–08 (2008).

[57] Shalhope, *supra* note 47, at 608.

[58] David A. Lieber, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1111 (2005).

proposed amendment.[59] Furthermore, in forbidding disarmament, except in specific cases, the proposal arguably sought to give a broad scope to the right.[60] And, yes, the proposal did, in fact, reflect a republican view of the meaning and extent of the "right to keep and bear arms," but not in the sense that many now attribute to it.[61]

The detailed language of the Minority's proposal raises a very significant question: if the "right to keep and bear arms" was generally understood by the founding generation to include an inalienable right to own and use arms for individual purposes such as self-defense and hunting, and protected individuals from being disarmed by the government, why did the Pennsylvania Minority deem it necessary to specify those instances in its proposed amendment?[62] Their doing so implies that the minority understood that if they failed to include them, that is, if the Second Amendment was ratified in the form that we know it, those aspects of the right were vulnerable and, to the extent they existed at all, could legitimately be taken away by legislative action.[63]

This understanding would have been entirely consistent with late eighteenth century political thought which viewed the "essence of republicanism" as the "sacrifice of individual interests to the greater good of the whole."[64] The "greater good" took precedence over any and everything else, even liberty.[65] This hierarchy of values was a constant and consistent theme of the republican writers whose works provided the intellectual framework of the political thought of the founding generation.[66]

Algernon Sydney, whose works were widely read and cited in the English colonies, wrote that the "restraint of liberty" is necessary to protect

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[59] *Id.*

[60] *See id.*

[61] *See id.*

[62] For those who have raised this question, see Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 227–30 (1999); Lawrence Delbert Cress, *An Armed Community*: *The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 33–34 (1984).

[63] Cress, *supra* note 62, at 32–34.

[64] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, 53, 53 (1972); 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION ITS ORIGINS AND DEVELOPMENT 69, 70 (7th ed. 1991); Lawrence Delbert Cress, *A Well-Regulated Militia: The Origins and Meaning of the Second Amendment*, *in* WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? 51, 57–58 (Saul Cornell ed., 2000).

[65] WOOD, *supra* note 64, at 54–55.

[66] *Id.* at 53–54.

"the good which man naturally desires for himself, children, and friends."[67] In his *System of Moral Philosophy*, Francis Hutcheson, another colonial favorite, maintained that through this restraint, civil laws, "so far from excluding liberty, . . . are its natural and surest defence" because, without it, "there would be no security of any right in society."[68]

This was true even when the most precious rights were at stake. In his fiery argument before the Massachusetts Superior Court in 1761 that the Crown's writs of assistance that facilitated searches for contraband were unconstitutional—an argument that John Adams maintained, "the child independence was born"[69]—James Otis had to acknowledge that, when the public good demanded it, even the sacred right to the inviolability of home and hearth had its limitations:

> This Writ is against the fundamental Principles of Law. The Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle, not with standing all his Debts, and civil Processes of any kind. —But For flagrant Crimes, and in Cases of great public Necessity, the Priviledge may be [encroached?] on. For Felonies an officer may break upon Prossess, and oath—i.e. by a Special Warrant to search such an House, sworn to be suspected, and good Grounds of suspicion appearing.[70]

The authors of the Pennsylvania Minority Report shared this republican concept.[71] After the Pennsylvania Ratifying Convention, John Smilie, one of the most outspoken leaders of the Anti-Federalists at the convention, and George Bryan, who authored the Minority Report, collaborated with a third Anti-Federalist, James Hutchinson, in a series of newspaper essays that

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[67] ALGERNON SYDNEY, THE WORKS OF ALGERNON SYDNEY 162 (Thomas Hollis ed., 1772).

[68] 2 FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 281 (1755).

[69] Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 THE WORKS OF JOHN ADAMS 244, 247–48 (Charles Francis Adams ed., 1856).

[70] James Otis, *Petition of Lechmere (Argument on Writs of Assistance)* 1761, *in* 2 LEGAL PAPERS OF JOHN ADAMS 106, 125–26 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (appears as in original). The word "encroached" is not clear in the manuscript. *Id.* at 126 n.63.

[71] *See* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, 85 (1999) [hereinafter THE OTHER FOUNDERS]; R. Carter Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention, 1787*, 22 WM. & MARY Q. 301, 309 (1965); Saul Cornell, *Notes and Documents: Reflections on "The Late Remarkable Revolution in Government": Aedanus Burke and Samuel Bryan's Unpublished History of the Ratification of the Federal Constitution*, 112 PA. MAG. HIST. & BIOGRAPHY 103, 107–108 (1988).

attacked the proposed Constitution and demanded a bill of rights.[72] Using the pseudonym "The Old Whig," Smilie and his cohorts remained true to the classic republican ideal that the good of the community came before even the most precious individual rights.[73]

In an installment published on February 6, 1788, they made this point as emphatically as possible: "An individual ought to submit to be tossed about, imprisoned, and treated injuriously, if the good of his country should require it; and every individual in the community ought to strip himself of some convenience for the sake of the public good."[74]

Even if it was a historical individual right, the Second Amendment's "right to keep and bear arms" was a right subject to limitations for the same reason. The history of the thirteen colonies and the early republic demonstrates that when the public good so demanded, the use, possession, and ownership of firearms was consistently and repeatedly regulated, limited, and even denied.[75]

IV. THE REGULATION OF FIREARMS

The need to protect the general welfare of the community often was emphasized in the preambles to colonial and early state restrictions on the use and ownership of weapons.[76] For example, the introduction to one of the first limitations on the use of firearms—a 1656 Virginia act—explained its purpose as follows:

> WHEREAS . . . the comon enemie the Indians, if opportunity serve, would suddenly invade this collony to a totall subversion of the same, and whereas the only means

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[72] *See supra* note 71 and accompanying text.

[73] THE OTHER FOUNDERS, *supra* note 71, at 85–86.

[74] An Old Whig, *The Old Whig, No. VII*, INDEP. GAZETTEER (Philadelphia), Feb. 6, 1788, at 2.

[75] THE OTHER FOUNDERS, *supra* note 71, at 86–87; *see* Act of Mar. 6, 1655 (Act XII), *in* 1 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 401, 401–02 (William W. Hening ed., 1809) [hereinafter 1VIRGINIA STATUTES]; *see also* An Act for Settling the Militia (May 6, 1691), *in* 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 231, 235–36 (1894) [hereinafter 1 NEW YORK COLONIAL LAWS] (forbid firing small arms unless "in case of any alarm Insurrection or any other lawfull Occation").

[76] *See* 1 VIRGINIA STATUTES, *supra* note 75; 1 NEW YORK COLONIAL LAWS, *supra* note 75; An Act for Regulating the Watch in the Town of Savannah (Mar. 27, 1759), *in* 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 290, 294 (Allen D. Candler ed., 1910) [hereinafter 18 GEORGIA COLONIAL RECORDS]; An Act for Better Ordering and Governing Negroes and Other Slaves in this Province, Sec. XLI (May 10, 1740), *in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 343, 412 (David J. McCord ed., 1840) [hereinafter 7 SOUTH CAROLINA STATUTES].

> for the discovery of their plotts is by allarms, of which no certainty can be had in respect of the frequent shooting of gunns in drinking, whereby they proclaim, and as it were, justifie that beastly vice spending much powder in vaine, that might be reserved against the comon enemie, *Be it therefore enacted* that [whoever] . . . shall . . . shoot any gunns at drinkeing (marriages and ffuneralls onely excepted) that such person or persons so offending shall forfeit 100 lb. of tobacco . . . .[77]

Prohibitions against firing weapons in towns proliferated as their populations increased and they became less rural and more urban.[78] One reason for this development was the danger to life and limb, as was described in the preamble to a 1740 Boston by-law:

> Whereas many Complaints have been made for Divers years past, that the Inhabitants and others in the Town of Boston, have been greatly endangered both in their Persons and Estates, by firing Guns at Pigeons and other Game, from the Streets, Yards, Pastures or other Inclosures, or from the Commons or Hills in this Town.[79]

In New York City, the problem was "the practise of great Numbers of Idle and disorderly persons . . . to hunt with Fire arms . . . to the Great Danger of the Lives of his Majesty's Subjects . . . ."[80] In Philadelphia, the populace was endangered by persons presuming "to shoot at, or kill . . . pidgeon, dove, partridge, or other fowl, in the open streets . . . or in the gardens, orchards and inclosures, adjoining upon and belonging to . . . the dwelling-houses within the limits of the said city . . . ."[81]

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[77] 1 VIRGINIA STATUTES, *supra* note 75 (appears as in original).

[78] *See* An Act to Prevent Hunting with Fire Arms in the City of New York, and the Liberties Thereof (Dec. 20, 1763), *in* 4 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 748, 748–49 (1894) [hereinafter 4 NEW YORK COLONIAL LAWS].

[79] City Document No. 66, Town Hall Meeting (Mar. 10, 1740), *in* A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON CONTAINING THE BOSTON RECORDS FROM 1729 TO 1742, 268 (1885) [hereinafter BOSTON RECORDS]. *See also* An Act to Prevent the Firing of Guns with Shot[t] or Ball in the Town of Boston (Sept. 13, 1746), *in* 3 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE OF THE PROVINCE OF THE MASSACHUSETTS BAY 305, 306 (1878) [hereinafter 3 MASSACHUSETTS ACTS & RESOLVES].

[80] 4 NEW YORK COLONIAL LAWS, *supra* note 78, at 748 (appears as in original).

[81] Act of April 9, 1760 (Sect. VII), *in* A DIGEST OF THE ORDINANCES OF THE CORPORATION OF THE CITY OF PHILADELPHIA; AND OF THE ACTS OF ASSEMBLY RELATING THERETO 76, 76 (John C. Lowber & C.S. Miller eds., 1822) (appears as in original). *See also* An Act for the Better Government of the City of Philadelphia (June 7, 1712), *in* 2 THE STATUTES AT LARGE

The specter of fire also led to weapons regulation in the colonies' growing population centers.[82] Black powder, flint, steel, and spark-ignited explosions propelling projectiles were a dangerous combination in the wooden towns.[83] The very description of the weapons—"firearms"—was a portent of the possibilities of conflagration. Confronted with potential disaster, legislators took steps to curb dangerous entertainments.[84] Philadelphia made it illegal for any person to "fire any gun or other fire-arm[s] . . . or [to] throw or fire any squibs, rockets or other fireworks" within the city.[85] Similar laws applied in New York, Charleston, and Newport.[86] Charleston adopted its version in the first year of the city's incorporation.[87]

Legislatures sought to limit the range of possible destruction of house fires by limiting the amount of gunpowder that citizens could store in their homes.[88] The amount permitted varied from city to city and from time to

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OF PENNSYLVANIA FROM 1682 TO 1801, 419, 420–21 (James T. Mitchell & Henry Flanders eds., 1896) [hereinafter 2 PENNSYLVANIA STATUTES].

[82] *See* An Act for Preventing Accidents that May Happen by Fire (Aug. 26, 1721), *in* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 158, 159–160 (Alexander James Dallas ed., 1797) [hereinafter 1 COMMONWEALTH OF PENNSYLVANIA].

[83] *See* An Act for the Continuance of an Act, Entitled "An Act for the Better Securing the City of Philadelphia from the Danger of Gunpowder" (May 8, 1747), *in* 5 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 52, 52–53 (James T. Mitchell & Henry Flanders eds., 1898) [hereinafter 5 PENNSYLVANIA STATUTES].

[84] *See id.*

[85] An Act for the More Effectual Preventing Accidents Which May Happen by Fire and for Suppressing Idleness, Drunkenness and other Debaucheries (Feb. 9, 1750), *in* 5 PENNSYLVANIA STATUTES, *supra* note 83, at 108. *See also* 1 COMMONWEALTH OF PENNSYLVANIA, *supra* note 82, at 159.

[86] *See* An Act for the More Effectual Prevention of Fires in the City of New York (Dec. 30, 1769), *in* 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 11, 12–13 (1894) [hereinafter 5 NEW YORK COLONIAL LAWS]; An Ordinance for Preventing, as Much as May Be, Accidents Which May Happen by Fire in Charleston, for Preserving the Fire-Engines in the Said City, and for Rendering the Same as Useful as May Be, in Case of Fire, and for Other Purposes Therein Mentioned, *in* ORDINANCES OF THE CITY COUNCIL OF CHARLESTON, IN THE STATE OF SOUTH CAROLINA, PASSED SINCE THE INCORPORATION OF THE CITY 256 (Alexander Edwards ed., 1802) [hereinafter ORDINANCES OF CHARLESTON]; An Act for Preventing of Mischief Being Done in the Town of Newport . . . by Firing of Guns and Pistols, and Throwing of Squibs, Fire-works, &c. (1731), *in* 4 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 463 (John Russell Bartlett ed., 1859) [hereinafter 4 RHODE ISLAND RECORDS].

[87] *See* ORDINANCES OF CHARLESTON, *supra* note 86, at 41.

[88] *See* An Act to Prevent the Keeping of Large Quantities of Gunpowder in Private Houses in Portsmouth & for Appointing a Keeper of the Magazine Belonging to Said Town (Feb. 28, 1786), *in* 5 LAWS OF NEW HAMPSHIRE INCLUDING PUBLIC AND PRIVATE ACTS, RESOLVES, VOTES, ETC. 127, 127–28 (1916) [hereinafter 5 LAWS OF NEW HAMPSHIRE].

time.[89] Concerned that "the keeping of large quantities of Gunpowder in private houses in Portsmouth . . . would greatly endanger the lives and properties of the inhabitants thereof in Case of Fire," the New Hampshire legislature limited the amount of gunpowder that could be kept in citizens' homes to ten pounds to "be kept in a tin Cannister properly secured for that purpose . . . ."[90] A 1701 Pennsylvania statute allowed only six pounds per household that was raised to twelve pounds in 1725.[91] On the other hand, the New York law went the other way, from twenty-eight pounds in 1763 to six in a 1772 statute.[92]

In 1783, the Massachusetts General Court addressed the danger presented by "loaded Arms in the Houses of the Town of Boston . . . to the Lives of those who are disposed to exert themselves when a Fire happens to break out in said Town."[93] The statute that the General Court passed that year made it unlawful to keep in "any Dwelling House, Stable, Barn, Out House, Ware House, Store, Shop, or other Building . . . Fire Arm[s], loaded with, or having Gun Powder in the same . . . ."[94]

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[89] *See id.* *See also* An Act Providing in Case of Fire Breaking Out in the Town of Newport, and for Other Purposes Therein Mentioned (Jan. 1798), THE PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS 557, 562–63 (1798) [hereinafter RHODE ISLAND PUBLIC LAWS].

[90] 5 LAWS OF NEW HAMPSHIRE, *supra* note 88. *See also* RHODE ISLAND PUBLIC LAWS, *supra* note 89, at 453 (appears as in original) (maximum of twenty-five pounds "in a tin powder flask").

[91] *See* An Act for Preventing Accidents that Happen by Fire in the Towns of Bristol (Formerly Called Buckingham), Philadelphia, Germantown, Derby, Chester, Newcastle and Lewes within This Government (Oct. 28, 1701), *in* 2 PENNSYLVANIA STATUTES, *supra* note 81, at 162–64; An Act for the Better Securing the City of Philadelphia from the Danger of Gunpowder (Aug. 14, 1725), *in* 4 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 31, 33 (James T. Mitchell and Henry Flanders eds., 1898) [hereinafter 4 PENNSYLVANIA STATUTES].

[92] *See* A Law for the Better Securing of the City of New-York, from the Danger of Gun-Powder, *in* LAWS, STATUTES, ORDINANCES AND CONSTITUTIONS, ORDAINED, MADE AND ESTABLISHED, BY THE MAYOR, ALDERMAN, AND COMMONALTY, OF THE CITY OF NEW-YORK 39, 39 (1763) [hereinafter CITY OF NEW-YORK]; An Act to Prevent the Danger Arising from the Pernicious Practice of Lodging Gun Powder in Dwelling Houses Stores or Other Places Within the City of New York or on Board of Vessels Within the Harbour (Mar. 24, 1772), *in* 5 NEW YORK COLONIAL LAWS, *supra* note 86, at 363–64.

[93] An Act in Addition to the Several Acts Already Made for the Prudent Storage of Gun Powder Within the Town of Boston (Mar. 1, 1783), *in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 119, 119–20 (1890) [hereinafter COMMONWEALTH OF MASSACHUSETTS].

[94] *Id.* at 120 (appears as in original).

From early on, colonies limited hunters in their use of firearms.[95] Many of these restrictions were similar to laws that we have today establishing a "season" that specified when game could be hunted, and banning such hunting at any other time of the year.[96] Often, these laws protected deer that were viewed as a valuable community asset.[97] So too were "waterfowl of divers[e] kinds" to the inhabitants of Massachusetts who valued them for "both meat and feathers."[98] Unfortunately, the birds were "affrighted and driven away by many persons" shooting at them from "boats, canoo's, floats or other vessel[l]s . . . at distance from the shoar, upon the flatts and feeding grounds" so the legislature made it a crime to do so.[99]

Colonials also faced restrictions as to where they could hunt.[100] An early Virginia statute was somewhat typical:

> Whereas the rights and interests of the inhabitants are very much infringed by hunting and shooting of diverse men upon their neighbors dividends . . . . *Be it therefore enacted* that if any planter or other shall hunte or shoote within the lymitts of anothers dividend without leave first obteyned from the proprietor, he or they soe offending shall forfeit for

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[95] *See, e.g.*, An Act to Prevent Killing Deer, at Unseasonable Time (1739), *in* 23 THE STATE RECORDS OF NORTH CAROLINA 128 (Walter Clark ed., 1904) [hereinafter 23 RECORDS OF NORTH CAROLINA]; An Act for the Preservation of Deer, and to Prevent the Mischiefs Arising from Hunting at Unseasonable Times (Aug. 23, 1769), *in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 310 (Thomas Cooper ed., 1838) [hereinafter 4 SOUTH CAROLINA STATUTES] (providing for an exception when killing deer for food); An Act to Prevent the Killing of Deer out of Season (Nov. 27, 1741), *in* 3 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 196 (1894) [hereinafter 3 NEW YORK COLONIAL LAWS]; An Act to Prevent the Killing of Deer out of Season, and Against Carrying of Guns or Hunting by Persons Not Qualified (1721), *in* 3 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 254, 255 (1896) [hereinafter 3 PENNSYLVANIA STATUTES].

[96] *See supra* note 95.

[97] *See* 4 SOUTH CAROLINA STATUTES, *supra* note 95, at 310–11.

[98] An Act for the Better Regulation of Fowling (Nov. 12, 1717), *in* 2 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 87, 87–88 (1874) [hereinafter 2 MASSACHUSETTS ACTS & RESOLVES].

[99] *Id.* at 88 (appears as in original).

[100] *See, e.g.*, Not to Shoote or Range Upon Other Mens Lands (1662), *in* 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, 96 (William Waller Hening ed., n.d.) [hereinafter 2 VIRGINIA STATUTES]. *See also* An Act to Prevent the Hunting of Deer and Other Wild Beasts Beyond the Limits of the Lands Purchased of the Indians by the Proprietaries of this Province and Against the Killing Deer Out of Season (Apr. 9, 1760), *in* 6 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 46, 46–47 (James T. Mitchell & Henry Flanders eds., 1899) [hereinafter 6 PENNSYLVANIA STATUTES].

> every such trespasse fower hundred pounds of tobacco . . . .[101]

Of course, there were variations.[102] A New Jersey law fined a non-resident more than twice as much as a resident if he presumed "to carry any Gun on any Lands not his own . . . ."[103] In South Carolina, distance, apparently, was the critical factor.[104] Liability attached if any person "hunt[ed] or rang[ed] on any lands . . . at a greater distance from his or her place of residence than seven miles . . . ."[105]

Carrying a weapon also could lead to sanctions in early America if a person carried that weapon in the wrong way or with the wrong people or with the wrong intent.[106] For example, an early order of the Common Council of the City of New York outlawed carrying "Daggers Durks Tucks in Canes, Pockett Pistolls Or Any Other Sortt of Concealed Weapons" as "Very Pernicious and Contrary to the Common Peace and Safty of the Governm[ent]."[107] In late seventeenth century Massachusetts, if you chose to "ride, or go armed offensively . . . in fear or affray of their majesties' liege people," you could be sent to prison.[108] An even harsher fate—death—awaited those who, like members of notorious gangs called "Black Boys," roamed Philadelphia in the 1770's "armed with swords, cutlasses, firearms and other offensive weapons, with their hands and faces blacked" committing criminal acts.[109]

Although—as in the case of convicted "Black Boys" who faced execution—some of the penalties for firearms violations were severe, the

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[101] 2 VIRGINIA STATUTES, *supra* note 100, at 36 (appears as in original).

[102] *See, e.g.*, An Act for the Preservation of Deer and Other Game and to Prevent Trespassing with Guns (Dec. 21, 1771), *in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 343 (Samuel Allinson ed., 1776) [hereinafter ACTS OF NEW-JERSEY].

[103] *Id.* at 344.

[104] *See* 4 SOUTH CAROLINA STATUTES, *supra* note 95, at 311.

[105] *Id.*

[106] *See, e.g.*, Order of Common Council on March 23, 1684, *in* 1 MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK 1675–1776, 160–61 (1905).

[107] *Id.* (appears as in original).

[108] An Act for the Punishment of Criminal Offenders (Nov. 1, 1692), *in* 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 51, 51–53 (1869) [hereinafter 1 MASSACHUSETTS ACTS & RESOLVES].

[109] An Act for Punishing Wicked and Evil-Disposed Persons from Going Armed in Disguise and Doing Injuries and Violences to the Persons and Properties of His Majesty's Subjects Within This Province, and for the More Speedy Bringing the Offenders to Justice (Feb. 24, 1770), *in* 7 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 350, 350 (James T. Mitchell & Henry Flanders eds., 1900) [hereinafter 7 PENNSYLVANIA STATUTES].

majority of these kinds of weapons offenses carried relatively minor penalties.[110] In addition, most did not touch on the ownership of weapons. But there were some that did. The Massachusetts act that punished those who went around "armed offensively . . . in fear or affray of their majesties' liege people" provided that an accused offender found guilty went to prison "until he find sureties for the peace and good behavior."[111] The convicted offender also lost "his armour and weapons," which were "apprized and answered to the king as forfeited."[112]

In New Jersey, a non-resident found guilty of carrying a gun on another's land without permission forfeited "his . . . Gun or Guns to any Person or Persons who shall inform and prosecute the same . . . ."[113] A person who violated a 1766 North Carolina statute by illegally hunting deer had to pay a fine and "forfeit his Gun, or the Value thereof . . . ."[114] Massachusetts's law imposed a similar penalty for illegally carrying guns on some of the islands in Dukes County.[115]

Hunters who violated the Massachusetts statute that forbid shooting water fowl from boats were "prohibited and restrained from using a gun to shoot at waterfowl, for the space of three years . . . ."[116] Massachusetts also had two laws that, pending trial, deprived defendants of the firearms they were accused of misusing.[117] A 1713 statute that forbade the "discharge or fire off any gun upon Boston Neck, within ten rods of the road or highway" authorized "any freeholder, to arrest and take into custody any gun so fired off, and render the same to one of the next justices in Boston, in order to its

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[110] *See id. See, e.g.*, 1 MASSACHUSETTS ACTS & RESOLVES, *supra* note 108, at 52–53 (prison was comparatively minor to other similar laws).

[111] *See* 1 MASSACHUSETTS ACTS & RESOLVES, *supra* note 108, at 52–53.

[112] *Id.* at 53.

[113] ACTS OF NEW-JERSEY, s*upra* note 102, at 344.

[114] An Act to Amend an Act . . . to Prevent Killing Deer at Unseasonable Times . . . (1766), *in* 23 RECORDS OF NORTH CAROLINA, *supra* note 95, at 775–76.

[115] *See* An Act for the Protection and Security of the Sheep and Other Stock on Tarpaulin Cove . . . and Several Small Islands Contiguous, Situated in the County of Dukes County (Jan. 30, 1790), *in* COMMONWEALTH OF MASSACHUSETTS, *supra* note 93, at 437–38.

[116] An Act for the Better Regulation of Fowling (Nov. 12, 1717), *in* 2 MASSACHUSETTS ACTS & RESOLVES, *supra* note 98, at 87–88.

[117] *See* An Act to Prohibit Shooting or Firing Off Guns Near the Road or Highway on Boston Neck (Oct. 23, 1713), *in* 1 MASSACHUSETTS ACTS AND RESOLVES, *supra* note 108, at 720; An Act to Prevent the Firing of Guns Charged with Shot[t] or Ball in the Town of Boston (Sept. 13, 1746), *in* 3 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 305, 305–06 (1878) [hereinafter 3 MASSACHUSETTS ACTS & RESOLVES].

being produced at the time of tryal."[118] A later act "to Prevent the Firing of Guns . . . in the Town of Boston" authorized the same procedure.[119]

In Boston, Philadelphia, New York and Portsmouth, New Hampshire, storing more gunpowder than the amount permitted by law could result in forfeiture of the gunpowder.[120] Under the 1783 Massachusetts statute mentioned earlier, any firearms found in any house or other building in Boston "charged with or having in them any gunpowder" were "liable to be seized" by the town's fire wardens and, if found to be loaded in violation of the act, "adjudged forfeit, and sold at public auction."[121]

V. DISARMING "THE OTHER"

A. Native-Americans and Slaves

In providing for the seizure of guns and gunpowder, the above laws demonstrated a colonial readiness to limit the right to keep and bear arms if it was in the public interest to do so.[122] These laws usually were implemented on an individual basis, but provincial governments were not

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[118] *See* An Act to Prohibit Shooting or Firing Off Guns Near the Road or Highway on Boston Neck (Oct. 23, 1713), *in* 1 MASSACHUSETTS ACTS & RESOLVES, *supra* note 108, at 720 (appears as in original). *See also* Boston Selectmen's Minutes (Aug. 16, 1786), *in* A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, CONTAINING THE SELECTMAN'S MINUTES FROM 1776 THROUGH 1786, 322 (1894) (Aaron Blaney appointed to inform on persons firing guns on Boston Neck "and to execute the Law by seizing the Guns & prosecuting such offenders . . . ." (appears as in original)).

[119] 3 MASSACHUSETTS ACTS & RESOLVES, *supra* note 117, at 305–06.

[120] An Act in Addition to an Act Intitled . . . An Act for Erecting of a Powder-House in Boston (Oct. 4, 1780), *in* 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 1418 (1886) [hereinafter 5 MASSACHUSETTS ACTS & RESOLVES]; An Act for the Better Securing the City of Philadelphia and Its Liberties from Danger of Gunpowder (Dec. 6, 1783) *in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 209, 209–10 (James T. Mitchell & Henry Flanders eds., 1906) [hereinafter 11 PENNSYLVANIA STATUTES]; An Act to Prevent the Danger Arising from the Pernicious Practice of Lodging Gun Powder in Dwelling Houses, Stores, or Other Places Within Certain Parts of the City of New York . . . (Apr.13, 1784), *in* 1 LAWS OF THE STATE OF NEW YORK 627, 627 (1886) [hereinafter 1 LAWS OF NEW YORK]; An Act to Prevent the Keeping of Large Quantities of Gunpowder in Private Houses in Portsmouth . . . (Feb. 28, 1786), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 88, at 127–28.

[121] An Act in Addition to the Several Acts Already Made for the Prudent Storage of Gun Powder Within the Town of Boston (Mar. 1, 1783), *in* THE CHARTER OF THE CITY OF BOSTON, AND ORDINANCES MADE AND ESTABLISHED BY THE MAYOR, ALDERMEN, AND COMMON COUNCIL, WITH SUCH ACTS OF THE LEGISLATURE OF MASSACHUSETTS, AS RELATE TO THE GOVERNMENT OF SAID CITY 137, 137–38 (1827).

[122] *See supra* Part IV.

averse to disarming entire groups of people.[123] The list is a long one: Native Americans, slaves, free blacks, white servants, antinomians, "Papists," "reputed Papists," Acadians, nonjurors, the disaffected, those who might be disaffected, and, in many cases, fellow countrymen who had a gun that the government decided that it needed.[124]

The question of whether to sell or otherwise provide arms to Native Americans presented a complex and continuing problem for the English settlors.[125] The Indian trade, especially in skins and furs, was important to the economies of many colonies.[126] Alliances with friendly tribes also were critical to those colonies facing threats from hostile Indians or foreign enemies.[127] Both the trade and the alliances were fueled by manufactured goods, including firearms.[128] Moreover, Indian alliances sometimes required supplying friendly tribes with weapons and training.[129] Of course, providing Indians with arms had the potential danger of those weapons being used against the very persons who had supplied them.[130] The colonial laws dealing with Indians and firearms reflected these tensions.[131]

Different colonies confronted the dilemma in different ways.[132] In their early years, Massachusetts Bay and Rhode Island took a zero tolerance approach.[133] A 1637 Massachusetts law ordered "that no man . . . shall sell or give to any Indian, directly or indirectly, any . . . gun, or any gunpowder, or shott, . . . or armour . . . ."[134] Rhode Island issued an edict that "the Indians residing upon the Island shall bee forthwith disarmed of all sorts of

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[123] *See, e.g.*, Order (May 17, 1637), *in* 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 195 (Nathanial B. Shurtleff ed., 1853) [hereinafter 1 RECORDS OF MASSACHUSETTS].

[124] *See, e.g.*, *id.*

[125] *See, e.g.*, Act XVII (March 1658), *in* 1 VIRGINIA STATUTES, *supra* note 75, at 441.

[126] *See, e.g.*, An Act to Prohibit Trade and Commerce with the Eastern Indians (Oct. 7, 1721), *in* 2 LAWS OF NEW HAMPSHIRE 364 (Albert Stillman Batchellor ed., 1913) [hereinafter 2 LAWS OF NEW HAMPSHIRE].

[127] *See, e.g.*, An Act for the Better Enabling the Right Honourable Governor . . . to Raise a Force Against Our Publick Enemies . . . (Feb. 14, 1708), *in* 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 320, 320–21 (Thomas Cooper ed., 1837) [hereinafter 2 SOUTH CAROLINA STATUTES].

[128] *See id.*

[129] *See id.* at 321 (to encourage "our Northern Indians . . . to fall upon and attack the said enemys . . . fifty guns, one thousand flints, two hundred pounds of powder, and four hundred pounds of bullets, be provided at the publick charge . . . .") (appears as in original).

[130] *See* 2 LAWS OF NEW HAMPSHIRE, *supra* note 126.

[131] *See id.*

[132] *See, e.g.*, 1 RECORDS OF MASSACHUSETTS, *supra* note 123.

[133] *See id.* at 196.

[134] The law also forbade the repair of any gun that belonged to an Indian. *Id.* (appears as in original).

armes . . . ."[135] While these methods might work in small areas populated with relatively docile Indians, attempts to seize weapons from warriors on a meaningful scale were impractical, if not dangerous.[136] In most cases, a different approach was necessary.

South Carolina attempted to mitigate the threat with a law that made it a crime for "any person or persons . . . [to] carry any [gunsmith's] tooles to, or mend any guns or fire arms for Indians" in certain areas of the colony.[137] Most provinces, however, opted to prohibit the transfer of firearms, powder, and ammunition to those Indians deemed dangerous but only for so long as they continued to be deemed dangerous.[138]

A ban on gun sales often resulted from an outbreak of hostilities on the frontier such as that described in the rather restrained language of a 1721 Massachusetts act: "the Eastern Indians . . . committed several wrongs and injuries to his majesty's liege people inhabiting the county of York . . . and have very lately, in a very insulting, hostile and rebellious manner, appeared . . . in arms, under French colours."[139] In such situations, as the Pennsylvania legislature said in reference to an outbreak there in 1763, "it must be . . . of dangerous consequence to supply the said Indians with guns, gunpowder or other warlike stores."[140]

The 1721 act forbidding arms sales to the Eastern Indians of Massachusetts was repealed in 1726 after those Indians "submitted themselves, and recognized their subjection and obedience, to the crown of Great Britain." But, sometimes, the situation was far more complicated, and the laws shifted with shifts in the view of what constituted the common good.[141] Virginia is a case in point. In 1643, the colony enacted a statute,

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[135] Acts, Orders and Proceedings of the Governor and Councill of His Majestys Collony of Rhode Island and Providence Plantations (May 1667), *in* 2 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 191, 193 (John Russell Bartlett ed., 1857) (appears as in original).

[136] *See* 7 PENNSYLVANIA STATUTES, *supra* note 109, at 350.

[137] An Act for Laying a Tax or Duty on Skins or Furs, for the Publick Use of This Province, and Regulating the Indian Trade (Sept. 1691), *in* 2 SOUTH CAROLINA STATUTES, *supra* note 127, at 64, 66.

[138] *See, e.g.*, An Act to Prohibit the Selling of Guns, Gunpowder or Other Warlike Stores to the Indians (Oct. 22, 1763), *in* 6 PENNSYLVANIA STATUTES, *supra* note 100, at 319–20.

[139] An Act to Prohibit Trade and Commerce with the Eastern Indians (Sept. 9, 1721), *in* 2 MASSACHUSETTS ACTS & RESOLVES, *supra* note 98, at 228 (appears as in original). *See also* 2 LAWS OF NEW HAMPSHIRE, *supra* note 126.

[140] *See* An Act to Prohibit the Selling of Guns, Gunpowder or Other Warlike Stores to the Indians (Oct. 22, 1763), *in* 6 PENNSYLVANIA STATUTES, *supra* note 100, at 319.

[141] An Act For the Allowing Necessary Suppl[ie][y]s to the Eastern Indians, and For Regulating Trade with Them, and for Repealing an Act Entituled "An Act to Prohibit Trade and Commerce with the Eastern Indians . . . " (Jan. 1, 1726), *in* 2 MASSACHUSETTS ACTS & RESOLVES, *supra* note 98, at 365–66.

that made it a crime to "sell or barter with any Indian or Indians for peece, powder and shott . . . ."[142] The legislature reenacted the statute in 1658.[143] The next year, everything changed.[144] The reason for the change—the Dutch in New Amsterdam were furnishing "the Indians with gunns, powder & shott" thereby, depriving Virginia of "the trade of beaver to our greate losse and their profit . . . ."[145] Deciding that it was "impolitick to debarre ourselves from soe greate an advantage as might accrue to us by the Indian trade when we could not prevent"[146] the Dutch from supplying guns, the Virginians passed an act declaring "Free Trade with the Indians": "*It is enacted*, That every man may freely trade for guns, powder and shott: It derogateing nothing from our safety and adding much to our advantage . . . ."[147]

Then, in 1665, everything changed again.[148] In the previous year, the English had seized New Amsterdam, which removed "those envious neighbors," leaving the fur trade to the Virginians who, at the time were facing "eminent danger" with a shortage of available arms and ammunition.[149] Consequently, the colony, once again decreed "that the sale of armes, gunpowder, and shott be wholly prohibited . . . ."[150]

The slave population was another group whose potential for violence raised the question of disarmament, but here the response was far less ambiguous, especially in the southern colonies.[151] Virginia, Maryland, Georgia, and the Carolinas had batteries of laws aimed at controlling slaves, and control included keeping those slaves disarmed.[152] While the titles of

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[142] Act XXIII (Mar. 1643), *in* 1 VIRGINIA STATUTES, *supra* note 75, at 255 (appears as in original).

[143] Act XVII (Mar. 1658), *in* 1 VIRGINIA STATUTES, *supra* note 75, at 441.

[144] *See* Act XXIV: Free Trade with the Indians (Mar. 10, 1659), *in* 1 VIRGINIA STATUTES, *supra* note 75, at 525.

[145] *Id.* (appears as in original).

[146] Act III: An Act Prohibiting the Sale of Armes to Indians (Oct. 17, 1665), *in* 2 VIRGINIA STATUTES, *supra* note 100, at 215 (appears as in original).

[147] Act XXIV: Free Trade with the Indians (Mar. 10, 1659), *in* 1 VIRGINIA STATUTES, *supra* note 75, at 525.

[148] *See* Act III: An Act Prohibiting the Sale of Armes to Indians (Oct. 17, 1665), *in* 2 VIRGINIA STATUTES, *supra* note 100, at 215.

[149] *Id.*

[150] *Id.* (appears as in original).

[151] *See, e.g.*, Act X: An Act for Preventing Negroes Insurrections (June 1680), *in* 2 VIRGINIA STATUTES, *supra* note 100, at 481.

[152] Some of the other colonies passed legislation curbing gun ownership by slaves, but not nearly to the extent that the southern colonies did. For example, after the New York City Slave Revolt of 1712, the colony passed a law that forbade any slave "to have or use any Gun or Pistoll but in his Master's or Mistresse's presence or by their direction." An Act for Preventing Suppressing and Punishing the Conspiracy and Insurrection of Negroes and Other Slaves (Dec. 10, 1712), *in* 1 NEW YORK COLONIAL LAWS, *supra* note 75, at 761, 766–67.

many of those codes provide little indication of their desperate purpose, the title of a 1680 Virginia statute left no doubt.[153] It was captioned: "An Act for Preventing Negroes Insurrections."[154]

These statutes were aimed at slave use, possession, and ownership of weapons.[155] Section XXIII of the 1740 South Carolina was typical of the type of law that controlled a slave's use of weapons:

> *It shall not be lawful for any slave, unless in the presence of some* white person, to carry or make use of fire-arms, or any offensive weapen whatsoever, unless such negro or slave shall have a ticket or licence in writing from his master, mistress or overseer, to hunt and kill game, cattle, or mischievous birds, or beasts of prey, . . . or unless there be some white person of the age of 16 years or upwards, in the company of such slave when he is hunting or shooting; or that such slave be actually carrying his master's arms to or from his master's plantation, by a special ticket for that purpose . . . .[156]

The laws forbidding slaves from the ownership or possession of weapons typically were enforced by slave patrols—statutorily authorized, quasi-military troops of volunteers who rode the counties in search of

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New Jersey made it a crime for a slave "to hunt or carry a Gun on the Lord's Day." An Act to Restrain Tavernkeepers and Others from Selling Strong Liquors to Servants, Negroes and Mulatto Slaves, and to Prevent Negroes and Mulatto Slaves from Meeting in Large Companies, from Running about at Night, and from Hunting or Carrying a Gun on the Lord's Day (Oct. 23, 1751), *in* ACTS OF NEW-JERSEY, *supra* note 102, at 191–92.

[153] *See* Act X: An Act for Preventing Negroes Insurrections (June 1680), *in* 2 VIRGINIA STATUTES, *supra* note 100, at 481.

[154] *Id.*

[155] *See, e.g.*, *id.*

[156] An Act for the Better Ordering and Governing Negroes and Other Slaves in This Province (May 10, 1740), *in* THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA, FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790, INCLUSIVE 163, 168 (John Faucheraud Grimké ed., 1790) [hereinafter PUBLIC LAWS OF SOUTH-CAROLINA]. *See also* An Act for Ordering and Governing Slaves Within this Province . . . (May 10, 1770), *in* DIGEST OF THE LAWS OF THE STATE OF GEORGIA, FROM ITS SETTLEMENT AS A BRITISH PROVINCE, IN 1755, TO THE SESSION OF THE GENERAL ASSEMBLY IN 1800, INCLUSIVE 426, 432 (Horatio Marbury & William H. Crawford eds., 1802) [hereinafter LAWS OF THE STATE OF GEORGIA]; An Act Concerning Servants and Slaves (1741), *in* 23 RECORDS OF NORTH CAROLINA, *supra* note 95, at 191, 201; An Act Relating to Servants and Slaves (1715), *in* 30 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 289, 291 (William Hand Browne ed., 1910) [hereinafter 30 ARCHIVES OF MARYLAND]; An Act for the Trial of Negroes (1721), *in* 1 LAWS OF THE STATE OF DELAWARE 102, 104 (1797).

runaway slaves, suspicious persons, and forbidden arms.[157] The patrols had the power to disarm those slaves found abroad with weapons in violation of the law.[158] They also usually had authority to "carefully search or break open if refused to enter, all negroe houses for offensive weapons, and any guns, swords, or other weapons, for which they have no licence from their master, mistress or overseer, to take away and to convert to the use of the patrol without further law or process[.]"[159]

It can be argued that disarming Native Americans and slaves has little relevance to the Second Amendment debate because these groups were not members of the polity that disarmed them, and, therefore, had no claim to protection by that polity of any right to bear arms.[160] This contention fails to recognize the reach, scope, and affect of these laws on the ownership of guns by individuals who were, in fact, members of the polity.

The high stakes involved in arming potentially hostile Indians mandated severe penalties for those who violated the laws that prohibited it.[161] Stiff fines were common.[162] An offender could also face corporeal punishment and prison time.[163] A 1763 Pennsylvania statute called for all three: a fine of £500, 39 lashes, and twelve months in "the common gaol of the county."[164] Repeated offenses brought even harsher treatment.[165] An offender convicted a second time for violating the 1721 Massachusetts "Act

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[157] *See* An Act for Establishing and Regulating of Patrols (Feb. 12, 1737), *in* 3 THE STATUTES AT LARGE OF SOUTH CAROLINA 456, 456 (Thomas Cooper ed., 1838) [hereinafter 3 SOUTH CAROLINA STATUTES].

[158] *See* An Act for Regulating Patrols in This Province (Apr. 9, 1734), *in* 3 SOUTH CAROLINA STATUTES, *supra* note 157, at 395–96.

[159] *Id. See also* An Additional Act to an Act Concerning Servants and Slaves (1753), *in* 23 RECORDS OF NORTH CAROLINA, *supra* note 95, at 388–89; An Act to Amend and Continue an Act for Establishing and Regulating Patrols . . . (Dec. 24, 1768), *in* 19 COLONIAL RECORDS OF THE STATE OF GEORGIA PART I 75, 76–8 (Alan D. Candler ed., 1911).

[160] *See* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1680–81 (2012).

[161] *See* An Act Prohibiting the Sale of Armes to Indians (Oct. 17, 1665), *in* 2 VIRGINIA STATUTES, *supra* note 100, at 215 (10,000 pounds of tobacco or two years of imprisonment).

[162] *See, e.g.*, An Act to Prohibit Trade and Commerce with the Eastern Indians (Sept. 9, 1721), *in* 2 MASSACHUSETTS ACTS & RESOLVES, *supra* note 98, at 228 (£500 and twelve months imprisonment).

[163] *See, e.g.*, *id;* An Act Prohibiting the Sale of Armes to Indians (Oct. 17, 1665), *in* 2 VIRGINIA STATUTES, *supra* note 100, at 215.

[164] An Act to Prohibit the Selling of Guns, Gunpowder or Other Warlike Stores to the Indians (Oct. 22, 1763), *in* 6 PENNSYLVANIA STATUTES, *supra* note 100, at 319–20 (appears as in original).

[165] *See* An Act to Prohibit Trade and Commerce with the Eastern Indians (Sept. 9, 1721), *in* 2 MASSACHUSETTS ACTS & RESOLVES, *supra* note 98, at 228.

to Prohibit Trade and Commerce with the Eastern Indians" was "deemed a felon" and condemned to "suffer the pains of death."[166]

There was another aspect of the arms-to-Indian issue that casts light on the colonial take on the sanctity of weapons ownership.[167] The preamble of a Virginia statute described the problem:

> And whereas it is informed that divers persons do [make use of] Indians to kill deare or other game, And do furnish the said Indians with peeces, powder and shott, by which great abuse, not onely the Indians (to the great indangering of the colony) are instructed in the use of our arms, But have opportunity given them to store themselves as well as with arms as powder and shott . . . .[168]

The act addressed the problem by making it "lawfull for any person meeting with any such Indian so furnished, to take away either peece, powder or shott," and for the owner who had lent the arms to lose ownership of them.[169] Similarly, a Connecticut statute provided that "every Gun lent . . . to any Indian, or Indians shall be forfeited."[170] An inhabitant of Maryland who delivered a gun or ammunition to an Indian faced the loss of his "Gunn to him that shall make Seizure thereof . . . ."[171]

The premise reflected in these laws—that citizens should lose their weapons if they betrayed the common good by making those weapons available to those who might endanger the community—also found expression in provincial slave laws.[172] Although a slave who violated these laws faced harsh discipline, responsibility for insuring that slaves obeyed the laws fell on their owners who often were punished for their slaves' indiscretions.[173] For example, South Carolina law assumed that slaves might use "drums, horns, and other loud instruments [to] call together or give sign or notice to one another of their wicked designs and purposes," therefore, a

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[166] *Id. See also* Act XXIII (Mar. 1643), *in* 1 VIRGINIA STATUTES, *supra* note 75, at 256 (second conviction–forfeiture of entire estate).

[167] *See* Act XXIII (Mar. 1643), *in* 1 VIRGINIA STATUTES, *supra* note 75, at 255.

[168] *Id.* (appears as in original).

[169] *Id.* at 255–56 (appears as in original).

[170] ACTS AND LAWS OF HIS MAJESTY'S ENGLISH COLONY OF CONNECTICUT IN NEW-ENGLAND IN AMERICA 98 (1750).

[171] Delivering of Gunns to Indians (October 1654), *in* ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 349 (William Hand Browne ed., 1883).

[172] An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province (May 10, 1740), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 397, 404–05.

[173] *See id.*

master who allowed his slaves to beat drums, blow horns, or use other loud instruments could be fined £10 per offense.[174] A slave owner also could be fined £10 each time he or she permitted a slave "to go and work out of their respective houses or families, without a ticket in writing . . . ."[175] If a slave was allowed to "wear clothes much above the condition of slaves," his or her master forfeited such clothes to whoever should seize them.[176]

The same held true for owners whose slaves violated weapons laws.[177] Slaves were punished for illegally possessing, carrying, or using guns, but so too were their masters for not preventing their slaves from doing so.[178] The punishment often included the master's forfeiture of the gun involved.[179] In colonial Maryland, a slave found guilty of carrying a gun from his master's land without a license from his master to do so, "shall be Lyable to be Carryed before a Justice of Peace And be whipt and his [or, more likely, his master's] Gun . . . shall be forfeited to him that shall seize the Same . . . ."[180]

North Carolina law also mandated that weapons seized from slaves be forfeited unless his or her master or overseer could prove "that such Slave carrying a Gun, Sword, or other Weapon, was without their Consent or Knowledge."[181] Similar laws of Virginia and Georgia provided that the owner of a weapon seized from a slave lost title to it unless he or she could "show cause why the same should not be condemned as forfeited."[182] South Carolina gave whites this opportunity, but denied it to people of color.[183] If

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[174] *Id.* at 410.

[175] *Id.* at 408.

[176] An Act for the Better Ordering and Governing Negroes and Other Slaves (Mar. 29, 1735), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 385, 396.

[177] An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province (May 10, 1740), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 397, 405.

[178] *Id.* at 404–05.

[179] *Id.* at 405.

[180] An Act Relating to Servants and Slaves (1715), *in* 30 ARCHIVES OF MARYLAND, *supra* note 156, at 291 (appears as in original).

[181] An Additional Act to an Act Concerning Servants and Slaves (1753), *in* 23 RECORDS OF NORTH CAROLINA, *supra* note 95, at 389.

[182] An Act for Ordering and Governing Slaves within this Province . . . (May 10, 1770), *in* LAWS OF THE STATE OF GEORGIA, *supra* note 156, at 433. *See also* An Act Concerning Slaves (Oct. 1785), *in* 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 182 (William Waller Hening ed., 1823) [hereinafter 12 VIRGINIA STATUTES]; An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province (May 10, 1740), *in* PUBLIC LAWS OF SOUTH-CAROLINA, *supra* note 156, at 168–69; An Act Concerning Servants and Slaves (1741), *in* 23 RECORDS OF NORTH CAROLINA, *supra* note 95, at 201.

[183] *See* An Additional and Explanatory Act to an Act of the General Assembly of this Province, Entitled "An Act for the Better Orderings and Governing Negroes and Other Slaves

they loaned weapons to slaves, those weapons were confiscated without recourse.[184]

Slave owners were not the only free persons whose ownership and use of weapons were impacted by the slave laws.[185] Those laws could cast a wide net. Concerned that indentured servants might conspire with slaves to break their bonds, a North Carolina statute grouped servants with slaves in its prohibition against carrying guns off of their masters' plantations without written permission to do so.[186] When it came to weapons, Virginia did not distinguish between slaves, Native Americans, and free blacks:

> [N]o negroe, mulattoe, or Indian whatsoever, shall keep, or carry any gun, powder, shot, club, or other weapon, whatsoever, offensive, or defensive, but all and every gun, weapon, and ammunition, found in the custody or possession of any negroe, mulattoe, or Indian, may be seized by any person . . . .[187]

B. The Acadians

Transplanted in 1755 from the Canadian Maritimes and ordered dispersed among the American colonies, the Acadians were about 12,000 settlers of French descent who refused to swear allegiance to their new sovereign after France ceded their homeland, Acadia, to the British by the Treaty of Utrecht (1713).[188] The colonial governments neither wanted Acadians nor did they know what to do with them when they arrived.[189] The Acadians were predominantly farmers with no land and no money to buy

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in This Province . . . " (May 17, 1751), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 420, 422.

[184] *Id.*

[185] An Act concerning Servants & Slaves (1715), *in* 23 RECORDS OF NORTH CAROLINA, *supra* note 95, at 62–63.

[186] *Id.*

[187] An Act Directing the Trial of Slaves Committing Capital Crimes; and for the More Effectual Punishing Conspiracies and Insurrections of Them; and for the Better Government of Negroes, Mulattoes, and Indians, Bond or Free (Oct. 1748), *in* 6 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 104, 109 (William Waller Hening ed., 1819) [hereinafter 6 VIRGINIA STATUTES]. Another section of the act made an exception for those free blacks and Indians who were "house keeper[s]" who were permitted "to keep one gun, powder, and shot." *Id.* at 110. Slaves, free blacks, and Indians who lived on a "frontier plantation" were "permitted to keep and use guns, powder, shot, and weapons . . . by licence, from a justice of peace . . . ." *Id.*

[188] *See* E. Merton Coulter, *The Acadians in Georgia*, 47 GA. HIST. Q. 68, 68–9 (1963).

[189] *Id.*

land, which meant the colonial governments had to provide for them.[190] Moreover, as French Roman Catholics, the Acadians were seen as potential fifth columnists, especially in 1755 when a new war with France was brewing.[191] This was particularly so in Georgia and South Carolina, which feared external attacks from Indians and internal insurrections from their slave populations.[192]

Although the Acadians generally were "docile and well behaved," there was friction between the French émigrés and their English hosts.[193] Part of the problem stemmed from the fact that the Acadians clustered in the colonies' two biggest towns—Savannah and Charlestown—where they lived "in close and inconvenient habitations" and provided grist for the rumor mills.[194] In Savannah, they were accused of cutting and appropriating "to their own Use the most Valuable Timber belonging to many of the Inhabitants . . . ."[195] In Charleston, Acadians were linked in the public mind with a destructive fire on one of the city's wharves that "was thought to have been started by some 'hellish incendiary.'"[196]

The legislatures of Georgia and South Carolina felt an urgent need to act and decided on the same solution: scatter the Acadians throughout each respective province, make indentured servants of those who would not or could not obtain employment, and take away their guns.[197] Under the Georgia statute, it was unlawful for any Acadian "to have or use any fire Arms or other Offensive Weapons otherwise than in his Masters Plantation or immediately under his Inspection . . . ."[198] The South Carolina law was more severe.[199] It read that it "shall not be lawful for any of the said

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[190] Ruth Allison Hudnut & Hayes Baker-Crothers, *Acadian Transients in South Carolina*, 43 AM. HIST. REV. 500, 500 (1938); Marguerite B. Hamer, *The Fate of the Exiled Acadians in South Carolina*, 4 J. S. HIST. 199, 200 (1938).

[191] *See* Coulter, *supra* note 188, at 69.

[192] *See id.*; Hamer, *supra* note 190, at 200–01; Hudnut & Baker-Crothers, *supra* note 190, at 500–01.

[193] Hamer, *supra* note 190, at 206–07.

[194] *See* An Act for Disposing of the Accadians Now in Charlestown, by Settling One Fifth Part of Their Number in the Parishes of St. Philip and St. Michael, and the Other Four Parts of Them in the Several Other Parishes Within This Province (July 6, 1756), *in* 4 SOUTH CAROLINA STATUTES, *supra* note 95, at 31; Coulter, *supra* note 188, at 73.

[195] An Act for the Providing for & Disposing of the Acadians Now in This Province (Feb. 8, 1757), *in* 18 GEORGIA COLONIAL RECORDS, *supra* note 76, at 189.

[196] Hudnut & Baker-Crothers, *supra* note 190, at 508.

[197] *Id.*; An Act for the Providing for & Disposing of the Acadians Now in This Province (Feb. 8, 1757), *in* 18 GEORGIA COLONIAL RECORDS, *supra* note 76, at 190.

[198] An Act for the Providing for & Disposing of the Acadians Now in This Province, *in* 18 GEORGIA COLONIAL RECORDS, *supra* note 76, at 190–91.

[199] *See* An Act for Disposing of the Accadians Now in Charlestown, by Settling One Fifth Part of Their Number in the Parishes of St. Philip and St. Michael, and the Other Four Parts

Accadians, upon any account or pretence whatever, to make use of any fire-arms or other offensive weapon whatever . . . ."[200]

C. Sectarians and Catholics

As noted, one of the reasons why the Acadians were suspect and disarmed was because they were Catholics.[201] They were neither the first in the colonies to be disarmed because of their religion, nor would they be the last, but for these others, it was far different.[202] Unlike the Acadians, these others were not recent enemies with a foreign culture who spoke a foreign language.[203] They were countrymen and neighbors.[204]

It started with the sectarian squabbles in Puritan New England.[205] In the view of the Massachusetts General Court, the problem arose from the fact that the antinomian "opinions & revelations" of Anne Hutchinson and the Rev. John Wheeleright had "seduced and led into dangerous errors many of the people heare in New England."[206] Concerned that some of these people, "upon some revelation, [might] make some suddaine irruption upon those that differ from them in judgment," the General Court ordered certain named members of Hutchinson's following to surrender all "guns, pistols, swords, powder, shot & match," and forbid them from buying or borrowing replacements.[207]

About the same time that this was happening, another troublemaker, a Puritan prophet named Samuel Gorton, arrived in Boston and promptly began gaining followers and irritating the orthodox clergy.[208] Finding the place inhospitable, Gorton went to Plymouth only to be promptly banished.[209] Then it was on to Portsmouth, New Hampshire, where, after a fist fight with authorities, he and his followers were expelled.[210] Gorton then headed for Newport, Rhode Island, but before his supporters could follow

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of Them in the Several Other Parishes Within This Province (July 6, 1756), *in* 4 SOUTH CAROLINA STATUTES, *supra* note 95, at 34.

[200] *Id.* (appears as in original).

[201] Hamer, *supra* note 190, at 200.

[202] *See* Philip F. Gura, *The Radical Ideology of Samuel Gorton: New Light on the Relation of English to American Puritanism*, 36 WM. & MARY Q. 78, 79–80 (1979).

[203] *See id.*

[204] Order (Nov. 20, 1637), *in* 1 RECORDS OF MASSACHUSETTS, *supra* note 123, at 211–12.

[205] *See* Gura, *supra* note 202, at 80.

[206] Order (Nov. 20, 1637), *in* 1 RECORDS OF MASSACHUSETTS, *supra* note 123, at 211 (appears as in original)..

[207] *Id.* (appears as in original).

[208] CURTIS P. NETTELS, THE ROOTS OF AMERICAN CIVILIZATION: A HISTORY OF AMERICAN COLONIAL LIFE 179 (2d ed. 1963).

[209] *Id.*

[210] *Id.* at 179–80.

him, the authorities there acted to avoid trouble.[211] The Newport authorities issued an order that if any of Gorton's people came "upon the Island armed, they shall be by the Constable . . . disarm'd and carried before the Magistrate, and there find sureties for their good behaviour . . . ."[212]

It was, however, Roman Catholics—"Papists"—who most often were deprived of their weapons on account of their religion.[213] Ironically, colonial Catholics were the first disarmed in Maryland—a proprietary colony that was founded in 1632, in part, as a refuge for Catholics—where religious toleration was established as a matter of law.[214] Although its proprietor, and most of the Maryland political and social elite were Catholic, the majority of its population were Protestants by 1650, most of whom resented both the power and the religion of the colony's leadership.[215] These dissidents fomented four unsuccessful rebellions before finally succeeding in 1689.[216] Triggered by the proprietorship's failure to promptly recognize the accession of William and Mary and by rumors of popish plots, the rebels took up arms, seized the provincial capital, and ousted the governor.[217]

In fear that they might take up the Proprietor's cause, the rebels then set about disarming Maryland's Catholics.[218] Apparently, this was done in an informal way, but, after the fact, it left a record in the archives of the colony:

> Upon Representation Ordered that all persons who tooke any private Armes from Roman Catholicks or others in the time of the late Revolution that they bring and deliver all such Armes up into the hands of the Collonell of the County

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[211] *Id.* *See also* Order of 1640, *in* 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 123 (John Russell Bartlett ed., 1856) [hereinafter 1 RHODE ISLAND RECORDS].

[212] Order of 1640, *in* 1 RHODE ISLAND RECORDS, *supra* note 211 (appears as in original).

[213] *See, e.g.*, Order of February 28, 1694, *in* ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COUNCIL OF MARYLAND 1693–1696/7, 224 (William Hand Browne ed., 1900) [hereinafter ARCHIVES OF MARYLAND]; An Act to Prevent the Growth of Popery Within This Province (May 22, 1756), *in* 52 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 441 (J. Hall Pleasants ed., 1935) [hereinafter 52 ARCHIVES OF MARYLAND].

[214] JOHN E. POMFRET & FLOYD M. SHUMWAY, FOUNDING THE AMERICAN COLONIES 1583–1660, 76–93 (1970) (discussing the rise and fall of the proprietary colony).

[215] *Id.* at 76–77, 82, 95–96.

[216] NETTELS, *supra* note 208, at 338–39.

[217] *Id.* at 339; JOHN D. KRUGLER, ENGLISH AND CATHOLIC: THE LORDS BALTIMORE IN THE SEVENTEENTH CENTURY 243–44 (2004).

[218] *Contra* ARCHIVES OF MARYLAND, *supra* note 213 (an Order from Maryland in 1694 to return arms taken from Catholics).

> where taken, who is hereby Obliged & Required to Cause the same to be restored to the Right Owners.[219]

Maryland became a royal colony and remained so until 1716 when the proprietor was restored to power. By that time, however, Lord Baltimore's dream of a sanctuary for his Catholic co-religionists had become a distant memory.[220] His descendent, the new proprietor, had converted to Protestantism, and Catholics were now an oppressed minority, their status institutionalized by a 1716 statute that effectively barred Catholics from public office or any position of trust.[221] Moreover, as noted earlier, colonial Catholics were always suspect, plagued by Protestant fears that, given the opportunity, they would ally themselves with Catholic France in its wars with Great Britain in the colonies.[222]

Although King George's war (1744–1748) was fought in the forests of New York, New England, and Canada, the Maryland assembly took the precaution of ordering the officers of the militia of St. Mary's County to "take particular Care that No Roman Catholick be for the future enrolled or mustered among the Militia of the said County," and that all "Publick Arms [] in the Possession of any Roman Catholick" be delivered to the Colonel of the county.[223]

When the Seven Years War (1756–1763) brought the French threat closer, the Maryland legislature used more stringent measures to neutralize what they saw as a dangerous threat from their Catholic neighbors—total disarmament:

> And be it further Enacted that all Arms Gunpowder and Ammunition of what kind soever any Papist or reputed Papist within this Province hath or shall have in his House or Houses or elsewhere shall be taken from Such Papist or

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[219] ARCHIVES OF MARYLAND, *supra* note 213 (appears as in original).

[220] NETTELS, *supra* note 208, at 339.

[221] *See* An Act For the Better Security of the Peace and Safety of His Lordship's Government, and the Protestant Interest Within This Province (1716), *in* ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 612, 612–14 (William Hand Browne ed., 1910); Lewis D. Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEGAL HIST. 97, 100 (1969); Timothy W. Bosworth, *Anti-Catholicism as a Political Tool in Mid-Eighteenth-Century Maryland*, 61 CATH. HIST. REV. 539, 543 (1975).

[222] Bosworth, *supra* note 221, at 544–45.

[223] Order, March 23, 1744, *in* ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COUNCIL OF MARYLAND 1732–1753, 315, 315 (William Hand Browne ed., 1908) (appears as in original). Subsequently, the no enlist rule was extended to all counties and County Colonels were ordered to discharge "any Person professing the Roman Catholick Religion" who was "already enlisted in the Militia." *Id.* at 340 (quoting Order from Sept. 14, 1744).

> reputed Papist by Warrant under the hand of one Justice of the Peace for the County wherein such Papist or reputed Papist shall be Resident and the said Arms and Ammunition so taken Shall be kept in Such Place as the Said Justice shall appoint.[224]

Protestants in Virginia and Pennsylvania shared the same concerns about the Catholics in their midst, and, as a petition from Berks County, Pennsylvania demonstrated, those concerns were quite serious and quite specific:

> We have thought it our Duty to inform Your Honour of our dangerous Situation, and to beg Your Honour to enable Us by some legal Authority to disarm or otherwise to disable the Papists from doing any Injury to other People who are not of their vile Principles . . . . [W]e have Reason to fear just at this Time that the Roman Catholicks in Cussahoppen, where they have a magnificent Chappel . . . have bad Designs, For in the Neighbourhood of that Chappel it is reported and generally believed that 30 Indians are now lurking, well armed with Guns and Swords or Cutlashes . . . . It is a great Unhappiness at this Time to the other People of this Province that the Papists shou'd keep Arms in their Houses, against which the Protestants are not prepared, who, therefore, are subject to a Massacre whenever the Papists are ready.[225]

The Pennsylvania legislature responded to the perceived threat with a provision in its 1757 militia act providing for the seizure of "all Arms, Military Accoutrements, Gun Powder and Ammunition" that "any Papist or reputed Papist within this Province, hath or shall have in his House or Houses, or elsewhere."[226] Virginia passed a similar act that required every

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[224] An Act for Regulating the Militia of the Province of Maryland (May 22, 1756), *in* 52 ARCHIVES OF MARYLAND, *supra* note 213, at 454. In 1756, the upper house of the Maryland Assembly drew up a highly restrictive law entitled "An Act to Prevent the Growth of Popery Within this Province," which provided that no Roman Catholic was to keep arms or ammunition except for personal defense. *Id.* at 441, 448. The bill "failed of passage." *See id.* at xxv ("Letter of Transmittal").

[225] Minutes of the Provincial Council (July 23, 1755), *in* 6 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA, FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 503 (1851) (appears as in original).

[226] Act for Forming and Regulating the Militia (1757), *in* 3 PENNSYLVANIA ARCHIVES 120, 131 (Samuel Hazard ed., 1853). For reasons, unconnected to this provision, the act was

"Papist or suspected . . . Papist" to take an oath of allegiance and supremacy.[227] None who failed to do so was permitted to "have, or keep in his house or elsewhere, or in the possession of any other person to his use, or at his disposition, any arms, weapons, gunpowder or ammunition."[228] The reason given for disarming their fellow Virginians was the same as was behind all such statutes: the perceived common good because "it [was] dangerous . . . to permit Papists to be armed . . . ."[229]

VI. DISARMING THE LOYALISTS

A. Prior to July 4, 1776

Twenty years after disarming the "Papists," Virginians again were seizing their neighbors' guns, as were patriots in all of the thirteen colonies.[230] It was inevitable. As a civil war, the American Revolution called everyone's loyalty into question—an armed neighbor could be an armed enemy.[231] The process of disarming those who represented a threat to the rebellion evolved through two stages.[232] In the early months of the revolution, when the political identity of the rebellious colonies was in flux and the criteria for membership in the body politic unclear, revolutionary legislatures, congresses, conventions, and committees routinely disarmed fellow members of the polity on the grounds that they represented, or might represent, a threat to the emerging order.[233] For example, on May 10, 1776, the Albany Committee of Correspondence resolved to disarm one Daniel Litts of Rensselaer because he had "[c]ursed the Committee, beat and abused Susannah Nagel, and spoke disrespectful[ly] of the Whigs . . . ."[234]

Between late 1775 and the middle of 1776, the Maryland Convention and local committees of safety aggressively acted to disarm possible

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subsequently disallowed by the Privy Council. Joseph J. Casino, *Anti-Popery in Colonial Pennsylvania*, 105 PA. MAG. HIST. & BIOGRAPHY 279, 304 n.83 (1981).

[227] An Act for Disarming Papists and Reputed Papists, Refusing to Take the Oaths to the Government (Mar. 29, 1756), *in* 7 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 35, 36 (William Waller Hening ed., 1820).

[228] *Id.*

[229] *Id.* at 35.

[230] Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 148 (2007). To some extent, the framework of the following discussion draws on the insightful analysis by Robert H. Churchill. *See id.*

[231] *See id.* at 158–59.

[232] *See id.* at 150.

[233] *Id.* at 158–60.

[234] Albany Committee Chamber (May 10, 1776), *in* 1 MINUTES OF THE ALBANY COMMITTEE OF CORRESPONDENCE 1775–1778, 402, 403 (James Sullivan ed., 1923).

opposition in the state.[235] The Convention ordered several independent companies of militia to Somerset County "to disarm all such persons in that County as shall, from good grounds, appear . . . to be disaffected . . . ."[236] At the local level, the Worcester County Committee of Observation "sent scouts through the County, in order to disarm all those who appear to be enemies to the present measures."[237] On orders from the Baltimore committee of correspondence, a local independent militia company disarmed "such persons as have refused to enroll as Militia."[238] Subsequently, the Baltimore committee ordered the militia "to disarm the Non-Associators and Non-Enrollers in *Patapsco*, Lower, and *Back River*, Lower, Hundreds."[239] The committee also sent similar expeditions to "disarm all Non-Associators and Non-Enrollers . . . in *Middle River,* Lower; . . . *Soldiers' Delight*; . . . [and] *Patapsco*, Upper . . . Hundred."[240]

During the same period, the Connecticut General Assembly decreed that:

> if any person, by writing or speaking, or by any overt act, shall libel or defame any of the resolves of the honourable Congress of the *United Colonies*, or the acts and proceedings of the General Assembly of this Colony, made, or which hereafter shall be made, for the defence or security of the rights and privileges of the people, and be thereof duly convicted before the Superior Court, shall be disarmed, and not allowed to have or keep any arms . . . .[241]

After expressing the "tender regard" that it held for "freedom of speech, the rights of conscience, and personal liberty, as far as an indulgence in these particulars may be consistent with our general security[,]" the Congress of

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[235] Meeting of the Maryland Convention (June 28, 1776), *in* 6 AMERICAN ARCHIVES 1490, 1490–91 (Peter Force ed., 4th ser. 1846).

[236] *Id.*

[237] Letter from the Chairman of the Committee of Observation for Worcester County (Nov. 17, 1775), *in* 3 AMERICAN ARCHIVES 1574, 1575 (Peter Force ed., 4th ser. 1840).

[238] Meeting of the Baltimore, Maryland Committee of Observation (Mar. 8, 1776), *in* 4 AMERICAN ARCHIVES 1744 (Peter Force ed., 4th ser. 1843).

[239] Meeting of the Baltimore, Maryland Committee of Observation (May 6, 1776), *in* 5 AMERICAN ARCHIVES 1523, 1524 (Peter Force ed., 4th ser. 1844) [hereinafter 5 AMERICAN ARCHIVES] (appears as in original).

[240] Meeting of the Baltimore, Maryland Committee of Observation (Apr. 15, 1776) *in* 5 AMERICAN ARCHIVES, *supra* note 239, at 1518.

[241] An Act for Restraining and Punishing Persons Who Are Inimical to the Liberties of This and the Rest of the United Colonies, and for Directing Proceedings Therein, Connecticut General Assembly (Dec. 14, 1775), *in* 4 AMERICAN ARCHIVES 270, 271 (Peter Force ed., 4th ser. 1843) (appears as in original).

New York resolved that anyone convicted by a county committee of safety for opposing or denying "the authority of the Continental or of this Congress, or the Committee of Safety," or any local committees of safety "such committee shall cause such [] to be disarmed."[242] In the same act, the Congress ordered that any person who sold provisions to "the ministerial army or navy . . . shall be disarmed," fined, and imprisoned for three months.[243]

In these early months, a number of states utilized test acts and loyalty oaths to determine fidelity of their residents.[244] Some of these acts called for disarming those who refused to subscribe.[245] At this stage, however, the rebellion was still viewed by most colonists as a dispute between members of the same body politic.[246] The primary criterion of loyalty was less an allegiance to any political entity, than a sworn willingness to oppose "the fleet and armies of Great Britain."[247] Those who would not declare their readiness to do so remained members of the body politic, but members that lost their weapons and, with that loss, their ability to endanger those who were willing to stand against the Crown.[248]

For example, in June 1776, when the Rhode Island General Assembly required "all male inhabitants" to "solemnly and sincerely declare" the righteousness of the opposition to Great Britain and their willingness to "heartily assist in the defence of the United Colonies," the consequence of refusing to take the oath simply was a loss of "all arms, ammunition and warlike stores" for which the nonjuror was to be compensated out of the public "treasury."[249] In the same vein, a resolution of the New York

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[242] Order of the Provincial Congress (Sept. 1, 1775), *in* 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK 1775–1777, 131, 132 (1842) [hereinafter 1 NEW YORK PROVINCIAL CONGRESS].

[243] *Id.* at 131–32.

[244] Churchill, *supra* note 230, at 158.

[245] *See* Churchill, *supra* note 230, at 159.

[246] Letter from Peter Van Schaack to Col. John Manunsell (May 7, 1775), *in* THE LIFE OF PETER VAN SCHAACK, LL.D., EMBRACING SELECTION FROM HIS CORRESPONDENCE AND OTHER WRITINGS, DURING THE AMERICAN REVOLUTION, AND HIS EXILE IN ENGLAND 37, 38 (Henry C. Van Schaack, ed., 1842).

[247] A. R. SPOFFORD, VERMONT HISTORICAL MAGAZINE, CLARENDON, *reprinted in* 1 THE HISTORY OF RUTLAND COUNTY VERMONT: CIVIL, ECCLESIASTICAL, BIOGRAPHICAL AND MILITARY 552, 559 (Abby Maria Hemenway ed., 1882).

[248] *See, e.g.*, Meeting of the Committee of Safety (Mar. 27, 1776), *in* 1 NEW YORK PROVINCIAL CONGRESS, *supra* note 242, at 389.

[249] An Act Empowering the Members of the Upper and Lower Houses of Assembly, to Tender to Such of the Inhabitants as Are Hereinafter Mentioned, a Declaration, or Test, for Subscription (June 1776), *in* 7 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE

Committee of Safety promulgated on March 27, 1776, called for disarming "all persons" who refused to promise "to defend by arms these United Colonies against the hostile attempts of the British fleets and armies."[250]

B. After July 4, 1776

In time, especially after July 4, 1776, this changed. Independence and the exigencies of war led state governments to define, and refine, the criteria for membership in the body politic and to institutionalize that criteria in loyalty oaths.[251] Now, the loyalty demanded was unqualified allegiance to the state and the new nation. The consequences for those who failed to swear such allegiance often included the loss of many of the rights and privileges of citizenship, among them any right they had to keep arms.[252] Now, those who failed to swear allegiance, in effect, had opted out of the body politic.[253] When the government deprived them of their weapons, it did not deprive them of their right to bear arms because, as nonjurors, they no longer were members of the body politic entitled to the protection of such rights.[254]

The punishment for those refusing to swear allegiance under Pennsylvania's "Act Obliging the Male White Inhabitants of this State to Give Assurances of Allegiance" was typical.[255] Nonjurors in Pennsylvania were deemed "incapable of holding any office or place of trust in th[e] state, serving on juries, suing for any debts, electing or being elected, buying, selling or transferring" property, and "shall be disarmed."[256] The Virginia and South Carolina oaths of allegiance imposed similar disabilities.[257]

PLANTATIONS IN NEW ENGLAND 566, 566–67 (John Russell Bartlett ed., 1862) [hereinafter 7 RHODE ISLAND RECORDS].

[250] Meeting of the Committee of Safety (Mar. 27, 1776), *in* 1 NEW YORK PROVINCIAL CONGRESS, *supra* note 242, at 388–89.

[251] *See, e.g.*, Richard A. Overfield, *A Patriot Dilemma: The Treatment of Passive Loyalists and Neutrals in Revolutionary Maryland*, 68 MD. HIST. MAG. 140, 145–47 (1973).

[252] *See* 7 RHODE ISLAND RECORDS, *supra* note 249. *See also* Churchill, *supra* note 230, at 159.

[253] *See* Churchill, *supra* note 230, at 159.

[254] *See, e.g.*, *id.* at 158–60.

[255] *Id.* at 160 n.50 and accompanying text.

[256] An Act Obliging the Male White Inhabitants of This State to Give Assurances of Allegiance to the Same and for Other Purposes Therein Mentioned (June 13, 1777), *in* 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, 110, 112–13 (James T. Mitchell & Hengry Flanders eds., 1903) [hereinafter 9 PENNSYLVANIA STATUTES].

[257] 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 (May 1, 1777), *in* 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 281, 281–82 (William Waller Hening ed., 1821); Act Establishing an Oath of Abjuration and Allegiance

The line between pre- and post-July Fourth test acts, and the disarmament of the disaffected, was not a hard and fast one. As early as May 1, 1776, when other states were treating nonjurors as dissident citizens who were not entitled to keep arms, the Massachusetts legislature enacted a statute that, along with disarming them, took away many of the other privileges of citizenship.[258] Under the act, nonjurors could not hold military or civil office, could not vote, and if a settled minister or grammar school master, could not sue to recover his salary for time spent or served in office.[259]

On the other hand, even after states passed acts that supposedly separated the "disaffected" from membership in the body politic and the aggregation of rights and privileges which such membership entailed, there still were instances in which citizens were disarmed as if a test act did not even exist.[260] In the Spring of 1777, North Carolina enacted an oath of allegiance required of "all Persons . . . being subjects of this State and now living therein."[261] Nevertheless, in a resolve promulgated in February 1780, the North Carolina legislature made no mention of giving anyone the opportunity of taking the oath when it empowered all local justices of the peace "to order the Sheriff with a *posse comitatus* to disarm all persons from whom any Injury of the public safety is to be apprehended."[262]

Moreover, many of those who were disarmed pursuant to the test acts actually were loyal citizens who, for one reason or another—conscience, ignorance, or old-fashioned cussedness, would not take the pledge.[263] In New York, "some of the friends to the American cause" who had refused to swear loyalty to the United American Colonies and had "in consequence thereof been disarmed," had refused to swear allegiance because they

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(Feb. 13, 1777), *in* 1 THE STATUTES AT LARGE OF SOUTH CAROLINA 135, 135–36 (Thomas Cooper ed.,1836).

[258] An Act for the Executing in the Colony of Massachusetts Bay, in New England . . . Disarming Such Persons as Are Notoriously Disaffected to the Cause of America . . . (May 1, 1776), *in* 5 MASSACHUSETTS ACTS & RESOLVES, *supra* note 120, at 479–81.

[259] *Id.* at 481.

[260] *See, e.g.*, Resolutions of the General Assembly (Feb. 12, 1780), *in* 15 THE STATE RECORDS OF NORTH CAROLINA 388 (Walter Clark ed., 1898) [hereinafter 15 NORTH CAROLINA RECORDS].

[261] An Act Declaring What Crimes and Practices Against the State Shall Be Treason, and What Shall Be Misprision of Treason . . . and for Preventing the Dangers Which May Arise From the Persons Disaffected to the State (Apr. 8, 1777), *in* 24 THE STATE RECORDS OF NORTH CAROLINA 9, 11 (Walter Clark ed., 1905) [hereinafter 24 NORTH CAROLINA RECORDS].

[262] 15 NORTH CAROLINA RECORDS, *supra* note 260.

[263] Meeting of the Provincial Congress (June 20, 1776), *in* 1 NEW YORK PROVINCIAL CONGRESS, *supra* note 242, at 500–01.

interpreted the language of the pledge as depriving them "of any rights reserved to them in and by the [] militia regulations," and as "impos[ing] on them the necessity of marching to the most distant of the Colonies whenever called upon . . . ."[264]

Many Quakers in Pennsylvania of varying shades of loyalty could not bring themselves to sign an oath of allegiance.[265] Some were fundamentally opposed to the acknowledgement of secular authority that the oath required.[266] They were not alone. Moravians, Dunkers, Schwenkfelders, Amish, Mennonites, and other German pietists sects also opposed the Pennsylvania oath.[267] And it was not just religious groups. Writing to George Bryan, then Vice President of Pennsylvania, one of his York County supporters warned him that "instead of strengthening us," the state's test act "hath . . . weaked us very much; not one fourth part of the Inhabitants hath, or will take it; nay, they spurn at it, yet say they are Friendly to the Cause in General . . . ."[268]

The picture of "loyalist" disarmament that emerges from the motley collection of statutes, resolves, and various other edicts from a myriad of legislative and executive bodies is far from distinct, but some conclusions seem reasonable.[269] First, it appears that many of those who were disarmed by the states under the test acts were, in effect, disarmed as aliens.[270] In refusing to take the oath of allegiance, they voluntarily opted out of the body politic of the state and, in so doing, lost the state's protection of their right to arms.[271]

It also seems apparent that many of those who were disarmed by the states were citizens of the state, members of its body politic, and entitled to whatever right of arms possession the state recognized.[272] But that right was

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[264] *Id.* at 501. The language that concerned the "the cause of America" required them to promise "at the risk of our lives and fortunes, to defend by arms the United American Colonies against the hostile attempts of the British fleets and armies . . . ." Meeting of the Committee of Safety (Mar. 27, 1776), *in* 1 NEW YORK PROVINCIAL CONGRESS, *supra* note 242, at 389.

[265] Harry E. Seyler, *Pennsylvania's First Loyalty Oath*, 3 HIST. EDUC. J. 114, 114–15 (1952).

[266] *Id.* at 121.

[267] *Id.* at 120.

[268] Letter from Archibald McClean to Vice President George Bryan (Oct. 11, 1777), *in* 5 PENNSYLVANIA ARCHIVES 661, 661 (Samuel Hazard ed., 1st ser. 1853) [hereinafter 5 PENNSYLVANIA ARCHIVES] (appears as in original).

[269] *See* SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 28 (2006).

[270] *Id.*

[271] *Id.*

[272] *Id.*

limited and, in disarming certain of its citizens as disaffected, the state was acting for the good of the whole.[273] In the end, disarming citizens who had a right to keep arms—even citizens who were only "suspicious," or who had criticized the government, or who were "Friendly to the Cause in General"—came down, as the Congress of New York recognized in disarming those who sold provisions to the enemy, to a higher right "the immutable laws of self-defence and preservation . . . ."[274]

VII. THE IMPRESSMENT OF ARMS

During the American Revolution, the Continental Congress, and virtually every state, authorized the impressment of arms from citizens loyal to the cause.[275] No one disputes that countless weapons were seized in this manner, but it has been argued that, due to the extreme opposition that such seizures generated, the impressment of weapons was used "reluctantly."[276] This opposition, so the argument goes, led authorities to resort to the impressment of arms only when the enemy was at the gates and, even then, to proceed cautiously, often carving out exceptions.[277] The implication, of course, is that the degree of opposition was unusual and the cautious treatment unique because of the high value colonials placed on their right to keep arms.

The historical evidence does not bear this out. To be sure, many Americans probably resented the impressment of their weapons, but such resentment was not limited to the appropriation of arms.[278] The founding

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[273] Meeting of the Committee of Safety (Sept. 1, 1775), *in* 1 NEW YORK PROVINCIAL CONGRESS, *supra* note 242, at 131–32.

[274] *Id.*

[275] *See, e.g.*, Resolution of a Committee of Congress (Nov. 24, 1776), *in* 3 AMERICAN ARCHIVES 828, 828 (Peter Force ed., 5th ser. n.d.); Proceedings of the General Assembly (Sept. 22, 1777), *in* 8 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 302, 307 (John Russell Bartlett ed., 1863); An Act for Providing a Reinforcement to the American Army (Nov. 14, 1776), *in* 5 MASSACHUSETTS ACTS & RESOLVES, *supra* note 120, at 595–96; New Jersey Committee of Safety (Mar. 26, 1776), *in* 5 AMERICAN ARCHIVES, *supra* note 239, at 508; Proceedings of the Provincial Congress (Aug. 10, 1776), *in* 15 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 122, 123 (Berthold Fernow ed., 1887); An Act to Regulate and Establish a Militia in This State (1778), *in* 24 NORTH CAROLINA RECORDS, *supra* note 261, at 190, 194–95; An Act for Raising and Equipping a Body of Minute Men . . . (Dec. 1775), *in* 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM MAY, 1775, TO JUNE, 1776, INCLUSIVE (Charles J. Hoadly ed., 1890).

[276] E. WAYNE CARP, TO STARVE THE ARMY AT PLEASURE: CONTINENTAL ARMY ADMINISTRATION AND AMERICAN POLITICAL CULTURE 1775–1783, 1, 77, 83 (1984).

[277] *See* Churchill, *supra* note 230, at 152–53.

[278] There is not a good deal of evidence relating to colonial resentment over the impressment of arms in particular. A frequently cited source is a comment by General

generation resented the impressment of any item of their private property, even the most mundane.[279] For example, when the Continental Congress resolved that Pennsylvanians provide blankets to the army, that state's Supreme Executive Council warned that the state assembly would not do it:

> they are legal Magistrates acting under a fixed Constitution, & that however inclined they may be, from the Ideas of self-preservation & necessity, to strain the powers of government, at this Crisis, to the present exigence, they apprehend that such apparent intrusion upon the private property of individuals will be unavoidably resented, as a grievance arising from the Constitution under which they act, & that it will greatly weaken & disable the Council from performing essential services within their proper sphere.[280]

Just as the citizenry would not provide freezing soldiers with blankets so too did they refuse to supply hungry soldiers with food.[281] Although Colonel Daniel Brodhead's quartermasters were "as Industrious as Circumstances will admit" in their attempts to impress livestock, "the Inhabitants disappoint them by driving their Cattle into the Mountains; and they now threaten to rise in arms against them . . . ."[282]

Nathanael Greene referring to soldiers complaining about Washington's order for the impressment of their arms after their enlistments ran out. *See id.* at 151–52. If one reads Greene's statement carefully, however, the soldiers' complaint may have less to do with their right to keep arms and more to do with receiving fair compensation for their guns:

> This is the last day of the old enlisted Soldiers service; nothing but confusion and disorder Reigns. We are obligd to retain their Guns whether private or publick property. They are prized [priced] and the Owners paid, but as Guns last Spring run very high, the Committee that values them sets them much lower than the price they were purchast At. This is lookt upon to be both Tyrannical and unjust.

Letter from Nathanael Greene to Samuel Ward, Sr. (Dec. 31, 1775), *in* 1 THE PAPERS OF GENERAL NATHANAEL GREENE 170, 173 (Richard K. Showman ed., 1976) (appears as in original).

[279] *See* CARP, *supra* note 276, at 78; Churchill, *supra* note 230, at 151.

[280] Supreme Executive Council of Pennsylvania to the President of Congress (Sept. 17, 1777), *in* 5 PENNSYLVANIA ARCHIVES, *supra* note 268, at 630.

[281] *See* Letter from Colonel Daniel Brodhead to President John Reed (Oct. 17, 1780), *in* 8 PENNSYLVANIA ARCHIVES 588, 589 (Samuel Hazard ed., 3d ser. 1853).

[282] *Id.*

Attempts to impress wagons and teams were often met with all kinds of resistance, especially in Pennsylvania, which was a crossroads of the war.[283] As the state's President reported to Washington, owners resorted to "hiding their horses and grain, and even destroying their wagons, that they may not be compelled to go. To impress requires a force to support it . . . ."[284] Many an impressment officer shared the lament of a Colonel Hay who was attempting to find wagons to transport flour to Paramus, New Jersey: "All the wagons . . . are already in the service with General *Lee*. We found a few ox-teams, but their owners will not let them go; and I have nobody here to take them away by force. I am at a loss what to do."[285]

In Virginia, it was saddle horses.[286] Fighting a hit and run war in the South, Nathanael Greene desperately needed cavalry, and that cavalry needed mounts.[287] Virginians, who, as Greene sarcastically noted, were "not less attached to their horses than their liberties," were not about to part with those horses voluntarily.[288] The general's impressment efforts precipitated a crisis when his dragoons seized stud stallions and brood mares.[289] Outraged, "the Virginia Legislature resolved that all [impressed] horses valued at more than £5,000 . . . [had to] be returned to the[ir] owners."[290]

Aware of the problems that seizing horses would cause, Greene was careful to direct his officers to "treat the Inhabitants with tenderness" when executing impressment warrants.[291] Greene followed the instructions of his

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[283] *See* Letter from President John Reed to George Washington (July 15, 1780), *in* 3 CORRESPONDENCE OF THE AMERICAN REVOLUTION; BEING LETTERS OF EMINENT MEN TO GEORGE WASHINGTON FROM THE TIME OF TAKING COMMAND OF THE ARMY TO THE END OF HIS PRESIDENCY 15, 22 (Jared Sparks ed., 1853).

[284] *Id.*

[285] Letter from Colonel A. Hawkes Hay to General Heath (Dec. 15, 1776), *in* 3 AMERICAN ARCHIVES 1235, 1235–36 (Peter Force ed., 5th ser. 1853).

[286] Letter from Nathanael Greene to the Marquis de Lafayette (June 9, 1781), *in* 8 THE PAPERS OF GENERAL NATHANAEL GREENE 366, 366 (Dennis M. Conrad et al. eds., 1995) [hereinafter 8 PAPERS OF NATHANAEL GREENE].

[287] Letter from Nathanael Greene to Governor Thomas Jefferson of Virginia (Feb. 15, 1781), *in* 7 THE PAPERS OF GENERAL NATHANAEL GREENE 289, 289 (Richard K. Showman et al. eds., 1994) [hereinafter 7 PAPERS OF NATHANAEL GREENE] (Referring to cavalry as "essential" and asserting that without them "[t]he Country is inevitably lost").

[288] Letter from Nathanael Greene to the Marquis de Lafayette (June 9, 1781), *in* 8 PAPERS OF NATHANAEL GREENE, *supra* note 286.

[289] THEODORE THAYER, NATHANAEL GREENE: STRATEGIST OF THE AMERICAN REVOLUTION 338 (1960).

[290] *Id.*

[291] Letter from Nathanael Greene to Colonel William Washington (Feb. 16, 1781), *in* 7 PAPERS OF NATHANAEL GREENE, *supra* note 287, at 298.

commanding general.[292] George Washington instructed his officers to impress "with as much tenderness as possible."[293] Washington was greatly troubled about the ill effects of impressing citizens' property—any property, not just arms.[294] He made it clear that he was

> utterly averse to a Military impress, except on great occasions, and when no other expedients can be devised to answer the end proposed. Because he apprehends it may tend to irritate the Minds, and alienate the affections of the well-disposed people from the Army, unless there is the greatest apparent necessity for the measure . . . .[295]

Washington's reluctance to impress supplies extended beyond wagons, horses, or arms.[296] It extended to the basic objects of sustinence:

> Sir: I enclose you a Warrant for impressing of Teams on the present important occasion; but if there is any other means in Your power of forwarding the Provisions, I would not have Military coercion made use of; if this is the only alternative left to prevent the Army from starving, let the measure be carried into execution immediately with the utmost prudence and precaution.[297]

Aware of the negative consequences of impressment, not only on support for the patriot cause, but also on the individual citizens involved, military officers and legislators took steps to ameliorate those consequences.[298] The measures varied, but, for this discussion, it is important to note that these measures were taken with regard to impressment of all sorts of things, again, not only weapons.[299]

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[292] *See* Instructions to Officers to Collect Provisions (Jan. 8, 1780), *in* 17 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, 360, 361 (John C. Fitzpatrick ed., 1937) [hereinafter 17 WRITINGS OF GEORGE WASHINGTON].

[293] *Id.*

[294] *See* Letter from George Washington to Colonel Timothy Pickering (Apr. 24, 1781), *in* 21 THE WRITINGS OF GEORGE WASHINGTON FROM THE MANUSCRIPT SOURCES 1745–1799, 498, 498 (John C. Fitzpatrick ed., 1937) [hereinafter 21 WRITINGS OF GEORGE WASHINGTON].

[295] *Id.*

[296] 17 WRITINGS OF GEORGE WASHINGTON, *supra* note 292 (ordering soldiers not to impress more food than a family could stand to lose).

[297] Letter from George Washington to Colonel Hugh Hughes (Apr. 25, 1781), *in* 21 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 294, at 500.

[298] *See, e.g.*, *id.*; Letter from Nathanael Greene to Colonel William Washington (Feb. 16, 1781), *in* 7 PAPERS OF NATHANAEL GREENE, *supra* note 287, at 298.

[299] *See, e.g.*, 17 WRITINGS OF GEORGE WASHINGTON, *supra* note 292 (instructing army officers not to impress milk cows when taking cattle); An Act for Providing for the Non-

In instructing his officers on impressment, Washington told them to have "regard to the Stock of each Individual, that no family may be deprived of its necessary subsistence. Milch Cows are not to be included in the impress."[300] Also dealing with impressing cattle, Governor Nelson of Virginia cautioned county officials to "take care not to draw too many from any one person."[301] Similarly, the Maryland Council repeatedly emphacized that, when impressing wagons, the "Burthen should be so divided as to interfere as little as possible with Cultivation."[302]

Legislatures often imposed statutory limitations on impressment.[303] For example, a 1777 Connecticut law provided for the impressment of clothing for officers, but only from persons "who can conveniently spare the same."[304] A New York "Act for Regulating Impresses of Forage" only permitted the impress of forage "over and above" the amount "necessary for the subsistence of the respective families and stock . . . ."[305]

Sometimes these limitations were quite specific. In Pennsylvania, teamster complaints led the legislature to create a rather elaborate administrative structure to deal with the "great inconvenience" of providing wagons to the army and "the burden of supplying them very unequally."[306] The act established a statewide hiarchy of wagonmasters, headed by a wagonmaster-general, who was to keep records of all of the wagons, teams, and owners in the state and their history of impressment.[307] When the army

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Commissioned Officers and Soldiers Belonging to the Battalions of Continental Troops Raised by This State and the Families of Such Officers and Soldiers (Oct. 1777), *in* 1 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 419, 421–22 (Charles J. Hoadly ed., 1894) [hereinafter 1 RECORDS OF CONNECTICUT] (placing limits on the impressment of clothing); Letter from George Washington to Colonel Timothy Pickering (Apr. 24, 1781), *in* 21 WRITINGS OF GEORGE WASHINGTON, *supra* note 294, at 498 (ordering movement of provisions through the impressment of wagon teams only if there is no other option).

[300] 17 WRITINGS OF GEORGE WASHINGTON, *supra* note 292, at 361.

[301] Letter from Governor Nelson to Charles Carter et al. (Sept. 21, 1781), *in* 2 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 474, 474 (Sherwin McRae ed., 1881).

[302] Letter from Council to Richard Dallam (May 12, 1778), *in* 21 ARCHIVES OF MARYLAND: JOURNAL AND CORRESPONDENCE OF THE COUNCIL OF MARYLAND 78, 78 (William Hand Browne ed., 1901). *See also* Journal Entry of the Council of Maryland (July 28, 1778), *in* 21 ARCHIVES OF MARYLAND: JOURNAL AND CORRESPONDENCE OF THE COUNCIL OF MARYLAND 167, 167 (William Hand Browne ed., 1901).

[303] *See, e.g.*, Resolution of September 12, 1777, *in* 1 RECORDS OF CONNECTICUT, *supra* note 299, at 421–22.

[304] *Id.*

[305] An Act for Regulating Impresses of Forage and Carriages and for Billeting Troops Within This State (Apr. 2,1778), *in* 1 LAWS OF NEW YORK, *supra* note 120, at 55–56.

[306] An Act for the Regulation of Wagons, Carriages and Pack Horses for the Public Service (Jan. 2, 1778), *in* 9 PENNSYLVANIA STATUTES, s*upra* note 256, at 181.

[307] *Id.*

needed wagons and teams, the law required the quartermaster to apply to the appropriate county wagonmaster who rotated impressment service among the owners.[308] Attempts to impress without following the mandated procedure could lead to a fine of £50.[309] There was, however, nothing like this to control the impressment of arms.

It was also contended that, absent a war-time emergency, impressment is not relevant to the state's power to disarm its citizens.[310] Impressment, so the argument goes, is an exercise of the state's military power.[311] In the exercise of its military power, the state historically has, when necessary, violated basic rights such as speech, habeas corpus, and, with impressment, the right to keep arms.[312] Such is not true with regard to the exercise of a state's police power in the course of which those rights must be respected.[313]

There are significnt problems with this argument. In the colonial period, the difference between a provincial government's exercise of its police powers and the exercise of its military powers was unclear at best.[314] In the decades prior to the American Revolution, the British North American colonies usually were either preparing for war, fighting a war, or recovering from one war and anticipating the next.[315] Many of the great issues that confronted colonial Americans in this period—taxation, executive power, Indian relations, the moving line of settlement—involved an interplay of the government's police and military power.[316] To the founding generation, there was no clear line of demarcation between the two.[317] To argue that there was such a line is to argue an anachronism.[318]

Moreover, when it came to the impressment of guns or other items of private property in the American Revolution, many state governments passed legislation that all but removed the military and the threat of armed compulsion from the impressment process.[319] "In 'civil impressment,' a term used by contemporaries, no soldiers were present, no bayonets

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[308] *Id.* at 182.
[309] *Id.* at 183–84.
[310] Churchill, *supra* note 230, at 150.
[311] *Id.*
[312] *Id.* at 150–51.
[313] *Id.*
[314] *See* William G. Merkel, *Mandatory Gun Ownership*, *the Militia Census of 1806*, *and Background Assumptions* C*oncerning the Early American Right to Arms*: *A Cautious Response to Robert Churchill*, 25 LAW & HIST. REV. 187, 193–94 (2007).
[315] *Id.* at 194.
[316] *See id*.
[317] *Id.*
[318] *Id.*
[319] *See* CARP, *supra* note 276, at 79.

leveled."[320] The reason for these laws, as New York's Governor George Clinton explained it, was that impressment was "more equitably executed under the Direction of a Civil Officer than by Quarter Masters, to whose Indiscretion, Negligence & Mismanagement, great part of our present Distresses may fairly be imputed."[321]

Under a somewhat typical "civil impressment" statute such as the act passed by Connecticut in October 1776, if the quartermaster of the Continental army sought to impress "necessary supplies . . . for the Use of said Army," he was required to apply to a justice of the peace for a "proper Warrant . . . for the impressing from any such person" the supplies in question "directed to the Sheriff . . . who shall impress, and cause an Apprizement to be made . . . and deliver the same to said Quarter-Master . . . ."[322]

The bottom line was whether firearms and other weapons were impressed in the exercise of the state's military or its civil police power or some hybred of the two is a distinction without a difference. When the state needed arms for the common defense, it took them.[323] It seized firearms as

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[320] *Id.*

[321] Governor [George] Clinton on the General Proposition (Dec. 15, 1778), *in* 4 PUBLIC PAPERS OF GEORGE CLINTON, FIRST GOVERNOR OF NEW YORK 387, 388 (Hugh Hastings ed., 1900).

[322] An Act to Compel the Furnishing Necessary Supplies and Assistance to the Quarter Master General of the Continental Army (Oct. 1776), *in* CONNECTICUT PUBLIC RECORDS 17–18. *See also* An Act to Prevent and Punish the Frauds and Abuses in the Quarter Masters and Commissaries Departments, and for Ascertaining the Pay of Impressed Teams and Their Drivers (Feb. 1, 1779), ACTS OF THE GENERAL ASSEMBLY OF THE DELAWARE STATE, THIRD SESSION BEGUN OCTOBER 20, 1778, 13, 15 (n.d.); An Act to Establish a Militia in This State (1777), *in* 24 NORTH CAROLINA RECORDS, *supra* note 261, at 3; An Act for Supplying the Army Within This State with Forage, Fuel, Teams and Horses, in Cases of Necessity (Dec. 1778), MAY 2, 1777–DECEMBER 1778 ACTS AND RESOLVES OF RHODE ISLAND 16, 16 (n.d.); An Act to Explain the Law and Constitution of the State of New-Jersey, as to the Quartering of, and Furnishing of Carriages for, the Army in the Service of the United States of North-America; and for Making Some Further Provision for the Same (Oct. 11, 1777), *in* ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY, 1ST SESSION, AUGUST 27, 1776 TO OCTOBER 11, 1777, 124, 124–26 (n.d.); An Act to Regulate Impresses (Nov. 1781), *in* 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, 496, 496 (William Waller Hening ed., 1822); Resolve Impowering the Conductor of Stores or His Deputies to Impress Teams, etc. (Apr. 25, 1778), *in* 20 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 392 (1918); An Act for Regulating Impresses of Forage and Carriages and the Billeting Troops Within This State (Apr. 2, 1778), *in* 1 LAWS OF THE STATE OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE 55, 55–58 (1886).

[323] *See supra* note 322.

it seized any other item of property.[324] The exigencies of the situation swept aside whatever rights associated with gun ownership.

VIII. CONCLUSION

In looking back to the time when the Second Amendment became a part of our Constitution, it is important to keep in mind that we are talking about a society that was predominently rural.[325] In 1790, the United States had a population of only about four million people, the vast majority of whom lived on farms or in very small towns.[326] The largest city, New York, had a population of a little over 33,000, or about one-third the size of present-day Kenosha, Wisconsin.[327] The population of Charleston, the largest city in the South, was about 16,360, and the tenth largest city in the country, Marblehead, Massachusetts was home to 5,661 residents.[328]

Of the approximately four million people living in the United States in 1790, almost 700,000 were slaves.[329] Their numbers were not distributed equally among the several states. A huge majority of the slaves—over 630,000 or about 90 percent—lived in Virginia, Maryland, South Carolina, North Carolina, and Georgia.[330] In these five states, slaves made up from 26 percent (North Carolina) to 43 percent (South Carolina) of the total population.[331] Within these states, the slave population was not evenly distributed. In South Carolina, for example, slaves accounted for only about 10 percent of the total population of Spartanburgh County and 9 percent of the population of Pendleton County.[332] In contrast, slaves outnumbered whites by a ratio of fourteen to one in Charleston's St. Paul and St. Stephens Parishes.[333]

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[324] *See supra* note 322; An Act to Compel the Furnishing Necessary [Supplies] and Assistance to the Quarter Master General of the Continental Army (Oct. 1776), *in* 1 RECORDS OF CONNECTICUT, *supra* note 299, at 17–18.

[325] *See Table 4. Population: 1790 to 1990*, U.S. BUREAU OF THE CENSUS (Aug. 26, 1993), https://www.census.gov/population/censusdata/table-4.pdf [https://perma.cc/JNB2-7MTT] [hereinafter *U.S. Census Table 4*].

[326] *See id*.

[327] *Table 2. Population of the 24 Urban Places: 1790*, U.S. BUREAU OF THE CENSUS (June 15, 1998), http://www.census.gov/population/www/documentation/twps0027/tab02.txt [https://perma.cc/39GD-VYGQ] [hereinafter *U.S. Census Table 2*].

[328] *Id.*

[329] U.S. DEP'T OF COMMERCE & LABOR, BUREAU OF THE CENSUS, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790: RECORDS OF THE STATE ENUMERATIONS: 1782 TO 1785, 8 (1908).

[330] *Id.*

[331] *See id.*

[332] *Id.* at 9.

[333] *Id.*

These demographics are critical to the discussion of gun control and the scope of any right to keep and bear arms. The overwhelmingly rural nature of the American colonies made the need for any gun regulation, let alone the confiscation of arms, largely unnecessary.[334] For the most part, a population living on farms and in very small towns did not create conditions in which firearms created a significant danger to the public welfare.[335] Except in the most unusual circumstances, the misuse of weapons or the negligent storage of guns or gunpowder had little, if any, effect on the community at large.[336] These realities, rather than a philosophical unwillingness to interfere with gun use and ownership, accounted for the relatively few restrictions on keeping and bearing arms in most of early America.

But, as we have seen, the situation was far different in the cities and in the slave South where the realities of the situation demanded it. White southernors lived in constant fear of their slaves, in particular, of armed slaves in rebellion.[337] The preamble to a 1740 South Carolina statute defining the duties of slave patrols expressed a shared concern in warning that many "horrible and barbarous massacres" had been comitted or plotted by slaves who were "generally prone to such cruel practices . . . ."[338] Given the possible consequences, it was imperative that weapons be kept out of the hands of slaves.[339] Laws were passed to diminish the possibility that this might happen.[340] In fact, so great was the concern that, in some instances, those laws were expanded to include free blacks and white servants who were considered possible allies of dissident slaves.[341]

As discussed earlier, there were laws forbidding slaves from carrying firearms without a licence or without the company of an adult white male.[342] Slave patrols were authorized to seize any weapons found in a slave's

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[334] *See U.S. Census Table 4*, *supra* note 325.

[335] *See* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1806 (2002).

[336] Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 510–11 (2004).

[337] *See* An Act for the Better Establishing and Regulating Patrols (May 10, 1740), *in* 3 SOUTH CAROLINA STATUTES, *supra* note 157, at 568.

[338] *Id*. In *Cry Liberty: The Great Stono River Slave Rebellion*, Peter Charles Hoffer succinctly and eloquently described the situation: "Without slaves, Carolina would never have been profitable enough to merit colonization. With slaves, no planter ever rested wholly secure in his bed." PETER CHARLES HOFFER, CRY LIBERTY: THE GREAT STONO RIVER SLAVE REBELLION OF 1739, at 37 (Oxford University Press 2010).

[339] An Act for the Better Establishing and Regulating Patrols (May 10, 1740), *in* 3 SOUTH CAROLINA STATUTES, *supra* note 157, at 568.

[340] *Id.*

[341] *See supra* notes 185–192 and accompanying text.

[342] *See supra* notes 151–156 and accompanying text.

possession.[343] In some cases, the penalty for violating these laws could result in the seizure of the weapon at issue.[344] Given the fact that slaves could not purchase guns, this meant that often the firearm confiscated belonged to a white citizen, doubtless in many cases, the master or mistress who had sent the slave out to shoot dinner for the evening table.[345]

South Carolina even went so far as to temporarily disarm its citizens in their homes rather than risk the chance of slaves gaining access to firearms.[346] A South Carolina statute required that "all . . . guns and other arms, when out of use," be kept "in a room locked up."[347] According to Justice Scalia's decision in *Heller*, rendering a gun not immediately useable to a person amounts to disarming that person.[348] The South Carolina storage statute would seem to fall into this category, yet it was considered necessary to prevent slaves from stealing guns.[349] It was deemed necessary for the common good of the white community.[350]

The concern that led to gun control in the cities was directly related to the nature of urban living—many people living closely together in wooden houses heated and illuminated by fire.[351] It was a situation in which the careless or accidental discharge of firearms or the negligent storage of gunpowder could have disasterous results. We have noted laws, such as the 1746 Massachusetts statute that made it illegal to "discharge any gun or pistol, charged with shot[t] or ball" in the city.[352] These statutes were

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[343] *See supra* notes 157–159 and accompanying text.

[344] *See supra* notes 157–159 and accompanying text.

[345] *See supra* notes 177–182 and accompanying text.

[346] *See* An Act for the Better Ordering and Governing Negroes and Other Slaves in This Province (1722), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 373.

[347] *Id.* This act strengthened a 1712 statute, which required firearms to be kept "in the most private and least frequented room in the house . . . ." An Act for the Better Ordering and Governing of Negroes and Other Slaves (1712), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 354. The 1722 provision was part of the Slave Act of 1735. An Act for the Better Ordering and Governing of Negroes and Other Slaves (1735), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 387. After the Stono River slave rebellion in 1739, the provision was not included in the 1740 revision of the slave code. An Act for the Better Ordering and Governing of Negroes and Other Slaves (1740), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 397. Apparently, it was decided that, on balance, it made more sense to keep loaded guns available in case slaves attacked rather than attempting to prevent slaves from gaining access to weapons.

[348] District of Columbia v. Heller, 554 U.S. 570, 630 (2008).

[349] *Compare Heller*, 554 U.S. at 630, *with supra* note 346, at 371 and accompanying text.

[350] *See, e.g.*, An Act for the Better Ordering and Governing of Negroes and Other Slaves (1740), *in* 7 SOUTH CAROLINA STATUTES, *supra* note 76, at 397.

[351] *See supra* note 79 and accompanying text; *supra* notes 90–91 and accompanying text; *supra* notes 93–94 and accompanying text.

[352] 3 MASSACHUSETTS ACTS & RESOLVES, *supra* note 79 (alteration in original).

particularized by a web of laws that specifically prohibited firing guns to celebrate holidays, or shooting at virtually anything within city limits.[353]

Some larger cities had laws limiting the amount of powder an urban householder or shopkeeper could store in his or her building.[354] Most of these statutes punished violators by confiscating their gunpowder—sometimes all of their gunpowder—that, in the era of muzzle-loading flintlocks, effectively disarmed those citizens.[355] In the interest of public safety, the 1783 Massachusetts statute discussed earlier, by its terms, disarmed anyone in Boston who owned a firearm.[356]

The act made it unlawful to keep loaded firearms in any house in Boston at the risk of losing that firearm.[357] Because this statute would seem to be closely analogous to the District of Columbia ordinance that required handguns to be rendered inoperative or locked with a trigger guard, Justice Breyer's dissent in *Heller* cited it as an example of the colonial view of the limitations on whatever rights an individual had to keep arms in his house, a view that was consistent with the District of Columbia ordinance.[358] His dissent is persuasive in this regard.[359]

Justice Scalia, however, rejected Breyer's position with irrelevent speculation and an unfortunate disregard of colonial precedents.[360] He maintained that the Massachusetts statute's terms and stated purpose was:

> to eliminate the danger to firefighters posed by the "depositing of loaded Arms" in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily

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[353] *See supra* note 79 and accompanying text.

[354] *See supra* notes 88–92 and accompanying text.

[355] *See, e.g.*, An Act in Further Addition to and Explanation of an Act in Addition to An Act for Erecting of a Powder-House in Boston (Jan. 4, 1733), *in* 2 MASSACHUSETTS ACTS & RESOLVES, *supra* note 98, at 659; An Act in Addition to an Act Intitled "An Act in Further Addition to and Explanation of an Act in Addition to an Act for Erecting of a Powder-House in Boston" (Oct. 4, 1780), *in* 5 MASSACHUSETTS ACTS & RESOLVES, *supra* note 120, at 1418; An Act for the Better Securing the City of Philadelphia and Its Liberties from Danger of Gunpowder (Dec. 6, 1783), *in* 11 PENNSYLVANIA STATUTES, *supra* note 120, at 209–10; An Act to Prevent the Danger Arising from the Pernicious Practice of Lodging Gun Powder in Dwelling Houses Stores or Other Places Within the City of New York, or on Board of Vessels Within the Harbour (Mar. 24, 1772), *in* 5 NEW YORK COLONIAL LAWS, *supra* note 86, at 363–64.

[356] *See supra* notes 93–94 and accompanying text.

[357] *See supra* notes 93–94 and accompanying text.

[358] District of Columbia v. Heller, 554 U.S. 570, 685 (2008) (Breyer, J., dissenting).

[359] *See id.*

[360] *Id.* at 631–32.

> loaded a firearm to confront an intruder (despite the law's application in that case).[361]

How Boston's authorities might have reacted to a particular situation is totally irrelevant to the issue at hand. The significance of the Massachusetts law is that it is a clear-cut example of a colonial statute that exhibited that the concern of the people's representatives, for what they deemed the welfare of the society (preventing injury to firefighters), trumped an individual's right to keep loaded firearms in his or her home. The text of this statute, promulgated less than ten years before the ratification of the Second Amendment, is what Justice Scalia has maintained is critical in interpreting the meaning of language of the Constitution.[362] The Massachusetts statute, to use Scalia's words, displays "how the text of the Constitution"—in this case, the "right" in the Second Amendment's "right to keep arms"—"was orginally understood."[363] And it was "understood" by the Massachusetts legislature as a right that could be limited in the same way that the District of Columbia had limited it.[364]

Virtually ackowledging the relevancy of the Massachusetts statute, Justice Scalia attempted to brush it aside:

> In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home.[365]

The problem with this assertion is that the Massachusetts provision was not the only law that disarmed citizens in their homes.[366] The South Carolina statutes that required "every master or head of any family shall keep all his guns and other arms, when out of use, in a room locked up," had the same efect as the D.C. law—it made firearms unavailable for self-defense.[367] And there is much more.

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[361] *Id.*

[362] *Id.*

[363] Antonin Scalia, *Common-Law Courts in a Civil-Law System*: *The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., Princeton University Press 1997). *See also Heller*, 554 U.S. at 632.

[364] *See Heller*, 554 U.S. at 685–86 (Breyer, J., dissenting).

[365] *Id.* at 632.

[366] *See* An Act for the Better Ordering and Governing of Negroes and Other Slaves (1722), *in* 7 South Carolina Statutes, *supra* note 76, at 371, 373.

[367] *Id.*

Contrary to Scalia's assertion, the "overwhelming weight of [] evidence" from the years prior to the adoption of the Second Amendment cuts against the *Heller* majority's position.[368] That evidence demonstrates that the Massachusetts and South Carolina provisions were not abberations. There were the laws impressing arms from citizens, seizing them from suspected loyalists, from Catholics, from Acadians, from those who lent guns to Indians or to slaves, from free servants and free Negroes, from hunters who hunted out of season or in the wrong place, and from those who discharged firearms within city limits.[369]

The immediate reasons for these seizures differed, but the underlying rationale was always the same: they were considered necessary for the good of the community as a whole.[370] Moreover, in many cases, the threshold for disarmament was very low and showed little regard for any "rights" involved.[371] Guns were impressed for the military from loyal Americans with no apparent concern whatsoever for the needs of the citizen.[372] A man could lose the right to possess a gun simply because some "patriotic" neighbor thought he looked "suspicious," or because swearing to a loyalty oath violated his religion.[373] Catholics who never said or did anything evidencing disloyalty were disarmed solely because they were Catholics or were "reputed" to be Catholics.[374]

This, then, is how contemporaries viewed the right "to keep and bear Arms" as those words are used in the Second Amendment. This accounts for the detailed language in the Pennsyvania Minority's proposed right to arms amendment.[375] They, like the rest of their generation, understood that unless aspects of weapons use and ownership, such as "the defense of themselves" or "killing game," were specifically indentified as protected rights, they could be lawfully eliminated.[376]

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[368] *See Heller*, 554 U.S. at 631–32.

[369] *See supra* Parts IV–VII. It may be that, at one time, Justice Scalia gave determinative weight to the number, variety, and reach of provincial and state restrictions on the ownership, possession, and use of weapons. In *A Matter of Interpretation: Federal Courts and the Law*, which was published in 1996, Scalia maintained that if one really understood "what the original Second Amendment said and meant . . . it is no limitation upon arms control by the states." Scalia, *supra* note 363, at 137 n.13. Then, years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), he changed course and voted with the majority in holding that the Second Amendment limits the states' ability to control arms.

[370] *See supra* note 75 and accompanying text.

[371] *See supra* Parts V–VI.

[372] *See supra* Part VII.

[373] *See supra* notes 201–202, 213, 273–275 and accompanying text.

[374] *See supra* notes 223–225 and accompanying text.

[375] *See supra* Part III.

[376] *See supra* Part III.

Justice Scalia's treatment of all of this colonial legislation is telling. As discussed earlier, he trivilized the Massachusetts ban on loaded guns with irrelevant speculation and completely ignored the South Carolina gun storage act.[377] Scalia also made no mention of all of the weapons impressed by the government from loyal citizens, or the mass disarmament of Catholics and other suspected groups—disarmament often based on little more than accusations.[378] He dismissed the gunpowder storage acts as irrelevant without addressing the fact that many of these statutes mandated forfeiture of the gun powder without which the firearms of the day were useless.[379]

Scalia asserted that provincial laws against loading or firing guns probably did not deter anyone from using a firearm because the punishments these laws carried—small fines and forfeiture of weapons—were not "significant criminal penalties."[380] According to Scalia, those penalties were "akin to modern penalties for minor public-safety infractions like speeding or jaywalking."[381] This assertion is completely at odds with the *Heller* majority's view of the sanctity of the right to arms. If seizing a citizen's firearm was not a "significant" penalty and, if it could follow a conviction of a relatively minor offense such as firing a shotgun to celebrate the New Year, the founding generation must have viewed any right to arms as readily alienable.[382]

The *Heller* decision is rife with such inconsistencies and unsupported assertions. The majority held that the District of Columbia's requirement calling for locking handgun triggers to prevent gun-related accidents violated the Second Amendment but that that locking a handgun in a box "to prevent accidents" does not.[383] This makes no sense. While acknowledging—as it had to do—that "the right secured by the Second Amendment is not unlimited," the *Heller* majority had a great deal of trouble dealing with which restrictions are permissible under the Second Amendment and which are not.[384] The Court stated that there was no doubt that laws prohibiting "the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and

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[377] District of Columbia v. Heller, 554 U.S 570, 631–32 (2008).
[378] *See generally id.*
[379] *Id.* at 632.
[380] *Id.* at 633.
[381] *Id.*
[382] *Id.* at 633–34.
[383] *Id.* at 632. *See* J. Harvie Wilkinson III, *Of Guns*, *Abortions*, *and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 297 (2009).
[384] *Heller*, 554 U.S. at 626.

qualifications on the commercial sale of arms" were "presumptively lawful," but never explained *why* they are "presumptively lawful."[385]

The Court also assserted that the Second Amendment protects only the types of weapons commonly used "for lawful purposes like self-defense" and allows the prohibition of "dangerous and unusual weapons."[386] This latter based only on vague "historical tradition."[387] As one astute conservative commentator has pointed out, "The *Heller* majority seems to want to have its cake and eat it, too—to recognize a right to bear arms without having to deal with any of the more unpleasant consequences of such a right."[388]

Americans of the founding generation suffered from no such hypocrisy. Their view of the right to arms was articulated in 1786 by a writer who styled himself "Scribble-Scrabble," one of Justice Scalia's "intelligent and informed people of the time."[389] Writing in Maine's *Cumberland Gazette*, "Scribble-Scrabble" provided the "contemporary understanding" of the meaning of the word "right" as used in the Massachusetts Constitution's guarantee of the "right to keep and to bear arms for the common defence," a guarantee that the *Heller* majority analogized to the right referenced in the Second Amendment:[390]

> It is there declared that "the people have a right to keep and bear arms for the common defence." By this article, the people's right to keep and bear arms for a particular purpose is secured to them against any further acts of the legislature: But it does not prohibit the people, or take away from them, the right originally in them of using arms for other purposes than common defense.
>
> . . . .
>
> The right to keep and bear arms, generally, for all purposes, is undoubtedly an alienable right; and the legislature have a power to controul it in all cases, except the one mentioned in the bill of rights, whenever they shall

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[385] *Id.* at 626–27, 627 n.26; Wilkinson III, *supra* note 383, at 281.
[386] *Heller*, 554 U.S. at 624, 627.
[387] *Id.* at 627.
[388] Wilkinson, *supra* note 383, at 273.
[389] *See* Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcom*, 105 NW. U. L. REV. 1821, 1825–26 (2011).
[390] *Heller*, 554 U.S. at 600–01.

> think the good of the whole requires it. But until the Legislature shall put their power into exercise and controul, direct or modify this general use, the people have the full incontrouled use of arms, as much as though the Declaration had been silent upon that head.[391]

Apparently, Scribble-Scrabble's understanding of the Massachusetts arms guarantee was shared by the people's elected representatives.[392] About three years after the ratification of the state's constitution (1780), the Massachusetts legislature enacted the ban on loaded guns in the houses of Boston (1783), and they knew what they were about.[393] That legislature was sprinkled with men—including Nathaniel Gorham, the Speaker of the House, and Sam Adams, the President of the Senate—who were members of the convention that drafted the Massachusetts Constitution with its protection of a right to arms.[394]

As discussed earlier, the *Heller* majority was adamant that the Second Amendment did not create a right to keep and bear arms but rather "codified a pre-existing right."[395] That "pre-existing right," as understood by Scribble-Scrabble, the members of the Massachusetts General Court, and the rest of their generation, was an alienable right subject to legislative limitations when it was in society's best interest to do so.[396] In interpreting the Second Amendment's right to arms as something far more absolute, the Court has done exactly what it maintained the Second Amendment did not do. The Court created a new right.

The consequence of the Court's decision, if society is to be kept safe from lunatics with machine guns, is that the Court must take it upon itself to determine the limits of the right to own and carry arms. In so doing, it will take on a role that historically belonged to the people's elected representatives, a role that those representatives, still today, are far better equipped to perform.

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[391] CUMBERLAND GAZETTE (Portland, Maine), Dec. 8, 1786, at 1.

[392] *See supra* notes 93–94 and accompanying text.

[393] *See supra* notes 93–94 and accompanying text.

[394] JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY: FROM THE COMMENCEMENT OF THEIR FIRST SESSION, SEPTEMBER 1, 1770, TO THE CLOSE OF THEIR LAST SESSION, JUNE 16, 1780, 7–19 (Boston, 1832); THE SALEM GAZETTE, June 6, 1782, at 2.

[395] *See supra* notes 31–37 and accompanying text.

[396] *See* Charles, *supra* note 389, at 1826–27.