

In the Lawful Defense of Himself or the State: The Historical Underpinnings of the Second Amendment



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Executive Summary

In the debate over gun rights and control, perhaps no element is as contentious as the textualist parsing of the Second Amendment of the United States Constitution. Both camps claim that the text vindicates their particular position by focusing on a different specific clause and disregarding the rest of the sentence. However, the historical arc preceding and flowing from the codification of the right to keep and bear arms is more nuanced than the conversation reflects.

The debate over whether the Second Amendment was intended as a collective or individual right has largely been settled in the Supreme Court of the United States' decisions in *District of Columbia v. Heller* and *McDonald v. Chicago*. Still, even recent jurisprudence incorrectly casts the Second Amendment as “providing for” the right to keep and bear arms when the modern interpretation was deliberately omitted from the U.S. Constitution as it was seen as a natural right fully guaranteed in practice and by common law.

The seventh and current iteration of the Constitution of Texas, adopted in 1876, is far less ambiguous. A document of strictly enumerated government powers, this constitution explicitly codifies a personal defense rationale in acknowledging the right of Texans to carry weapons. Interestingly, the Constitution of Texas also explicitly allows the legislature to regulate the *wearing* of said arms in furtherance of public safety. The parsimonious Texas example alone seems to create a paradox, to say nothing of the ambiguity and embattled history of its federal counterpart. This paper argues that, if properly construed as originally intended, the tension between liberty and safety is not nearly as fraught as the current debate would make it seem. Finally, it highlights the often-overlooked history of forcible disarmament by governments as a precedent for historical atrocities, a scenario envisioned and discussed ad nauseam as the U.S. Constitution was drafted. Although hypothetical, it was likely the fear of a tyranny that prompted the Founders to vest both political and martial power in the most irreducible unit in our government, the citizen.

Both sides of the modern argument are likely to find their preconceptions questioned herein. In fact, it is demonstrated that the Second Amendment suggests a civic obligation for common military and civil defense—one we have near-completely abandoned. However, it is this understanding that undergirds the modern jurisprudential interpretation of the Second Amendment: that the common man or woman has both the right and obligation to arm themselves in defense of—and equally as important, defense *from*—the government.

Key Points

- The Second Amendment is an individual right and can only be restricted in limited circumstances.
- The Second Amendment stems from a multi-century history of religious and class-based genocide extending hundreds of years prior to this country's founding.
- The Texas Constitution is unambiguous in declaring the right to keep and bear arms as an individual right.
- Current case law rightly acknowledges the Second Amendment's history and founding intent.
- The right to keep and bear arms is a natural right, irrespective of the text of the U.S. Constitution.

A Concise History of the Second Amendment

Like the rest of the Bill of Rights, the Second Amendment is a direct response to the predations of the English Crown upon the American colonists. Just as the Fourth Amendment arose from the Kingdom of Great Britain's penchant for employing general warrants to aid in law and customs enforcement, the Second Amendment was a reaction to the Crown's attempts to disarm the colonists in the face of rising tensions. This tit-for-tat assessment, while accurate, fails to account for heated debates surrounding how the fledgling United States government was to be structured and defended, to say nothing of the historical antecedents. As a country whose legal system is molded in the tradition of English common law, it is important to understand how the contemporary civil framework has evolved from Anglo-Saxon law, Norman law, and Salic law. As such, the present legal system is deferential to *stare decisis*, allowing the prevailing rationale of earlier judgments to inform legal questions in the present.

Medieval History

Prompted by an Anglo-Saxon succession crisis, the Norman Invasion of 1066 brought pronounced change to England, seeing both the eradication of the Anglo-Saxon aristocracy and their lands being distributed amongst the victors. The Norman leader William the Conqueror installed a feudal system, granting landed titles to Norman and French nobility. These noblemen were expected to keep peace within their demesne and provide levied soldiers for their lord's adjunct military use. This is the first relevant emergence of the militia. Existing in stark contrast to a king's or emperor's standing army, the militia came to be understood as a part-time emergency assemblage of able-bodied men conscripted to defend their homeland (Bean, 1970).

At the dawn of the 13th century, the English throne was held by King John. Like the previous two French Angevin kings, John derived his authority mostly from the arbitrary and capricious application of threats and violence rather than any established system of governance. Essentially a medieval despotism, this state of affairs aggravated the feudal lords. In an attempt to settle the growing rebel sentiment, John begrudgingly signed the Magna Carta in 1215 at Runnymede (Holt, 1992).

The 1215 document, widely seen as the progenitor of the uncodified Constitution of the United Kingdom and

influencer of the Constitution of the United States, was the first codified partial devolution of royal prerogative into a more democratic form of government, although the locus of power was divvied up between John and the barons rather than their subjects. Still, this fundamental shift brought about early examples of present-day governance, such as due process and no taxation without general consent. Importantly, it constrained the ability of the king to demand armed levies or war funds. However, bad faith execution from both parties led only to temporary peace as mutual aggravation escalated into the First Barons' War. Subsequently, the Magna Carta was revised and reissued in 1216, 1217, 1225, and 1297; each iteration resulting in another modicum of power being devolved to the feudal lords (Bean, 1970).

With the institutional weakening of the English monarchy, subsequent sovereigns became increasingly reliant on the militia for civil defense and keeping the king's peace. The king, in turn, was able to place certain strictures on

the militia and its constituent membership. One example of these restrictions was the Statute of Northampton in 1328. During his reign, Edward III began implementing royal justice pursuant to the precepts of Roman civil law as opposed to traditional English common law. The Statute read:

Item, it is enacted, that no man great nor small, of

what condition soever he be, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office ... be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure. And that the King's justices in their presence, ... [local officials], shall have power to execute this act. And that the justices assigned, at their coming down into the country, shall have power to enquire how such officers and lords have exercised their offices in this case, and to punish them whom they find that have not done that which pertained to their office. -Statute of Northampton, 1328

This change, one of many chipping away at the rights laid out in the Magna Carta enacted by English monarchs,

functionally prohibited the bearing of arms as common law prohibition against affray referred to simply anything that could subjectively “bring fear” to the public (Cramer, 2015; Cornell, 2017). Despite the widespread unrest triggered by the unpopularity of the king’s disregarding of the common law, his reign remained intact.

The Interregnum, the Glorious Revolution, and the English Declaration of Rights

From 1547 to 1653, the English line of succession ran through both Catholics and Protestants. Almost without exception, the ascendant king or queen used their sovereign power to disarm—and in several instances, purge—adherents of the other sect (Malcolm, 2002; Shagan, 2004). This secular and religious tension culminated in the War of the Three Kingdoms, and most notably three English civil wars over the course of nine years from 1642 to 1651. These wars resulted in Charles I’s execution in 1649, the exile of his heir Charles II in 1651, the capture of English governmental power by Parliament, and the functional abolition of the monarchy (Royle, 2004). In these conflicts, the Crown’s army was pitted against militias of the religious minority when defensive action was taken.

Following the wars, the British Isles (now known as the Commonwealth of England, Scotland and Ireland) were governed by a Lord Protector—first Oliver Cromwell and then briefly his son Richard. Just as Parliament had established the Lord Protectorate in 1653, it dissolved the position in 1659 in favor of the quasi-parliamentary English Council of State, which had existed since appointing the elder Cromwell. Richard, prior to his resignation, recalled Parliament. For the first time in nearly 20 years, a general election was called.

Representative of the festering religious and secular political schisms in England, the composition of Parliament was functionally equal parts parliamentarians and royalists, Presbyterians and Anglicans. These divisions manifested in an unstable government, one in which General George Monck—an endorsee of Oliver Cromwell and the commander-in-chief of the armies of England and —was able to engineer the restoration of the English throne (Bennett, 2006).

Monck was elected to the reconvened “Convention” Parliament, all the while secretly championing the royalist agenda and communicating with the presumptive heir to the throne, Charles II. Charles, still in exile in the Netherlands,

capitalized on the ascendant royal sentiment in Parliament by issuing the Declaration of Breda. In this proclamation, Charles promised that, should he be recognized as the rightful king of the Commonwealth’s lands, he would pardon most offenses of the rebellion and interregnum, allow landholders to keep their land, and adopt more tolerant religious laws (Seaward, 1988). The war-weary, royalist-leaning parliament proclaimed Charles II the rightful king in May of 1660. The Convention Parliament was dissolved and the “Cavalier” Parliament—one loyal to the king and overwhelmingly Anglican—was installed.

With the monarchy fully restored and Parliament largely in thrall, Charles faced few headwinds to royal prerogative. He partially kept the promises made in the Declaration of Breda, although exempted 50 Regicides (those who had been proximate to the trial and execution of Charles I). Charles II’s vengeance upon the Regicides was summary, resulting in those who had already died, such as Cromwell, to be exhumed, posthumously executed, desecrated, and

discarded. Further, promises of religious tolerance went unfulfilled as Parliament enacted the acts of the Clarendon Code. The Code sought to solidify Anglican supremacy, requiring all government officials to be part of the Church of England, mandating the Anglican Book of Common Prayer, and forbidding non-Anglican religious gatherings of five or more.

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The recentralization of power within the monarchy aggravated the various estates of the former Commonwealth. By the 1670s, Parliament, too, grew weary of Charles’s military adventurism on the European mainland and domestic religious inconsistency. Charles finally honored the promise of religious liberty extended to Catholics through the Royal Declaration of Indulgence of 1672, which largely suspended the Penal Laws. Enraged, the Anglican Parliament asserted its near-dormant power claiming that the king cannot unilaterally suspend duly passed laws. Chastened, Charles withdrew the Declaration and even supported the Test Act, which imposed a religious test for government service as well as severe penalties for recusants and nonconformists.

The final blow to the fragile peace between the Crown and Parliament came from the line of succession, with Charles II’s Roman Catholic brother James II assuming the throne following Charles’s passing in 1685. James spent the first few years of his reign chipping away at the anti-Catholic

policy ensconced in the preceding decades. This enraged the still-Anglican, Parliament and relations approached a boiling point in early 1688.

Three events that year pushed the status quo into chaos. In April, James reinstated the Royal Declaration of Indulgence and required it to be read from Anglican pulpits. Shortly thereafter, James's son, James Francis Edwards, was born and presented the first potential of a permanent Catholic monarchy. Relations and national turmoil became so tense that in December James fled to France, dropping the seal of the realm in the River Thames. In January and April of 1689, the English and Scottish parliaments, respectively, considered this action to be an abdication of the throne (Miller, 2014).

Upon the invite of Protestant nobility and with the backing of the Dutch military, Protestant William III and Mary II (James II's daughter) invaded England in 1688 in what became known as the Glorious Revolution. Parliament was greatly divided, with the House of Commons (i.e., "the people") wanting to install William as king, while the House of Lords wanted a joint monarchy or Mary to have exclusive reign. The pair were ultimately declared joint monarchs with authority expressly limited by Parliament.

Since William and Mary were technically only regents, they required an act of Parliament to declare them the holders of the throne, as well as to enumerate the body's grievances against James II. Most importantly, the English Declaration of Rights was the first enactment of Lockean limits on a government or sovereign, although the "rights" discussed therein were vested in Parliament as an edifice of "the people" rather than the people themselves.

The Declaration of Rights was codified into law in mid-December of 1689, as the English Bill of Rights. A response to years of royal overreach and diminished power of the estates, the Bill (1689) established, among several common law rights, parliamentary supremacy by explicitly:

- Requiring Parliament's consent to suspend any law;
- Prohibiting the King from collecting taxes without Parliament's consent;
- Prohibiting a standing army;
- Prohibiting excessive bail, cruel or unusual punishments, and providing for trial by jury;
- Prohibiting fines and forfeitures, absent a conviction;

- Granting the right of free speech and to petition the King;
- Prohibiting establishing institutions of the Catholic Church; and
- Granting the right [for Protestants] to keep and bear arms.

Philosophy and Firearms in Colonial America

With thousands of miles of ocean and weeks of travel time between England and colonial America, the colonial interpretation of the "Rights of Englishmen" had begun to divergently evolve from the 17th-century status quo. The colonists tightly adhered to the principles of subsidiarity, not because of philosophical agreement but rather immutable need. Constantly facing frayed relations with indigenous peoples, difficult seasons, and simple geographic separation, problems often had to be handled locally. Thus, man's relationship to government as inferred at Runnymede took hold in colonies far stronger than it would have in the face of a strong parliament and involved king. Some colonies, such as South Carolina, went as far as to codify English common law as set forth in the Magna Carta into law.

This nascent American understanding of natural rights was buoyed by the writings of contemporary philosophers, most notably John Locke, Thomas Paine, and those whose beliefs

fell somewhere in between. Locke's philosophy specifically had arguably the greatest impact on the zeitgeist of colonial America, fleshing out in vivid detail the relationship between the government and the governed. In the 17th century, Locke's ideas started to permeate the English consciousness well in advance of William of Orange landing in England. His seminal works, the *First* and *Second Treatise of Government* (1689), were written between 1681 and 1688 in part to articulate the grievances animating the various rebellions preceding the Glorious Revolution.

The First Treatise of Government serves as a religious and philosophical basis for the evisceration of Sir Robert Filmer's concept of the divine right of kings, the legitimizing belief that even an absolute monarchy is justified so long as God wills it. Locke saw this supposed right as justifying a secular government unaccountable to its subjects. Filmer contended that there was no state of nature conferring freedom upon man, and the kingdom had been established since Genesis. Locke refuted this theory with natural law.

It is in *The Second Treatise of Government* that Locke (1689) fully fleshes out the importance of a government's

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legitimacy based on natural law. Natural law, simply put, is a collection of universal moral truths that all men possess (p. 182). This differs greatly from “positive,” or man-made, statutory law (p. 203). While the latter is often inherited by those who had little to no say in its formation and subject to whimsical change, the former is constant and immutable. Although philosophers expositing natural law have sometimes referred to it as “divine law” and have thoroughly illustrated its heritage in Judeo-Christian teachings, the concept itself is inherently secular as the truth does not require divine revelation alone to be conferred on man.

This is a sharp contrast from the Hobbesian view expounded in *Leviathan*. Hobbes’s view of the state of nature was so dour that he rejected the premise of natural law nearly entirely. It is not hyperbole to say that, absent a legitimate positive law construct prohibiting such, a government could rationally be justified in performing any and all acts of subjugation short of systematic genocide. Hobbes’s (1651) philosophy was adequate in rationalizing a government of shared, limitless-but-checked power like the English Parliament, but inadequate in explaining one of devolved, enumerated powers such as ours.

One of the primary reasons that a Lockean understanding of the relationship between man and state triumphed over Hobbes in the colonies was necessity.

The subsidiarity of colonial governance and the requisite autonomy needed to meet basic existential needs simply could not be beholden to an uninterested government that was days, weeks, or, in the Crown’s case, months away. Of course, the geographic argument alone presupposes that such pleas would be heeded if received. As the colonial governments evolved, so too did their adherence—both formally and informally—to the tenets of liberty descended from English law. So pronounced was the influence of natural law on the American colonies that South Carolina, shortly after separating from North Carolina and being recognized as an official colony, incorporated the Magna Carta in 1712. This classically liberal doctrine was widespread amongst the colonies as American custom grew and filled the crevices left by an absentee administration from London. As illustrated by Kirk’s third principle of conservatism—prescription—the prevailing social order with all its inherent liberties became the status quo (Kirk, 1993).

However, external forces sought to erode the natural order of the colonies. In the latter half of the 18th century,

worldwide military campaigns by the European central powers left the British government heavily indebted. Viewing the American colonies as a potential fiscal windfall, Parliament, without any representative input, passed several measures of taxation and increased government power. Starting with the Sugar Act of 1764, the body began creating extractive revenue streams from the colonies. Other legislation, such as the Stamp Act of 1765, imposed a steep tax and import duty on many commonplace documents. The colonists were incensed to be facing a new levy without having a say in the matter other than the cursory “virtual representation” accorded to every subject of the British Empire. In 1766, as boycotts and protests began to erode the revenue collected by these taxes, Parliament repealed the Stamp Act and softened the Sugar Act, at the same time reasserting that Parliament has ultimate authority over the colonies (McManus & Helfman, 2014).

Parliament and the king continued to disrupt daily life in the colonies. In 1765, the Quartering Acts mandated that British soldiers be given room and board in private homes

and facilities, even though the French and Indian War had concluded. New York, the headquarters of the British Army both during and after the war, had initially refused to comply with the first of the Quartering Acts when Lord Loudon arrived in 1766 with a contingent of 1,500 British

regulars. Incensed by the colonial government’s refusal to accommodate the soldiers, Loudon ordered the troops to force themselves into private homes.

Despite the 1766 placation from reducing the Stamp and Sugar Acts, Parliament continued to exert coercive authority on the colonies. Between 1767 and 1768, Parliament passed the five Townshend Acts, which in tandem sought to both raise tax revenues in the colonies and provide for the enforcement of parliamentary prerogative. Included in this legislation was the New York Restraining Act, which suspended colonial governance in New York until it complied with the Quartering Acts and the Revenue Act, which established a system of general warrants. The latter was seen as a direct affront to the private property rights of the colonists extending back to the signing of the Magna Carta. Most proximate to the devolution of relations between the colonists and the Crown, the Commissioners of Customs Act established a customs board in Boston to enforce and collect shipping taxes.

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The customs board in Boston proved to be incredibly unpopular, necessitating the Crown send a garrison to keep the peace. However, the added military presence only served to further increase tensions. This escalation culminated in the Boston Massacre of 1770, leaving eight colonists dead or wounded as British forces opened fire into an unruly protest. The violence stoked colonial resentment both in and beyond Boston as the Crown shifted from a removed, aloof government to active oppressor.

In an effort to cool simmering tensions, Parliament canceled all taxes on the colonists, save for the duty on imported tea. By keeping this tax in place, Parliament not only retained the authority to tax but also offered a venue to empower consignees as designated tea merchants, nullifying the smuggling of untaxed tea. In 1773, Parliament passed the Tea Act, essentially creating a colonial monopoly for the East India Company selling tea in the colonies. Both smugglers and law-abiding citizens not granted a designated consignment were faced with economic ruin. This prompted the Boston Tea Party in December of that year, resulting in the destruction of hundreds of thousands of pounds of British tea (McManus & Helfman, 2014).

In order to quell the insurrection beginning in Boston, Parliament passed the Coercive Acts, or the Intolerable Acts, as they were known in the colonies. Collectively, the legislation functionally dissolved any self-rule in Massachusetts, mandated voluntary extradition of royal officials accused of any crimes, closed the port of Boston until restitution was made for the destroyed tea, and reinstated the provisions of the Quartering Acts (McManus & Helfman, 2014). Parliament intended for these acts to drive a wedge between radical revolutionaries of the Massachusetts Bay Colony and the rest of the colonies. However, the severity and autocratic nature of the legislation simply caused more animus between the British and American colonials.

Prior to the hostilities of the American Revolution, Crown authorities sought to disarm the militia in order to subjugate the colonists. Sir William Keith, governor of Pennsylvania, proposed that the militia not be eliminated out-of-hand, but rather let atrophy through misuse and negligence. The militia would become so disreputable and distrusted, he believed, that the people would have no choice but to rely upon the standing army (Halbrook, 2008).

The American Revolutionary War

In 1774, the colonists convened the First Continental Congress, an open statement of defiance to determine a

collective reaction to the Intolerable Acts. The Congress established the Continental Association, which banned the importation of any material from the British Commonwealth and issued a petition to King George III for a redress of grievances caused by the Intolerable Acts and other instances of British tyranny. The petition went unheeded.

In response to the dissolution of colonial self-rule in Massachusetts, locals created the Massachusetts Provincial Council to function as a colonial shadow government. As articulated in the Suffolk Resolves, colonists were entreated to ignore the dictates of royal decree, to boycott British goods, and to begin assembling a militia for the common defense. In February of 1775, the Massachusetts Bay Colony was declared by British authorities to be in an open state of rebellion.

Broadly punishing the American colonists for the perceived unruliness in Boston further spread rebel sentiment across the thirteen colonies. Foreseeing King George III using the British Army to enforce the Intolerable Acts, the colonists prepared themselves for martial conflict. In Lancaster County, Pennsylvania, residents of Hanover succinctly articulated the cause of armed resistance on June 4, 1774: “That in the event of Great Britain attempting to force unjust laws upon us by the strength of arms, our cause we leave to heaven and our rifles” (Johnson, et al., 2017: p. 249).

At this point, militias had formed throughout the colonies, not least of which was in Massachusetts. In April of 1775, the British garrison was ordered to disarm the colonists, specifically to seize a large militia weapons cache near Concord. By the time the 700-man British force was passing through Lexington in the early morning, 77 militiamen, alerted through actions of Paul Revere and others, had assembled. After a brief exchange, eight militiamen lay dead with ten more injured, and the British resumed their march toward Concord having only one of their own wounded. The militiamen slain in Lexington were to be the first casualties of the American Revolutionary War.

The muster in Concord, while larger, could not match the size of the British Army. The militia retreated to a safe elevation overlooking the town. The British regulars commenced with their search of Concord. The weapons caches had been relocated in anticipation of coming military action, leaving the British to recover (and render inoperable) only a handful of firearms and cannon. However, as the British searched Concord for the weapons, roughly 2,000 militiamen assembled from neighboring areas. After a brief

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symmetrical skirmish with the assembled militiamen, the British soldiers formed a column and began the march back to Boston. By this point, casualties on both sides had been relatively minimal.

If the first shot fired in Lexington was to be known as “the shot heard around the world” and considered legendary in the annals of American history, then the British soldiers’ experience during their march back to Boston holds similar stature in the history of gun rights. Armed with muskets and fowling pieces, the militiamen followed the British column, firing upon the ranks from behind trees and embankments. This asymmetrical engagement style left the British largely defenseless and near surrender. One militiaman wrote, “We pursued them and killed some; when they got to Lexington, they were so close pursued and fatigued, that they must have soon surrendered, had not Lord Percy met them with a large reinforcement and two field-pieces” (Crowder, 2017, p. 136).

Similarly, the British account was frustrated and dire, as described by General Percy (in Weeks & Bacon, 1909):

During the whole affair the Rebels attacked us in a very scattered, irregular manner, but with perseverance & resolution, nor did they ever dare to form into any regular body. Indeed, they knew too well what was proper, to do so. Whoever looks upon them as an irregular mob, will find himself much mistaken. They have men amongst them who know very well what they are about, having been employed as Rangers against the Indians & Canadians, & this country being much covered with wood, and hilly, is very advantageous for their method of fighting. (pp. 555-556)

Here, a personally armed, modestly trained fighting force of citizens not only earned a military victory against one of the then-most powerful professional armies in the world but was able to bring the aggressors to the point of almost being routed. This civic call to arms was the Platonic ideal of the militia.

Shortly after the hostilities at Lexington and Concord, and the return to Boston, the former colonies called the Second Continental Congress in May of 1775. The Congress ruled to assemble militia units in the Continental Army and to issue the Olive Branch Petition, the final attempt to stave off a war with Great Britain by affirming fealty to the king while enumerating the grievances and illegitimacy of Parliament. King George III, however, having just proclaimed all of the American colonies in open rebellion, refused the petition. Left with no recourse but to fight for their continued existence as freemen, the Congress issued the

Declaration of Independence on July 4, 1776, a direct recitation of Lockean principles (McManus & Helfman, 2014).

Just as military actions in the northern reaches of the colonies was stymied and at times upended by the civilian militia, the British Army suffered similar setbacks in the South. With the population radically divided on the question of revolution and with the British securing the strength of several Native American tribes, it was not until 1778 that the British Army focused on increasing loyalist holdings in the southern colonies. This reprioritization was counterbalanced by both France and Spain formally declaring war on Great Britain that same year. Lord Charles Cornwallis, a British Army officer who while in Parliament had voted against the Stamp Act, was tasked with securing and coordinating loyalist support in the South in 1779 under General Henry Clinton. By May of 1780, the British Army had secured both Savannah and Charleston, effectively neutering organized American military operations in the South.

After Charleston, Clinton left the British Army in the South to Cornwallis to take a command role in New York. While organized American forces were scattered, Cornwallis was beset by patriot militias. His forces were able to summarily rout the militia in Lancaster, South Carolina, at the Battle of Waxhaws, but the victory proved to be pyrrhic as it only served to enervate local militias far removed from areas of military action. The Overmountain Men—militias from west of the Appalachian Mountains—decisively contributed to the attrition of the British Army. The consistent pressure put on the Redcoats from the militias helped the Continental Army prevail at Cowpens, setting up their final defeat at Yorktown (Russell, 2009).

The 7 years of fighting resulted in an estimated 70,000 American dead. Having made several strategic miscalculations and unable to stem foreign intervention on behalf of the Americans, Great Britain assented to the Treaty of Paris in 1783, ending hostilities and relinquishing all Crown holdings in the 13 American colonies.

The Constitutional Convention and Beyond

While the influence that the English Bill of Rights had on its American cousin is evident, it is important to note a fundamental difference between the two. The Declaration of Rights sought a revanchist return to the spirit of Magna Carta where the king was prohibited from committing certain actions against the people, thereby creating the English people’s “rights” in the negative space where it existed, so long as Parliament thought it wise to allow the people to retain them. In contrast, the American, Lockean conceptualization of rights was nearly unlimited in that (a) rights could only be diminished or duties imposed via the consent of those subject to the relinquishment, and (b) even the

relinquishment of rights is limited to those not in the body of natural, unalienable rights (Locke, 1689, p. 11).

Many scholars have dedicated their careers to the philosophical granularity of natural law philosophy, and any attempt to fulsomely summarize it here would likely do injustice to that body of literature. Still, the general, agreed-upon tenets of natural law are important as they have broadly animated the founding traditions of the United States. Most elementary school students can identify that the American republic was founded on the basis of “life, liberty, and the pursuit of happiness” as enumerated in the Declaration of Independence, but few understand it as shorthand for its antecedent “life, liberty, and property,” as Locke had originally conceived. Life, liberty, and property were the foundation of natural law—what no tyrant or zealous mob could take from those unwilling to part with them.

After the beginning of the Revolutionary War, the Second Continental Congress had approved, and the colonies ratified, the Articles of Confederation, a binding document that loosely defined the relationship among the states and enumerated the powers of a deliberately weak central government. Notably, the new assemblage of states had no power to levy or enforce taxes on the states or their citizens. Naturally, this made fielding an army for the common defense difficult as the body had to petition the states for money in order to finance military action (McManus & Helfman, 2014).

Viewed through the lens of a defensive military alliance, the Articles of Confederation were more than sufficient to establish the necessary cooperative framework amongst the states, notwithstanding the aforementioned issues with collective finance for the common defense in times of war. In peace, standing armies were prohibited, although the states were mandated to keep a trained and armed citizen militia.

However, considered under the rubric of a functional constitution, the Articles of Confederation were simply too weak to bind 13 independent states in perpetuity. Without any meaningful enforcement powers, states could openly defy duly passed laws at will. Other states would be made to enforce these laws through military action, an option expressly forbidden by the Articles. This is to say nothing of the existential threats posed by major European powers with colonial interests or intents in the Americas. Shortly after the Revolutionary War ended, calls to revise the Articles of Confederation began to rise.

In May of 1787, the Constitutional Convention began in Philadelphia. While the delegates largely agreed on the need for a federal government, they strongly disagreed on the ambit of its powers. Relevantly, one central point of disagreement between the delegates was the state of military affairs in the fledgling country.

The colonists keenly remembered the oppression meted out by the British armies garrisoned in the colonies during the revolution. As the newly formed states began enacting their own constitutions, many borrowed explicitly from the grievances enumerated in the Declaration of Independence and admonished standing armies as potential instruments of tyranny in favor of a system based on state militias. However, the reliance on foreign regulars, navies, and privateers sparked the debate on the sustainability of the militia alone for the collective defense of the country. Further, the military standards of the state militias varied greatly with non-uniform requirements for service outside of age and gender (McManus & Helfman, 2014).

Federalists like Gouverneur Morris of Pennsylvania argued that the ability to field a federal army of regulars was necessary for the existential continuity of the new country. Many antifederalists, such as James Madison, argued that the federal government should be given the power to set the standards of and execute control over the national army, but that such must be an assemblage of the state militias. Both camps, however, were cognizant that providing the president as commander-in-chief at the helm of a national army had disturbing precedents in colonial and British history. Prospectively, there was ample fear that a powerful army would become a political faction unto itself.

The resulting compromise favored the position of the federalists, providing for the ability to field a standing army with control vested in the citizenry via the legislatures. The antifederalists, bemused at the threat this arrangement posed to liberty, took solace in the common understanding that American citizens were to be armed both collectively in their ability to field a state militia and individually in their unfettered rights to bear arms. Author Noah Webster (1787) summarized:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band

The general, agreed-upon tenets of natural law are important as they have broadly animated the founding traditions of the United States.

of regular troops that can be, on any pretence, raised in the United States. ... In spite of all the nominal powers, vested in Congress by the constitution, were the system once adopted in its fullest latitude, still the actual exercise of them would be frequently interrupted by popular jealousy. (p. 43)

This understanding was considered the guarantor of other individual liberties. Zachariah Johnson, delegate from Virginia, described the compromise in the vein of religious liberty (in Elliott, 1881):

The people are not to be disarmed of their weapons. They are left in full possession of them. ... Under these circumstances should any one attempt to establish their own system [of religion], in prejudice of the rest, they would be universally detested and opposed, and easily frustrated. This is the principle which secures religious liberty most firmly. (p. 646)

This interpretation is subsumed in English jurist William Blackstone's (1765) observation:

In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear; but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. (p. 395)

This conceptualization of the right to keep and bear arms is best understood not solely as permission to be armed, but also as the civic obligation to do so in service of liberty and the laws of the state. To fully participate in the *Res Publica* is to defend it, and the unfettered, individual liberty to defend it is a core tenet of republican government. Independence, as a principle, requires the absence of dependence, here specifically upon the state. This common understanding was carried forth into the Constitutional Convention.

While the discussion over what was to become the Second Amendment to the Bill of Rights was contentious, no less

fraught was the debate on whether to include such a section in the constitution. While there was near-unanimous agreement that the offenses of the Crown were intolerable against a society of free people, the federalists argued that a federal enumeration of individual rights was superfluous. They believed that the federal government was duly bound by enumerated powers while the rest were reserved for the states and their people, while the antifederalists believed that liberty would be threatened by a strong central government in the absence of explicit fundamental prohibitions on government power. The final version of the Bill of Rights included 10 amendments, each enumerating a constraint of government power.

The right to keep and bear arms was codified in the Second Amendment to the United States Constitution. It reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

As time progressed, the balance in public consciousness between the militia and a standing army shifted to privilege

This perspective requires expositors to feign ignorance of nearly half a millennium of how the Lockean view of the right to keep and bear arms became ascendant.

the latter. This has permitted modern scholars to suggest that if the implied civic obligation has diminished with time, so too has the explicit prohibition on government's encroachment on the right to keep and bear arms entirely. This perspective requires expositors to feign ignorance of

nearly half a millennium of how the Lockean view of the right to keep and bear arms became ascendant. The Second Amendment is not, nor was it intended to be, the terms of a fleeting transactional relationship between a government and her people. It was explicitly enacted in order to keep a centralized authority from using force to impose the will of a removed ruling class on the least of her subjects. The right to keep and bear arms is a collective right only insofar as it is an aggregate and guarantor of each citizen's individual rights.

The initial intent of this right was demonstrated a year before the Constitutional Convention was called. As one of the hotbeds of revolutionary activity, Massachusetts had acutely felt the aftereffects of the war, not least of which were economic. Even prior to the war, Boston and the coastal areas of the former colony enjoyed a cosmopolitan market economy while the state's inland western regions lived a subsistence existence with little more than their land to their name. As currency and credit diminished in

the postwar period, merchants began calling in debts to generate the cash needed to do business with European markets as well as the other colonies. The rural landowners were largely unable to meet these obligations, a problem compounded further by the state's civil authorities becoming more aggressive in the collection of delinquent taxes (Richards, 2002).

The inevitable escalation of civil turmoil was largely delayed by John Hancock, who served as Massachusetts' first governor before resigning in May of 1785. Hancock largely avoided taking measures in the troubled fiscal climate that would have hastened the unrest, such as enacting hard currency economies within the state. This allowed his erstwhile gubernatorial opponent James Bowdoin to take control of the state under the mantle of "fiscal responsibility." The subsequent policy changes, such as increasingly aggressive enforcement of delinquent tax collections, enraged rural landowners, many of whom lost their property or freedom shortly thereafter.

The crippling burden of debt and taxes, considered by John Adams as "heavier than the People could bear," sparked widespread civil unrest in western Massachusetts (McCullough, 2001, p. 369). Legislative remedies for relief were sent to the statehouse by rural representatives and were largely ignored by the mostly merchant class body. Some bills, such as those promoting the use of a paper currency, were actively opposed by the independently wealthy Bowdoin as the resulting devaluation of debt would have been contrary to his interests. Protestors began shutting down courthouses in rural Massachusetts to delay the seizure of property and jailing of individuals pursuant to delinquent debt. Bowdoin condemned the protest, promising that subsequent unrest would be met with military force.

When the court in Worcester was shut down just three days after Bowdoin's proclamation, the governor called for the militia to muster and put down the protest. Being drawn from the local populace, the militia refused to take up arms against their friends, neighbors, and relatives. As more courts were shut down by successful protests, the Massachusetts government quickly moved to suppress the fledgling rebellion. Samuel Adams, patriot leader during the Revolution and at the time holding office in the state senate, drafted the Massachusetts government's iteration of the Riot Act and proposed legislation that suspended *habeas corpus* and would punish rebellion with execution. Bowdoin himself and 125 wealthy merchants had funded a private militia 3,000 men strong (Richards, 2002).

The 3,000 mercenaries and the loose assemblage of 4,000 rebels under Revolutionary War veteran and farmer Daniel Shays engaged in multiple skirmishes over the 10 months

of hostilities, resulting in dozens upon dozens of injuries but fewer than 10 deaths. Hancock returned to public life, roundly defeating Bowdoin in the 1787 election. Nearly all of the rebels were granted amnesty after the conflict that later became known as Shays' Rebellion, save for two who were also looting. This incident was viewed by the federalists as a persuasive case for a strong national government.

Moreover, Shays' Rebellion validated in no uncertain terms the fears of the antifederalists, Blackstone, Burke, and others. Within only 10 years of the American Revolution, those lauded as heroes had secured high seats in state and federal governments. Those who would risk their own lives and fortunes against the British would, provided the chance, unilaterally take through force the property, freedom, and even lives of their fellow patriots in pursuit of self-interest. Further, it illustrated that simply calling a recently assembled army (Bowdoin's) a militia does not mean that it is fielded in defense of the people. If it were not for the militia, with its faults, the protestors would have been put down after the first courthouse closure, and the seizures and jailing would likely have continued apace. Under Lockean understanding, a domestic tyranny is no less abhorrent to a free people simply because it features an auxiliary democratic process.

The sanctity of American natural rights was soon reified by the United States Supreme Court in *Calder v. Bull* in 1798. The case itself was fairly innocuous: an inquiry into the applicability of protections against *ex post facto* laws to changes in civil laws retroactively applied. However, the opinion explored *why* a subsequent change in law could or could not bear on actions already taken.

In doing so, Justice Salmon Chase wrote in the *Calder v. Bull* (1798) opinion:

There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law or to take away that security for personal liberty or private property for the protection whereof of the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. (p. 3)

In short, that which violates first principles of the United States Constitution is *per se* illegitimate. The legislatures (or Congress) are entities conjured entirely from subordinate authority delegated by state and federal constitutions. Absent from this delegated authority is the power to usurp or mute superior powers established in the founding

documents. More bluntly, in the universe of that which a government could possibly seek to restrict, certain natural rights are wholly off limits.

Collective Disarmament and Litigation of the Second Amendment

Despite the common understanding of militia and the right to keep and bear arms established at the founding, the Second Amendment was in short order limited to only White citizens. Black freemen were explicitly denied the ability to join the militia and provide for the common defense by the Uniform Militia Act of 1792, creating an implicit understanding that they would have no need to arm themselves. Prior to the Civil War, nine states¹ (all but Maryland located in the antebellum South) had enacted laws prohibiting slaves from owning or possessing firearms, seven of which extending the prohibition to free Black citizens as well.²

This racialized application of natural rights was bolstered in *Scott v. Sandford* (1857):

For if they were so received, and entitled to the privileges and immunities of citizens it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. ... It would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. (pp. 417-418)

After the conclusion of the Civil War, Alabama and North Carolina continued to prohibit Black citizens from keeping and bearing arms. This practice was forbidden by the Civil Rights Act of 1866 and later constitutionally prohibited by the ratification of the 14th Amendment in 1868. States like Mississippi and Florida simply ignored the amendment and continued to enforce pre-emancipation law, while states like Alabama, Arkansas, Tennessee, Texas, and Virginia enacted usurious taxes on firearm-related activities, thereby making gun ownership cost-prohibitive for poor Blacks and Whites alike. However, Black ownership of firearms was thrust into the national discourse by two incidents in Louisiana shortly after the end of the Civil War: the New Orleans and Colfax massacres.

In the wake of the postbellum enactment of Black Codes—legislation regulating the activities of Black American

citizens—Louisiana Republicans sought to reconvene the Louisiana Constitutional Convention in 1866. A detachment of Black Republican supporters, animated by the day's proceedings, planned a parade to the Mechanics Institute (the equivalent of a job training center) where the convention was taking place. Awaiting the marchers at the Mechanics Institute were the White, anti-abolition Democrats—former Confederate soldiers, party officials, and members of the New Orleans police and fire departments.

The proceedings were immediately suspended within the building as the marchers came under attack. In addition to the police force firing indiscriminately into the groups of marchers, the assembled Democrats also fired into the Institute and at frantic escapees. Dr. William Hire, a participant in the convention, offered a harrowing account (in Select Committee on the New Orleans Riots, 1867):

There was some confusion in the hall; many shots were fired in the hall, through the windows, during this time and afterwards ... There was a period of silence, and the attention of everybody was directed to the doors. Presently the doors opened; I looked around and saw some police and citizens make their appearance. Following a death-like silence, there was a volley fired, from the door, upon those inside. ... It appeared to me that they discharged their four or six-shooters as rapidly as possible. ... Members of the convention, colored men and all, rushed to the door. ... The citizens and police were repulsed. It seemed ridiculous to me that men should, with chairs, battings, and pieces of railings, contend against an armed force, regularly organized. ... Dr. Dostie ... said: "They will kill me: they are bound to kill me." That seemed to be the prevailing opinion of all of us, especially of those who were known to be Union men. (pp. 6-7)

When hostilities had ceased, 150 individuals were injured or killed, including the deaths of 44 Black and 3 White Republicans. The Democrats justified the massacre of the largely unarmed convention-goers on the grounds that the meeting was *per se* illegal and that Republicans and freedmen sought to "secure to their party the absolute control of the offices of the State" (p. 37). Benjamin Moyer (D-PA) authored the minority report for Select Committee on the New Orleans Riots, stating:

Under ordinary circumstances a small body of men assembling for the purpose of changing the government of a State with so little color of law might be treated as a body of harmless adventurers, and regarded as entitled to but little public notice. But in this case the times and

¹ Maryland, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia had enacted complete bans for slaves by 1861.

² Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia prohibited all Black people from owning firearms prior to 1861.

circumstances were extraordinary, and well calculated to excite serious apprehension. Men high in position were connected with the conspiracy. (p. 40)

The nationwide outrage resulting from the Democrats' action and justification led to a sweeping Republican victory in congressional elections in November of 1866. Ironic to those holding the same opinion as Mr. Moyer, this landslide victory gave Republicans 77% of the seats in Congress, a comfortable margin beyond that needed to override President Andrew Johnson's veto on the First Reconstruction Act. Additionally, the Congress passed the Enforcement Act of 1870, granting the federal government the power to enforce certain terms of the United States Constitution against state actors.

While individually tragic, the death toll paled in comparison to that of the Colfax Massacre on Easter Sunday of 1873. Still roiling in racialized politics, the Louisiana gubernatorial race of 1872 produced two claimants to the office: Republican William Pitt Kellogg and "Fusionist" (Democrats joined by Liberal Republicans—those opposing President Grant's approach to Reconstruction) John McEnery. A narrow majority of the Fusionist-dominated elections board eventually certified McEnery as the winner. This ruling only served to further escalate the racial and regional tensions in the state, as McEnery began dispatching militias and White supremacist paramilitary units to retake control of Black parishes by force.

Fearing the loss of the courthouse in Colfax—the county seat of Grant Parish—the all-Black Republican militia mustered at the town square to defend the Kellogg-installed slate of local candidates. On April 13, a White Democrat paramilitary force of 300 men assembled from surrounding parishes marched on the courthouse under the banner of Christopher Columbus Nash, a Confederate veteran and McEnery's parish sheriff and judge appointee. Few casualties were sustained before the defending Republican forces routed (Lane, 2008).

The massacre occurred as Nash's forces continued hostilities after the rout and retreat of the courthouse defenders. Mounted soldiers chased the 60 fleeing Black men into the woods of Grant Parish, offering no quarter for surrender and slaughtering the defenders. Another 50 had surrendered after the hostilities at the courthouse had stopped.

That evening, the Republicans who surrendered and survived the day were executed without trial (Lane, 2008).

Bill Cruikshank, one of the McEnery-appointed judges, killed many of the captives himself. While the wholesale execution would be treated as a violation of Louisiana state law (if it were to be investigated at all), the United States Attorney of New Orleans G.R. Beckwith launched an inquiry into whether Cruikshank had conspired to deprive the Black Republicans of their First Amendment right to assemble, as well as their Second Amendment right to keep and bear arms.

Cruikshank was convicted, and the case ultimately advanced to the Supreme Court of the United States. The Court held 5-4 that, irrespective of Cruikshank's actions and office, the federal government was unable to restrain the behavior of individuals under the Enforcement Act. The lower court's convictions were overturned, and Cruikshank walked free. The decision in *Cruikshank* (1876), while federalist in nature, was widely seen as clear evidence of the federal government's inability to intercede when the police powers of an individual state are deliberately wielded against her citizens.

The decision in *Cruikshank* was widely seen as clear evidence of the federal government's inability to intercede when police powers of an individual state are wielded against her citizens.

In North Carolina, Reconstruction Era politics fomented similar tensions. Wilmington in particular was a hotbed for antiblack racial animus, being both the then-most populous city in the state and majority Black. Blacks began integrating into most facets

of the local economy, Republican politics, and society, prompting outward resentment from White, urban Democrats. Rural Whites, however, rejected the ascendant metropolitan priorities within the Democratic Party and formed the "People's Party," a left-leaning populist movement that supported agrarian interests like progressive income taxation and free education. The White People's Party found common cause with the largely Black Republicans and formed the Fusion Coalition in 1894.

During the elections of 1894 and 1896, the Fusionists took every statewide office. Under the administration of Governor Daniel Russell, the coalition began to put the previously appointed state bureaucracy to popular election. This aggravated the leadership of the state Democratic Party to the point they sought relief, unsuccessfully, from the state Supreme Court. Soon, the urban elite began forming White Supremacy Clubs to counteract the effects of "negro domination" (Cecelski & Tyson, 1998, p. 25).

As racial tensions approached a crescendo in the days leading up to the 1898 election, Blacks sought to arm themselves against the inevitable violence. At this point, North Carolina had rescinded its law prohibiting Blacks from owning or possessing firearms, although local merchants refused to sell to them, leaving Blacks with antiquated pistols and muskets to defend themselves with. White citizens, however, were not only able to purchase small arms, but the White supremacy campaign was gifted a Gatling gun.

On election day, many members of the Fusionist Coalition were repelled from the polls with threats by the Red Shirts, a White supremacist paramilitary outfit and auxiliary arm of the Democratic Party. The result was to be expected, as Cecelski & Tyson (1998) write:

Election day came and went without much of a stir. Black citizens avoided the polls in the hope that the bloodshed for which the Democrats clamored could somehow be avoided. The threat of violence suppressed the Republican turnout, and additionally the evidence strongly suggests a significant degree of election fraud. A journalist from the North reported that Wilmington's Republican majority of 5,000 in 1896 gave way to a Democratic majority of 6,000 in 1898—a gain of 11,000 votes. In their determination to win, leading Democrats had declared their intention of doing so by hook or by crook, peacefully if possible but by revolution if necessary; and they did not falter in this resolve at any stage in the proceedings. But Jane Murphy Cronly, a white woman in Wilmington, expressed the sentiments of many ordinary citizens when she later wrote of the day after the election: "I awoke that morning with thankful heart that the election has passed without the shedding of the blood of either the innocent or the guilty. I heard the colored people going by to their work talking cheerfully together as had not been the case for many days now." Before the day was out, it would be clear that Cronly had been overly optimistic. (p. 36)

Alfred Waddell, a North Carolina congressman voted out of office in the early days of the Republican/Fusionist ascendancy, was the central figurehead in advancing the Democratic Party's White identity. Emboldened by the results of the election, Waddell and his colleagues drafted the "White Declaration of Independence," a document declaring White victory and compelling the press and editor of *The Record*, a Black-run newspaper, be expelled from the city within 24 hours (p. 29).

When the demands laid out in the declaration went unheeded by the next morning, Waddell and about 500 men assembled at the Wilmington Armory, equipping themselves with weapons and the Gatling gun. The mob marched

to *The Record's* building and proceeded to vandalize it and set it ablaze. The group was then joined by 2,000 additional White men and was ordered to fan out into the city to expel the previous government. The rallying cry of the mob was to "kill every damn n----- in sight" (p. 34). When the dust settled, nearly 2,000 Blacks were driven from the city and an estimated 10-100 lay dead. Waddell himself estimated the death toll to be 20.

As time progressed, the militia-centric interpretation of the Second Amendment remained inviolate. However, following the particularly bloody Prohibition Era, the U.S. Congress sought to regulate and *de facto* prohibit possession of certain types of firearms and accessories under the National Firearms Act of 1934. Items such as automatic firearms, silencers, and long guns below a certain barrel length were required to have a prohibitively expensive tax stamp affixed and interpersonal transfers were strictly regulated. A challenge to the Act rose to the Supreme Court of the United States in 1939 under *United States v. Miller*, after the case's namesake was caught transporting a short-barreled shotgun across state lines. The Court held that, while the Second Amendment does provide a state-level right to the militia, the regulated items are not common implements within the militia. This is ironic, as many of the militiamen's fowling pieces used to decimate the British army on the road back from Concord would likely require a stamp under the National Firearms Act.

State violence against a smaller group of armed citizens was not confined simply to race. Shortly after World War II, the east Tennessee city of Athens became the site of an uprising against the local Democratic political machine. During the war, several complaints of abuse and malfeasance were filed with the U.S. Department of Justice, to no avail. Regardless of race, soldiers and sailors home on leave were frequently harassed by the McMinn County Sheriff's Office led by Pat Mansfield, the machine candidate (Joy, 2011).

With about 3,000 of the city's 11,000 residents serving in the war, the following peace destabilized the machine's control on local politics as veterans permanently returned home. In 1946, state Senator and immediate past Sheriff Paul Cantrell sought to be elected to the local office, with Mansfield replacing him in the state Senate.

Having endured prolonged harassment under the chosen candidates of the political machine, the veterans banded together to create the GI Nonpartisan Ticket of five candidates running for local office, including a challenger to Cantrell. In response, Mansfield had deputized hundreds of allies from neighboring counties to secure the polls. Poll watchers and voters from the GI Nonpartisan Ticket were harassed, beaten, and at least one Black veteran was shot by

a special deputy as he tried to cast his ballot. After the polls closed, the ballots were transferred to the county jail for tabulation by electoral commission, including Mansfield and Cantrell.

This enraged the local veterans who, fed up with the violence and malfeasance perpetrated by the political machine, marched on the jail. Around 50 men assembled carrying personally owned firearms and a few weapons from the local militia armory. The veterans demanded that those inside the jail turn over the ballot boxes or be fired upon. A shot was fired, provoking a six-hour standoff that left many wounded, though no one killed. The ballots were eventually tallied, and the entire slate of the GI Nonpartisan Ticket candidates prevailed in their races. This incident—the “Battle of Athens”—has been noted as an illustrative example of original intent of the Second Amendment, permitting recourse against a tyrannical government after “all legal avenues” have been exhausted (Joy, 2011, p. 885).

Native Americans have also relied upon the Second Amendment properly construed to secure their safety and dignity in the pre-Civil Rights Era South. Using desegregation as a catalyst, the Ku Klux Klan had began to reorganize and spread through the South in the mid-1950s. In and around Robeson County, North Carolina, the Klan had so actively resisted integration that members of the local Lumbee Tribe “couldn’t go to the store and get a Coca-Cola,” even under *de jure* segregation (Oakley, 2008, p. 63). On January 18, 1958, James Cole, the Klansman in charge of organization efforts in North Carolina, had planned to hold a rally in the center of the Lumbee community denouncing integration, miscegenation, and the “mongrelization” to be expected if Whites were to regularly interact with other races (Oakley, 2008, p. 63). Cole was able to secure a field belonging to a sympathetic farmer for the event.

Angered by the barrage of threats and insults used in the publication of the rally, many Lumbee took up arms and prepared to protest the event. As the rally’s scheduled start time of 8:30 p.m. approached on the evening of the 18th, the ranks of Lumbee assembled in protest far outnumbered that of the Klan. Tensions rose as the two groups insulted each other, and, as the rally was about to begin, several Lumbee rushed the public address system, disabling it and the temporary light pole that was illuminating the field. Gunfire rang out in the darkness, as did photographic flashes of the news media assembled to document the event. When the smoke cleared and the North Carolina Highway Patrol had arrived to restore order, the Klan had been driven from the field. With the Lumbee shooting into the air to frighten rather than into the crowd to wound or kill, no serious injuries or deaths resulted from the ordeal, which came to

be known as the Battle of Hayes Pond. With the Lumbee having demonstrated the willingness to defend themselves, the Klan ceased both organizing and intimidation efforts in Robeson County.

Perhaps the most recent application of the original intent of the Second Amendment has been Black armament in the American South. The hegemonic control of southern politics exerted by the Klan during the civil rights era stymied Black social advance even following the passage of the Civil Rights Act of 1964. Local chapters would frequently react with violence and intimidation to Blacks who asserted their rights. Local authorities were reticent to intercede on behalf of the Black citizens. Left with little recourse and poor prospects for state protection, many Blacks across the South banded together to form their own militias to guarantee full access to their civil liberties.

In 1965, several chapters of “Deacons for Defense and Justice” were founded. Erstwhile members of peaceful groups like the National Association for the Advancement of Colored People (NAACP) and the Congress of Racial Equity (CORE) took up arms in cities where the Klan was deeply entrenched in local politics. For instance, in Bogalusa, Louisiana, the Klan had joined forces with the local police department and sought to harass volunteers as they worked for the integration of local institutions. The Deacons provided protection to ensure the volunteers did not come to harm (Hill, 2004).

Similarly, Korean War veteran Joe Mallisham organized a parallel effort composed of diverse servicemembers in Tuscaloosa, Alabama. When Reverend T.Y. Rogers defied the local police and continued with a planned march on city hall, local authorities met the protesters with hoses, cattle prods, batons, and firearms. When Reverend Rogers was taken into custody, tempers quickly flared between the police and protesters, resulting in the teargassing of the crowd. In response, Mallisham’s group took up arms to guard Rogers’s house from encroachment from the local police or the Klan (Wendt, 2004).

Minority groups have also used firearms for self-defense during large-scale civil unrest. In 1992, the acquittal of the police officers who had beaten Rodney King triggered widespread rioting and looting in the Los Angeles Black community. Interracial relations between the local Black community and Korean community had been at a nadir since the controversial shooting of 15-year-old Latasha Harlins over a suspected shoplifting the year prior. As mobs of rioters closed in on Korean-majority neighborhoods and business districts, many property owners took to the streets or their roofs, armed with pistols and shotguns, in an effort to drive the crowd away. When the smoke cleared, about

2,300 businesses of the Korean community had been looted or burned, with damages reaching “approximately \$350 million, roughly forty-five percent of all damages” incurred during the riots (Kim, 2012, p. 2007). Despite the staggering toll, the damage to property and life could have been far greater without individuals acting in the community’s self-defense.

As the 20th century progressed, most states continued to use their police power to further restrict gun possession and ownership. This was not without attributable cause, as the second half of the century featured one of the most severe, sustained increase in overall crime rates in recorded history. As crime control policies were unsuccessfully enacted across the nation (Cohen, 2017), lawmakers started to target the implements of crime, even if legally possessed (Cohen, 2019). Several states restricted how weapons could be carried and if certain common weapons were even permissible.

The District of Columbia enacted such a prohibition in 1976. The District’s Firearms Control Regulations Act prohibited the ownership of handguns, “high capacity” semiautomatic firearms, along with many types of firearms already regulated under federal law. The few classifications of firearms that were not wholly prohibited by the Act were required to be disassembled or disabled by a trigger lock. Functionally, a disassembled or trigger-locked weapon would be impractical, if not impossible, to deploy in the event it was needed for self-defense.

In 2003, Dick Heller—a DC resident and special police officer—alongside other plaintiffs brought suit against the District. The lower courts differed in their rulings on the merits, and the case progressed to the Supreme Court in 2008. In a 5-4 decision, the Court held that the District’s de facto firearms ban was unconstitutional due to its imposition on the individual right to self-defense. The holding also declared that the Second Amendment, while not absolute, was an individual right held inviolate so that it may manifest itself in the collective. This ruling was incorporated to the states in 2012 under *McDonald v. Chicago*, thereby eviscerating the holding and much of the legacy of *Cruikshank*. Currently, *Heller* and *McDonald* are controlling law, recognizing an individual right to keep and bear arms in defense of the state, self, and even self from the state.

Conclusion

In Western civilization, the right to keep and bear arms exists as one of the most foundational liberties of free citizens of a republic. Unique to the United States is the Lockean understanding that a democratic republic, even

with 51% popular approval or more, is restrained from stripping fundamental individual rights. Unlike the British Parliament, whose authority is derived from, though not restrained by, the people via the democratic process, the American system is one in which the state is wholly subservient to her citizens. This was deliberately created, as the response to intergenerational atrocities perpetrated by the English throne upon her people.

Americans are served by their government, not ruled by it. This relationship is guaranteed by the Second Amendment of the United States Constitution and by many state constitutions enacted at the country’s founding and subsequently. Compliance with the dictates of government can only be compelled by civil—not martial—authority, and the process by which the state can seek such compliance is deliberately onerous.

Current case law under *Heller* and *McDonald* properly recognize that the Second Amendment and its historical antecedents provide for the individual right to keep and bear arms. However, in our Lockean understanding of republican government, if the amendment were to be repealed tomorrow, its associated liberty would remain untouched. Natural rights cannot be eliminated, even by broad majorities.

In today’s hyperbolic and unnuanced discourse, simply recognizing the plain history and current interpretation might be interpreted as a call for open rebellion against the state. Perhaps there are some anarchists for whom this would be a desired next step, but such extremism is anathema to conservative principles. Guaranteeing the supremacy of the people in our constitutional republic ensures that an aggressive majority, or well-armed minority, does not wholly control public and private life in the United States.

So rancorous has the discussion surrounding the Second Amendment become that neither side acknowledges the affirmative duty therein. The right to keep and bear arms was not created in ink during the 1780s; it preexists government and those who formed ours. However, implicit in the text is the civic obligation: Since Americans are permitted to have their weapons because no legitimate government authority exists to disarm them, it is incumbent upon those who bear arms and those who do not to be a participatory member of the republic. There is no obligation that one must agree with their countrymen, so long as they do so peacefully and thoughtfully and are afforded the same courtesy. ★

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ABOUT THE AUTHOR



Derek Cohen, PhD, is the policy director for Right on Crime and for Citizen Defense at the Texas Public Policy Foundation.

Dr. Cohen was instrumental in the passage of the First Step Act, federal legislation that borrowed from successful changes to prisons and sentencing that he had helped pass in conservative states. In previous legislative sessions, Dr. Cohen has successfully worked on issues of occupational licensure, truancy reform, and orders of nondisclosure. In addition to leading the Foundation's work on criminal justice, he is also the lead researcher of firearms policy.

Prior to joining the Foundation, Dr. Cohen worked as a researcher with the University of Cincinnati's Institute of Crime Science and completed three advanced statistical trainings at the Inter-university Consortium for Political and Social Research at the University of Michigan. He also taught classes in statistics, research methods, criminal procedure, and corrections.

Dr. Cohen's academic work can be found in *Criminology and Public Policy*, *Victims and Offenders*, the *Oxford Handbook on Police and Policing*, and many other academic outlets. He has presented several papers to the American Society of Criminology, the Academy of Criminal Justice Sciences, and the American Evaluation Association on the implementation and outcomes of various criminal justice policy issues.

Dr. Cohen graduated with a BS in criminal justice from Bowling Green State University and earned his MS and PhD in criminal justice from the University of Cincinnati.

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