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## IT ISN'T ABOUT DUCK HUNTING: THE BRITISH ORIGINS OF THE RIGHT TO ARMS

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TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT. By *Joyce Lee Malcolm*. Cambridge: Harvard University Press. 1994. Pp. xii, 232. \$29.95.

Almost as long as Americans have been discussing guns and government restrictions on guns, they have been looking to the example set by Great Britain. And almost without exception, they have misunderstood the legal and social reality of gun control in Great Britain. Historian Joyce Lee Malcolm's<sup>1</sup> new book, *To Keep and Bear Arms*, does much to correct the confused American mind, particularly regarding the right to bear arms in Great Britain in the latter half of the seventeenth century—a period of internal turmoil and repression that culminated in the adoption of a British Bill of Rights including an explicit right to arms. The British Bill of Rights is a direct ancestor of the Second Amendment in the American Bill of Rights.

In earlier times, prominent American legal commentators tended to view the British right to arms as barely worth the paper on which it was written. St. George Tucker, author of the American version of Blackstone's *Commentaries*<sup>2</sup> and the legal commentator most often cited by the U.S. Supreme Court for a quarter of a century,<sup>3</sup> claimed that "[w]hoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England."<sup>4</sup> Moreover, claimed Tucker, "not one man in five hundred can keep a gun in his house without being subject to a penalty."<sup>5</sup> William (pg.1334) Rawle, author of the standard constitutional law textbook<sup>6</sup> used in American law schools in the second quarter of the nineteenth

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<sup>2</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*143 n.40 (St. George Tucker ed., 1803).

<sup>3</sup> The Supreme Court notes Tucker's role as the first major commentator in *New York Times Co. v. Sullivan*, 376 U.S. 254, 296-97 (1964). He also served as a law professor at William and Mary, a justice of Virginia's highest court, and a federal district judge. See CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 13, 31-50, 74 (1993).

<sup>4</sup> 1 BLACKSTONE, *supra* note 2, at \*144 n.41.

<sup>5</sup> 1 *id.* at \*300.

<sup>6</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Philadelphia, H.C. Carey & I. Lea 1825).

century<sup>7</sup> wrote that though English subjects had a nominal right to arms, "An arbitrary code for the preservation of game in that country has long disgraced them."<sup>8</sup> Supreme Court Justice Joseph Story called the American right to bear arms "the palladium of the liberties of a republic,"<sup>9</sup> which served as the ultimate guarantor of all other rights. He distinguished the British right, which he thought "more nominal than real."

<sup>10</sup> Tucker, Rawle, and Story, in disparaging the British right, intended to contrast it with the vigorous American right to arms guaranteed by the Second Amendment. They wanted to demonstrate the difference between the restrictive European and free American forms of government.

More recently, courts, legislatures, and commentators have turned the Tucker-Story-Rawle analysis on its head. In the 1960s, New Jersey enacted the most stringent state-level gun control laws in the United States.<sup>11</sup> The Supreme Court of New Jersey rejected a constitutional challenge to the controls. The court reasoned that the American right to bear arms derived from the British right to bear arms, and, that in modern times, the British right had vanished: "[F]or all practical purposes the average citizen cannot lawfully obtain firearms in Great Britain at the present time."<sup>12</sup> Likewise, the North Carolina Supreme Court, in turning aside an argument that the Second Amendment protected an individual right to carry firearms, relied on English legal history as precedent.<sup>13</sup> (pg.1335)

The New Jersey and North Carolina courts obtained their information on guns in England almost entirely from an article published in the *Northwestern University Law Review*.<sup>14</sup> Unfortunately, that article was completely incorrect in its assertion that the average Briton could not lawfully obtain a gun. When Feller and Gotting wrote the article, a Briton could walk into a store and five minutes later walk out with an armload of shotguns. Even today, shotguns are available to almost any Briton without a criminal record, and rifle and handgun permits are available for target shooting.<sup>15</sup>

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<sup>7</sup> Rawle declined President Washington's offer to become the first Attorney General of the United States. Instead, he served as United States Attorney for Pennsylvania.

<sup>8</sup> RAWLE, *supra* note 6, at 122.

<sup>9</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1889, at 746 (Boston, Hilliard, Gray, & Co. 1833).

<sup>10</sup> 3 *id.* § 1891, at 747.

At the constitutional convention of the new Republic of Texas in 1845, Judge and delegate William B. Ochiltree explained that the convention should not extend the legislature's power to regulate concealed carrying of weapons to allow regulation of unconcealed carrying, for such regulation might become a prohibition, and "[w]e might be placed in the condition of the people of Ireland, and a large portion of England, who are denied the right of having firearms about their houses." WILLIAM F. WEEKS, DEBATES OF THE TEXAS CONVENTION 311 (1846), *quoted in* Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629, 642 (1989).

<sup>11</sup> See N.J. STAT. ANN. § 2A: 151-1 to -63. (West 1966) (current version at N.J. STAT. ANN. §§ 2C: 39-1 to 39-11; 58-1 to 58-10 (West 1982 & Supp. 1994)).

<sup>12</sup> *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968) (quoting Peter Buck Feller & Karl L. Gotting, *The Second Amendment: A Second Look*, 61 NW. U. L. REV. 46, 49 (1966) (alteration in original)).

<sup>13</sup> *State v. Dawson*, 159 S.E.2d 1, 9 (N.C. 1968) (citing *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. approx. 1685)).

<sup>14</sup> Feller & Gotting, *supra* note 12.

<sup>15</sup> Current British gun statutes and regulations are detailed in DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* 74-88 (1992). This book was selected as book of the year by the American Society of Criminology's Division of International Criminology.

American politicians in search of justifications for American gun control have also misperceived British gun control laws. Supporters of the U.S. National Firearms Act of 1934,<sup>16</sup> which taxed the transfer of automatic firearms, justified the law in part on the grounds that gun laws in England were already so severe that, according to then Attorney General of the United States, Homer Cummings, "the use and possession, of every kind of firearm, and of the ammunition therefor" required police permission and registration.<sup>17</sup> In fact, at that time an escapee from a British mental institution could walk into a gun store, purchase two dozen shotguns, and stroll away with weapons and ammunition after paying the cashier, no questions asked. There was no need for police permission or registration.<sup>18</sup>

Who, if any, of these American analysts has found the truth? Does the story of the British right to arms offer anything of value to the modern American gun debate? The academic literature has heretofore been sparse. My two books on gun control in Great Britain both focused mainly on twentieth-century gun policy, rather than the story of the 1689 Bill of Rights and its right to arms.<sup>19</sup> The one British book on gun control shares a similar focus.<sup>20</sup> Various (pg.1336) law review articles have touched on the history of the British right, but usually only in a few pages as part of a larger article that is mainly about the American Second Amendment.<sup>21</sup> Almost all of the commentators have accepted the claim of the 1689 Convention responsible for drafting the British Bill of Rights that the

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<sup>16</sup> National Firearms Act, ch. 757, 48 Stat. 1236 (1934), *repealed by* IRC, ch. 2, 53 Stat. 1 (1939).

<sup>17</sup> *National Firearms Act: Hearings on H.R. 9066 Before the House Ways and Means Comm.*, 73d Cong., 2d Sess. 28 (1934) (statement of Hon. Homer S. Cummings, Attorney General of the United States).

<sup>18</sup> Cummings's mistake derives from his misunderstanding of British law. Cummings was referring to Britain's Firearm Act of 1920, which did place strict controls on rifles and pistols. The Act imposed no controls on shotguns. In British law a "firearm" is a rifle or pistol, while in America a "firearm" can also be a shotgun. This article uses the word "firearm" in the American sense, meaning any kind of gun that uses a gunpowder explosion to propel a projectile.

<sup>19</sup> DAVID B. KOPEL, *GUN CONTROL IN GREAT BRITAIN: SAVING LIVES OR CONSTRICTING LIBERTY?* (1992); KOPEL, *supra* note 15.

<sup>20</sup> COLIN GREENWOOD, *FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES* (1972).

<sup>21</sup> *See, e.g.*, David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 *FORDHAM URB. L.J.* 31, 32-35 (1976) [hereinafter Caplan, *Restoring the Balance*]; David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 *DET. C. L. REV.* 789 (1982) [hereinafter Caplan, *Right of the Individual*]; Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 *J. AM. HIST.* 22, 25-27 (1984); Robert Dowlut, *The Right to Arms*, 36 *OKLA. L. REV.* 65, 83-86 (1983); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 *DAYTON L. REV.* 5, 7-14 (1989); William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 *MIL. L. REV.* 1, 2-23 (1992); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 *N. KY. L. REV.* 63, 64-73 (1982); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 *HARV. J.L. & PUB. POLY.* 559 (1986) [hereinafter Hardy, *Armed Citizens*]; David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 *J.L. & POL.* 1 (1987) [hereinafter Hardy, *Second Amendment*]; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204, 235-39 (1983) [hereinafter Kates, *Handgun Prohibition*]; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 *CONST. COMMENTARY* 87 (1992) [hereinafter Kates, *Self-Protection*]; Robert E. Shalhope, *The Armed Citizen in the Early Republic*, *LAW & CONTEMP. PROBS.*, Winter 1986, at 125, 126-33 [hereinafter Shalhope, *Armed Citizen*]; Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 *J. AM. HIST.* 599, 602-06 (1982) [hereinafter Shalhope, *Ideological Origins*]; Robert E. Shalhope & Lawrence Delbert Cress, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 *J. AM. HIST.* 587 (1984); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 *HASTINGS CONST. L.Q.* 961, 964-78 (1975).

right to arms was a "true, ancient, and indubitable right" of British subjects, albeit a right subject to various restrictions.<sup>22</sup>

As the Firesign Theater comedy troupe once put it, "Everything you know is wrong."<sup>23</sup> *To Keep and Bear Arms* sweeps away over two centuries of American—and British—misunderstanding of the British right to arms, providing the first clear picture of what the right to arms meant to the British of 1689, as well as what it meant to the Americans of 1791 who drafted the Bill of Rights with the British experience very much in mind.

Malcolm states her radical thesis in the first paragraph of the Preface (p. ix). She argues that before 1689, no right to bear arms existed at all. When the 1689 Convention Parliament decided to guarantee a right to arms, the Convention chose, for political-tactical benefit, to pretend that it was reaffirming an "ancient" right to arms (pp. ix-x). In fact, argues Malcolm, the Convention created (pg.1337) the right then and there, for reasons growing directly out of the political conflict of the previous century (pp. ix-xi).

## I. GUNS IN BRITAIN BEFORE THE ENGLISH CIVIL WAR

The story of the British government's concern with arms begins in the mists of Anglo-Saxon times, when every male aged sixteen to sixty bore arms to defend the nation by participating in the "fyrd,"<sup>24</sup> which, in Anglo-Saxon law, was "the military array or land force of the whole country."<sup>25</sup> Malcolm, however, begins her narrative in the Middle Ages. Her first chapter summarizes British arms policy from the Norman Conquest until the seventeenth century. During this period, the British did not view ownership and use of weapons as an individual right; rather it was a duty, sometimes an onerous one, that the government imposed.

Professional police forces did not exist during the Middle Ages; the government did not create them until the mid-nineteenth century in England—and in the United States. Civil defense was the responsibility of the people. Whenever someone committed a serious crime, the government required villagers to raise a "hue and cry," and, upon hearing the call, to bring their own weapons and pursue the criminal as long as it took to capture him (p. 2). When the village gates closed at sundown, the villagers guarded the gates, again using their own weapons, keeping "watch and ward" (p. 3). Additionally, the government required able-bodied men to assist the sheriff in suppressing

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<sup>22</sup> See, e.g., Caplan, *Restoring the Balance*, *supra* note 21; Caplan, *Right of the Individual*, *supra* note 21, at 794-97; Dowlut, *supra* note 21; Fields & Hardy, *supra* note 21, at 2; Gardiner, *supra* note 21, at 64-67; Hardy, *Armed Citizens*, *supra* note 21, at 562; Hardy, *Second Amendment*, *supra* note 21, at 7-9; Kates, *Handgun Prohibition*, *supra* note 21, at 238-39; Kates, *Self-Protection*, *supra* note 21; Shalhope, *Armed Citizen*, *supra* note 21, at 127-28; Shalhope & Cress, *supra* note 21; Shalhope, *Ideological Origins*, *supra* note 21, at 602-03.

<sup>23</sup> FIRESIGN THEATRE, *EVERYTHING YOU KNOW IS WRONG* (Columbia Records 1974).

<sup>24</sup> ROBERT W. COAKLEY & STETSON CONN, *THE WAR OF THE AMERICAN REVOLUTION 2* (1975).

<sup>25</sup> BLACK'S LAW DICTIONARY 609 (5th ed. 1979).

riots or in performing other law enforcement functions, as part of the "posse comitatus."<sup>26</sup> (pg.1338)

All of these law-enforcement duties were primarily local. In addition to following a hue and cry, the government obligated all able-bodied male Britons aged sixteen to sixty to serve in the militia.<sup>27</sup> Although the law required all men to serve, by the late sixteenth century it was common for a county to choose a group of men to receive intensive militia drill in "trained bands" (p. 4). In either the general militia or the specialized trained bands, the men-at-arms were freeholders, craftsmen, or other middle-class citizens under the command of upper-class men of the community.<sup>28</sup>

In this context, until the seventeenth century, British "gun control" laws did not intend to disarm ordinary Britons, even Britons who were not legally free. Rather, weapons controls focused on forcing Britons to supply their own weapons, and sometimes on specifying what kinds of weapons were suitable for persons of various stations in life (p. 10).

Gun controls, in the sense that modern Americans might recognize, were rare and generally ineffectual. It was illegal to shoot a gun in or near a town except in self-defense (p. 10). A statute of Henry VIII prohibited poor people from owning handguns.<sup>29</sup> A 1553 decree of Edward VI ordered "all persons who shoot guns" to register themselves with the local justice of the peace, but a legal guide for Justices of the Peace in the early 1600s asked "quaere if this now be in use."<sup>30</sup> In 1569 Queen Elizabeth's Privy Council suggested that the government should centrally store militia arms—a proposal that aroused such intense opposition that the Council immediately withdrew it (p. 10). The government did, however, maintain a monopoly on the production of saltpeter and gunpowder (p. 11), as did many continental governments.

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<sup>26</sup> In the United States, the *posse comitatus* was—and in many states still is—all the adult males in a locality who would assemble at the command of the sheriff to apprehend local lawbreakers. 3 STORY, *supra* note 9, § 1196; Pauline Maier, *Popular Uprisings and Authority in Eighteenth-Century America*, 27 WM. & MARY Q., 3, 3 (1970). Even in the early twentieth century, Colorado law provided for punishment of anyone failing to join the *posse comitatus*. COLO. REV. STAT. § 1836 (1908) (repealed 1971). In June 1977, the Aspen, Colorado sheriff called out the *posse comitatus*—ordinary citizens with their own guns—to hunt for escaped mass murderer Theodore Bundy. Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 210 n.140 (1982) (citing RICHARD LARSEN, BUNDY: THE DELIBERATE STRANGER 179-82 (1980)).

A typical modern *posse comitatus* statute is Kentucky's: "Any sheriff, deputy sheriff or other like officer may command and take with him the power of the county, or a part thereof, to aid him in the execution of the duties of his office, and may summon as many persons as he deems necessary to aid him in the performance thereof." KY. REV. STAT. ANN. § 70.060 (Baldwin 1991).

In recent years, some fringe groups have taken to calling themselves the *posse comitatus*. See Judy Pasternak & Stephen Braun, *Nichols Brothers Swept Up in Dark Maelstrom of Fury*, L.A. TIMES, May 31, 1995, at A1, A6. They are no more a genuine *posse comitatus*, and their misappropriation of the name should not be any more tolerable, than the attempt of some right-wing extremists of the 1960s to style themselves as "Minutemen."

<sup>27</sup> The U.S. Supreme Court's one major gun control case in the twentieth century recognized this fact by citing historian H.L. Osgood for the proposition that the English militia was based upon "the general obligation of all adult male inhabitants to possess arms." *United States v. Miller*, 307 U.S. 174, 179 (1939).

<sup>28</sup> Pp. 3-5. Ensuring that militia officers, though ultimately subject to the King, would be local men with local sensibilities became a divisive issue as the seventeenth century progressed. The issue remained important in eighteenth-century America, as the U.S. Constitution gave Congress ultimate control of the state militias though "reserving to the States respectively, the Appointment of the Officers." U.S. CONST. art. I, § 8, cl. 16.

<sup>29</sup> Similar issues arise in the current American gun control debate with proposals to outlaw inexpensive handguns owned mainly by poor people—so-called Saturday-night specials—current prohibitions on gun ownership in many public housing projects, and proposals to impose extremely heavy taxes on ammunition.

<sup>30</sup> P. 10 (quoting MICHAEL DALTON, *THE COUNTRY JUSTICE* 93 (London, 1697) (1618)).

The fact that ordinary Englishmen, rather than a standing army or foreign mercenaries,<sup>31</sup> defended England was a great source of (pg.1339) pride to many Englishmen, though they often viewed actual militia duty as a nuisance, and there are numerous court records of prosecutions for failure to perform militia duties or local law enforcement duties (pp. 4-5). When times were peaceful, militia musters were rare or nonexistent.<sup>32</sup>

While restrictions on gun ownership in Britain were generally mild, there were constant efforts to disarm potential subversives. The government allowed Catholics—viewed with suspicion after Henry VIII broke with the Papacy and appointed himself head of the Church of England—to have firearms and other weapons for home defense, but it did not allow them to keep militia arms in their homes (p. 11).

In modern America, many gun control advocates readily affirm the legitimacy of firearms intended for hunting, while arguing that weapons that are mainly useful for antipersonnel purposes—handguns and "assault weapons," allegedly—should not be in civilian hands.<sup>33</sup> The situation in England was just the opposite. The ruling classes were happy to have a national defense based on a popular civilian militia, rather than on an expensive standing or mercenary army. But the idea of commoners hunting was anathema.<sup>34</sup> Unlike in the United States, private aristocratic estates held most English hunting land, and hunting by commoners was generally illegal.

Still, as Blackstone would later note, the government sometimes enacted game laws for the ostensible preservation of the game, but those laws also served to "prevent[ ] ... popular insurrections."<sup>35</sup> (pg.1340) A 1389 law, enacted after a lower-class uprising<sup>36</sup> a few years before, set

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<sup>31</sup> The issue of foreign mercenaries as a perceived tool of a potentially oppressive government is amazingly persistent. The Magna Charta demanded removal of "all alien knights, crossbowmen, sergeants and mercenary soldiers." P. 5. The presence of Hessian troops in the United States during the American Revolution succeeded in further inflaming many Americans against the Crown. *E.g.*, THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776) ("He [King George III] is at this time transporting large armies of Foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of cruelty & perfidy scarcely paralleled in the most bararous ages, and totally unworthy the Head of a civilized nation."). More recently, a proposal in the 1994 federal crime bill to hire Royal Hong Kong Police as American officers—because of their ostensible ability to penetrate Asian gangs—provoked strong opposition from many citizens, leading the supporters of the bill to drop the Hong Kong police from the conference committee version of the bill. H.R. 3335, 103d Cong., 1st Sess. § 5108 (1993); H.R. CONF. REP. NO. 694, 103d Cong., 2d Sess. 441 (1994) (deleting Hong Kong police from final bill). Interestingly, much of the opposition came from persons who also opposed the bill's ban on so-called assault weapons—a sociological fact possibly showing that support for an armed citizenry and fear of a standing-mercenary national army remain two sides of the same coin. *See, e.g.*, GUN OWNERS OF AM., STATUS REPORT ON THE CRIME BILL AND GUN BAN para. 9 (1994) (on file with author).

<sup>32</sup> P. 7. Militia musters also declined in the United States in the decades following the War of 1812. KOPEL, *supra* note 15, at 321-22.

<sup>33</sup> COALITION TO STOP GUN VIOLENCE 1, 5 (1994) (on file with author).

<sup>34</sup> Pp. 11-12. "Hunting" in Britain refers only to the pursuit of foxes, deer, otter, hare, or mink with hounds. Oscar Wilde described the sport as "the unspeakable in full pursuit of the uneatable." OSCAR WILDE, A WOMAN OF NO IMPORTANCE act I (G. Putnam's Sons 1920) (1894). "Shooting" refers to bird hunting and to target sports. "Stalking" refers to humans, without dogs, searching for animals to shoot. The usage in this article follows the American convention: "hunting" means any efforts by humans with guns with or without dogs to kill wild animals.

<sup>35</sup> 2 BLACKSTONE, *supra* note 2, at \*412.

<sup>36</sup> In 1348-1349, the plague killed about a third of the British population, which resulted in a labor shortage, and a greatly improved economic bargaining position for surviving British working people. A 1351 law, the Statute of Laborers, forbade employment of laborers at wages above the preplague levels. Although employers frequently violated the statute, a capital tax increase sparked a peasant rebellion in 1381 that soon chose Wat Tyler as a leader. Tyler led his forces into London, where they forced a meeting with King Richard II. On June 14 at Mile End, the King agreed to Tyler's demands to abolish serfdom, feudal service, monopolies, and restrictions on buying and selling. The King also agreed to pardon the rebels. The next day, however, Tyler was killed in a confrontation with the Mayor of Smithfield, and Richard II ruthlessly repressed the revolt. He then immediately revoked the Mile End grants. *See* CHARLES OMAN, THE GREAT REVOLT OF 1381 (1906).

property qualifications for hunting. Henry VIII outlawed conspiracies for the purpose of illegal hunting. Although some of the hunting laws criminalized possession by poor people of devices that had no other purpose but hunting, such as hunting dogs and snares, Henry VIII and Parliament made no attempt to criminalize possession of weapons, such as bows or guns, that individuals could use for personal or civil defense.<sup>37</sup>

Malcolm compresses six hundred years of English weapons policy into her first chapter as she sets the stage for the main topic of her book: the English Civil War and its aftermath. Malcolm's approach, though still the best single source available, does not fill in all the nuances of the various early English statutes as fully as one might hope. Accordingly, a scholar looking for the full story of the right to arms from the Norman Conquest to the English Civil War will need to start with Malcolm but then move on to the various discussions scattered throughout the legal literature.<sup>38</sup>

The greater weakness of Malcolm's coverage of this period is the scant attention she gives to the reigns of James I and Charles I in the first three decades of the seventeenth century. As detailed in Lois Schwoerer's excellent book *No Standing Armies*,<sup>39</sup> these kings (pg.1341) attempted to raise large standing armies, and, often lacking the funds to support the armies, ordered private homes to quarter soldiers at the homeowners' expense, sometimes for years at a time. Since the lower ranks of the army were generally composed of the "dregs of society," the quartering of soldiers essentially meant that these Kings forced British homeowners to support and live with violent criminals and drunks who happened to be in the employ of the government.<sup>40</sup>

Schwoerer's history helps explain why the British of the later seventeenth century shared such an intense fear of standing armies—a fear that was based not merely on political experience, but on the personal experience of unfortunate homeowners. This fear then explains in part why the British people felt such great sentiment for a popular militia not under the monarchy's control. Although Schwoerer does not delve deeply into American constitutional history, her work makes it easy to see why the Second Amendment, which deals with militias and private arms, was placed adjacent to the Third Amendment, which forbids the quartering of soldiers in the homes: the Founders designed both Amendments in large part as checks on a federal standing army.<sup>41</sup>

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<sup>37</sup> Pp. 12-13. One ancient law even forbade farmers in designated forest areas from killing deer that ate their crops. P. 14. Under the current interpretation of the Endangered Species Act, a Montana farmer has been prosecuted for going into his barn to confront (and eventually shoot) a bear that was eating his sheep. See Ike C. Sugg, *If a Grizzly Attacks, Drop Your Gun*, WALL. ST. J., at A15.

<sup>38</sup> See, e.g., SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982) [hereinafter THE RIGHT TO KEEP AND BEAR ARMS]; STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984). For a citation to applicable law review articles, see *supra* note 21.

The scattered discussions of English history in the above sources will mainly interest Anglophiles and persons interested in the philosophical discussions about armed citizens in seventeenth- and eighteenth-century England. To the extent that the reader is studying the English right to arms as a clue to the meaning of the American Second Amendment, Malcolm's book renders most of the above articles obsolete. Those who attempt to read all of the above articles will rapidly find that they discuss mostly the same material. One can thank Malcolm for, among other things, bringing to a new level a debate that has often been stuck on a narrow body of the same well-known texts.

<sup>39</sup> LOIS G. SCHWOERER, "NO STANDING ARMIES!" THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND (1974).

<sup>40</sup> *Id.* at 11, 22.

<sup>41</sup> For example, Joseph Story's *Commentaries* traced the Third Amendment to abuses during the reign of Charles I, and a violation of the principle "that a man's house shall be his own castle, privileged against all civil and military intrusion." 3 STORY, *supra* note 9, § 1893, at 747. See generally William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the*

## II. THE ENGLISH REVOLUTION

The bulk of Malcolm's book takes us from the Scottish revolt in 1639—"the First Bishop's War"—through the English Revolution, the Interregnum, the Restoration, the Glorious Revolution, and finally the Bill of Rights of 1689 and its explicit guarantee of an individual right to arms. Throughout, the focus is on the struggle over who would have the ultimate power of force in society—whether the power should be widely dispersed or under central absolutist control.

In 1639, King Charles I attempted to impose the Anglican Book of Common Prayer on Scottish Presbyterians. The Scots revolted, enjoying great sympathy from many English Protestants. Charles sent the English militia to suppress the rebellion, but he found that "militiamen forced to fight for an unpopular cause were unreliable," and that the militia functioned poorly in offensive operations far from home (p. 17). A lack of military might forced the King to conclude a treaty with the Scots on unfavorable terms (p. 17). The costs of war also forced Charles to summon Parliament into session (pg.1342) to appropriate him money, but a restive Parliament brought forth a long list of grievances, the Grand Remonstrance. An end to the gunpowder monopoly was among Parliament's demands and the King acceded (pp. 17-18).

Shortly thereafter, a dispute arose as to whether the King or Parliament had final authority over the militia, and it was this dispute that precipitated the English civil war that began in 1641 (pp. 18-19). The antimonarchists eventually won, seated the "Rump Parliament," and beheaded Charles Stuart. The Rump Parliament also began to use the militia for new purposes—the surveillance and disarmament of political opponents (p. 25). As the Rump Parliament became increasingly aware of its own unpopularity, it gradually increased weapons controls. A 1659 law ordered all persons to supply lists of their arms, ammunition, and horses. The Parliament also offered rewards to persons who informed militia officers about unregistered items (p. 28).

During the Interregnum, James Harrington wrote *The Commonwealth of Oceana*,<sup>42</sup> expressing the conventional wisdom of the opponents of a standing army. Widely read even a century later, Harrington also expressed what became the conventional wisdom of the Founders of the American republic: A free society rests upon the foundation of small farmers who own their own land. The virtuous yeoman farmer, bringing his own arms to duty in a popular militia, is the best security of a free state. Unlike a standing army, a militia would never tyrannize its native land. Indeed, a militia could overthrow a despot. And unlike hired mercenaries or professional soldiers, the militiaman had his own country to fight for and was therefore the best defender of a free state against foreign invasion.<sup>43</sup>

## III. THE RESTORATION AND GUN PROHIBITION

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*Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393 (1991).

<sup>42</sup> JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* (1656), reprinted in *THE POLITICAL WORKS OF JAMES HARRINGTON* (J.G.A. Pocock ed., 1977). For Harrington's importance to American political theory, see SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 20-22 (1993).

<sup>43</sup> HARRINGTON, *supra* note 42, at 213, 314-15, 424-25, 442-49, 454-57, 689-90, 696. Harrington's theories had their origins with Machiavelli, as elaborated in J.G.A. Pocock, '*Oceana*': *Its Argument and Character*, in HARRINGTON, *supra* note 42, at 43-45, 54-55, 58-59, 70-71, 131.



The Rump Parliament proved increasingly unable to maintain order, and in 1660, Charles II ascended to the throne, restoring the monarchy to the great joy of almost the entire nation (pp. 30-32). The new King set about at once to reform society so that monarchy would remain supreme forever. Although the King spoke in conciliatory terms of tolerance and forgiveness, his actions bespoke an effort to eliminate competing sources of power. In December 1660, (pg.1343) the Privy Council ordered gunsmiths to supply a list of all guns produced and all gun purchasers within the past six months. Henceforth, the Privy Council ordered, the gunsmiths would have to produce manufacturing and sales lists weekly.<sup>44</sup> A few days later, the King ordered the militia to conduct warrantless searches for arms and ammunition stockpiles greater than those necessary for self-defense, "in the house of any person disaffected to us."<sup>45</sup> At the same time, Charles II began building up the first peacetime standing army in English history, euphemistically calling its members "guards" rather than "soldiers" (p. 45).

Shortly after ordering searches for arms and ammunition stockpiles in excess of self-defense needs, the King ordered the militia to disarm all persons "knowne to be of ill principles"—namely republicans and religious dissidents (p. 45). In March 1660, the King forbade the transport of arms or ammunition into the countryside without a permit (p. 45). The government also increased religious repression that spring, following Charles's advice that "[i]f you find new Diseases, you must study new Remedies."<sup>46</sup> Later that year, Parliament plugged the last "loophole" in the gun control laws; it forbade the import of firearms, ostensibly because imports were harming domestic gunsmiths. Persons the government perceived as "malecontents, fanatics, and sectaries" were disarmed and placed under constant surveillance.<sup>47</sup> Throughout the nation, government (pg.1344) forces tore down town walls and destroyed target ranges for both bows and guns (pp. 51-52).

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<sup>44</sup> Pp. 42-43. A somewhat similar gun registration law was proposed by President Carter, but rejected by the U.S. House of Representatives in 1978. See 124 CONG. REC. 16,653 (1978). For the proposed regulations, see 43 Fed. Reg. 11,802 (1978) (to be codified at 27 C.F.R. § 178.131(c)). "Brady II," the comprehensive gun control bill currently being pushed by Handgun Control, Inc., also proposes total firearms registration. See H.R. 3932, 103d Cong., 2d Sess. (1993); S. 1882, 103d Cong., 2d Sess. (1993).

<sup>45</sup> P. 43. Chicago Housing Authority police conducted warrantless house-to-house gun searches in public housing projects, until a federal court ordered them to desist. *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994). According to the court, "These 'sweeps' were conducted by searching entire apartment units, including closets, drawers, refrigerators, cabinets, and personal effects." *Pratt*, 848 F. Supp. at 793. The police justified the warrantless searches because gunfire in the area created "exigent circumstances." *Pratt*, 848 F. Supp. at 794. Exigent circumstances arise when there is an immediate threat to life or imminent destruction of evidence thus allowing an exception to the warrant requirement of the Fourth Amendment. See *Segura v. United States*, 468 U.S. 796 (1984). As the *Pratt* court noted, however, not one of the searches in question took place within 48 hours of the shooting activity. *Pratt*, 848 F. Supp. at 792.

Ross Perot and Richard Wigod, the president of the Los Angeles County Medical Association, have also proposed warrantless gun searches. Paul Cotton, *CDC Investigators Explore New Territory in Aftermath of Unrest in Los Angeles*, 267 JAMA 3001 (1992) (suggesting a "military attack" on ghetto areas and encouraging police to "make a sweep through those neighborhoods [and] take all the weapons [they] can find"); Donald Lambro, *Quayle Lands First Major Hit on Perot*, WASH. TIMES, June 13, 1992, at A1.

<sup>46</sup> P. 49. The King's quote suggests that governmental efforts to ban guns under the rhetoric of "public health" are perhaps not so novel as might first be thought.

<sup>47</sup> Pp. 47-49. American gun control advocates have sometimes enjoyed a symbiotic relationship with the American firearms industry. The Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 921 (codified as amended at 18 U.S.C. §§ 921-30 (1988)), which outlawed the import of firearms not deemed "particularly suitable for sporting purposes," grew out of the American gun industry's efforts in the early 1960s to receive protection from "cheap foreign guns," namely World War II surplus bolt-action rifles that were being sold at bargain prices as Western European armies moved up to more sophisticated guns.

The Bush administration's 1989 ban on the import of "assault weapons"—guns which had earlier been approved for import as "sporting" weapons—enjoyed a great deal of quiet support from the American gun industry, which disliked the competition offered by inexpensive Chinese rifles.

Charles had been following a policy of disarmament "by successive steps" with "a train of enterprizes."<sup>48</sup> But despite the prohibitions Charles had enacted, politically and religiously correct subjects were still allowed to own registered guns. This situation changed, however, with the Game Act of 1671.<sup>49</sup> The initiative for the Act came from Parliament, rather than the King, but he insisted that it be vigorously enforced (p. 56).

Although the parliamentary record on the Game Act is obscure, it attracted little controversy during its enactment because there was apparently an increasing problem of rural violence as common people resisted the increasing pace of aristocratic enclosure of formerly (pg.1345) open, common fields (p. 67). The Act authorized all persons at the rank of esquire or above to appoint a gamekeeper for their estates who would be empowered to confiscate all hunting devices from persons who did not have an income derived from land of at least one hundred pounds a year. For the first time in English law, Parliament treated guns like forbidden devices—such as traps—useable only for hunting. As a result less than one percent of the people in rural areas, as well as the many wealthy but landless urbanites, were forbidden to hunt and to possess firearms and bows. Trial was before a single justice of the peace, and the testimony of a single witness was sufficient to convict (pp. 70-75). The vast majority of Englishmen were now forbidden to kill a rabbit on their own land or to own a gun for protection.<sup>50</sup> The Game Act's purported concern with poaching as a pretext for widespread gun prohibition was implausible. Poachers rarely used seventeenth-century firearms,

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<sup>48</sup> P. 54. In this regard, the King foreshadowed the strategies of the major American gun control lobby, which has advocated gradual steps rather than an all-at-once approach to outlawing civilian handguns. The National Council to Control Handguns' founding chair Nelson Shields explained his strategy for prohibition:

The first problem is to slow down the increasing number of handguns being produced and sold in this country.

The second problem is to get handguns registered. And the final problem is to make possession of *all* handguns and *all* handgun ammunition—except for the military, police, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal.

Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 53, 58. Although HCI sometimes claims it no longer subscribes to Shields's prohibitionist goal, HCI has opposed changing the laws in Chicago and Washington, D.C. that prohibit the acquisition of handguns. *See* Brief for Amicus Curiae Handgun Control, Inc. at 2, *Kalodimos v. Morton Grove*, 470 N.E.2d 266 (Ill. 1984) (defending City of Morton Grove's handgun prohibition as "narrowly drawn to serve a compelling government interest"); HANDGUN CONTROL, INC., HANDGUN CONTROL (Washington, D.C., undated brochure) ("We successfully defended the Washington, D.C., handgun law in the courts."). The D.C. law can be found at D.C. CODE ANN. §§ 6-2311 to -2312 (1981).

Following a similar strategy, former New York City Police Commissioner Patrick Murphy explained that his goal of complete civilian disarmament cannot be accomplished all at once: "it will be a gradual thing, to reduce the number of guns in the hands of criminals when private citizens will see the wisdom of a national policy of disarmament of the citizens." *"Saturday Night Special" Handguns*, S. 2507: *Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 189 (1971) (statement of Patrick V. Murphy, Commissioner of Police, New York City).

<sup>49</sup> This bill to disarm the vast majority of the British population bore the innocent title "An Act for the better Preservation of the Game, and for Securing Warrens not Inclosed, and the several Fishings of this Realm." P. 69. The use of dishonest "pro-sports" titles in weapons prohibition legislation remains a viable tactic. A 1994 Congressional bill that outlawed approximately 200 rifles, shotguns, and pistols by dubbing them "semi-automatic assault weapons" was titled the "Public Safety and Recreational Firearms Use Protection Act," despite the fact that the Act added not an iota of legal protection to the status of the guns that the Act identified as "sporting" weapons. *See* H.R. 4296, 103d Cong., 2d Sess. (1994).

<sup>50</sup> P. 76. Residents of Washington, D.C. face a similar situation. They are effectively forbidden from owning firearms for protection. Handguns are outlawed, except for guns owned by city residents before 1976, and even long guns must be stored disassembled or locked up, rendering them nearly useless for protection against a criminal who does not announce his intentions well in advance. D.C. CODE ANN. §§ 6-2301 to -2380 (1981).

whose loud report would attract attention and whose large size—even for handguns—made them awkward to carry and very difficult to conceal.<sup>51</sup>

One of the great weaknesses of most previous analyses of gun laws in different countries has been their heavy reliance on statutory materials. But as Malcolm explains, she is not writing solely a traditional legal history (p. xi) using only what Robert Gordon calls "the mandarin materials" of written legal opinions, statutes, and recorded legislative debates.<sup>52</sup> Malcolm looks as widely as possible at the materials of social history, including diaries, to put the statutory evolution into its social context. Her holistic approach is particularly helpful in her analysis of the effects of the 1671 Game Act and preceding gun controls.

Although Great Britain should have been nearly totally disarmed by the end of Charles II's reign, and though strict property (pg.1346) qualifications for handguns dated back a century to the reign of Henry VIII, firearms of all types, handguns included, were pervasive and easy to obtain. Civilians could buy illegally diverted military equipment and other firearms on the black market, and even legal guns were inexpensive enough for all but the very poorest to purchase (p. 83). Moreover, most of the gentry chose not to enforce the Game Act vigorously, choosing instead to use selectively the right to search for weapons in order to deal with particular troublemakers.<sup>53</sup> Shooting matches involving illegal gun owners were common, and many illegal gun owners made no effort to conceal their possession of firearms (pp. 79-91).

Popular distrust of Charles II was founded not only on his enthusiasm for absolutism and his disdain for civil liberty, but also upon the suspicion that he had secret Catholic sympathies, as evinced by his failure to enforce most of the anti-Catholic laws even as he vigorously persecuted Protestant dissenters. In fact, the King may have secretly converted to Catholicism on his deathbed in 1685 (p. 93). His successor James Stuart, James II, was Catholic, had a very Catholic wife, and was under great popular suspicion—quite correctly—of plotting to disestablish the Anglican Church and restore Catholicism as the state religion (pp. 94-95).

Both local aristocrats and local militias supported Protestant uprisings in Ireland and England. As James II suppressed the rebellions, he moved further to build up a standing army that, on a per capita basis, was as large as the one in France.<sup>54</sup> The government again brought foreign

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<sup>51</sup> P. 75. Parallels might be drawn to modern efforts to outlaw various semiautomatic firearms on the pretext that they are the "weapon of choice" of criminals, even though police firearms seizure data show that they comprise only about one percent of crime guns. David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 406-10 (1994) (citing police data from Akron, Baltimore County, Bexar County (San Antonio), California, Chicago, Chicago suburbs, Connecticut, Denver, Florida, Los Angeles, Maryland, Massachusetts, Miami, Minneapolis, Nashville, Newark, New Jersey, New York City, New York State, San Diego, San Francisco, Virginia, and Washington, D.C.). Most so-called assault weapons are rifles, which, like seventeenth-century muskets, are awkward to carry and conceal for criminal purposes. The so-called assault pistols are also large and bulky, and no more concealable in ordinary clothing than the oversized Black & Decker power drills that they resemble. DAVID B. KOPEL, GUNS: WHO SHOULD HAVE THEM? (forthcoming 1995).

<sup>52</sup> Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984).

<sup>53</sup> P. 91. One study found the Game Act to be enforced mainly against persons whose "crime" was not attending church. P. 199 n.92 (citing P.B. MUNSCHÉ, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671-1831, at 213 (1981)).

<sup>54</sup> Englishmen had long looked to French reliance on a professional army rather than a popular militia as a major cause of French debility in general, and French tyranny in particular. For example, Sir John Fortescue had written:

Thai [the French peasants] gon crokyd, and ben feble, not able to fight, nor to defend the realm; nor thai haue wepen, nor money to bie thaim wepen withall. But verely thai liven in the most extreme pouertie and miserie, and yet dwellyn thai in on the most fertile reame of the worlde. Werthurgh the French kynge hath not men of his owne reame able to defende it, except his nobles, wich beyren non such impositions, and ther fore *thai* ben right likely of their bodies; bi wich cause the said kynge is compellid to make his armeys and retenues for the defence of his lande of straungers, as Scottes, Spaynardes, Arrogoners, men of Almeyn [Germans], and of other

mercenaries into the country and resumed the detested practice of billeting soldiers in private homes. To make matters worse from the viewpoint of the Anglican majority, King James II put a hundred Catholic officers at the head of this (pg.1347) vast standing army. At the same time, James II ordered the lords lieutenant not to muster the militia, as the King attempted to destroy the militia through disuse.<sup>55</sup> The King enforced existing gun laws with greater intensity than ever before. Royal forests having long been "gun-free zones"—at least for ninety-nine percent of the population—the King now empowered forest officers to search for guns in homes up to ten miles away from forests.<sup>56</sup>

The 1328 Statute of Northampton had made it illegal to carry firearms in the presence of royal officers, and to go armed "in Fairs, Markets," and "elsewhere."<sup>57</sup> The statute had heretofore been used solely against persons carrying arms for criminal purposes, but James II now enforced it against anyone, other than government employees, carrying a gun. Sir John Knight, a Protestant opponent of the King, was brought to trial under the charge that he "did walk about the streets armed." The case became a cause célèbre, all the more so after a jury acquitted Knight (pp. 104-05).

Two weeks after Knight's acquittal, the King, finding the Statute of Northampton an insufficient tool to enforce general disarmament, ordered full enforcement of the Game Act of 1671. He also ordered mass searches for firearms because "a great many persons not qualified by law ... keep muskets and guns in their houses."<sup>58</sup> Perhaps because of lackadaisical enforcement by the lords lieutenant, the King's order failed to disarm most of the public (pp. 105-06).(pg.1348)

The Anglican religious establishment, with overwhelming public support, grew bold and even brazen in resisting the King's efforts to Catholicize the nation and his attempts to repeal the civil disability laws that kept Catholics out of positions of power. Many Protestants hoped that the King might die without a male heir, thereby leaving his Protestant daughters Mary and Anne next

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nacions, or ellis all his enymes myght ouerrenne hym; for he hath no defence of his owne except his castels and fortresses. Lo, this is the fruit of jus reale. Yf the reaueme of Englonde, wich is an Ile, and therfor mey not lyghtly geyte souxore of other landes, were ruid under such a lawe, and under such a prince, it wolde then be a pray to all other nacions that wolde conqwer, robbe or deuoir it.

JOHN FORTESCUE, *THE GOVERNANCE OF ENGLAND: THE DIFFERENCE BETWEEN AN ABSOLUTE AND A LIMITED MONARCHY* 114-15 (rev. ed. 1885).

<sup>55</sup> Pp. 96-107. David Williams argues that the American government has essentially accomplished what Charles II attempted: destroying the militia through disuse. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *YALE L.J.* 551 (1991). He argues that when the Second Amendment was written, it was presumed that people would be taught responsible gun ownership through participation in the militia. In modern times, the government does not require militia training, and hence the predicate condition for an individual right to arms in the United States has vanished. *Id.* at 590-96. His argument, though creative, would place in the American federal government the power to disarm the populace, which was exactly the power that the authors of the Second Amendment sought to deny. Moreover, grammatically speaking, the Second's Amendment's "right of the people to keep and bear arms" is not dependent upon the introductory militia language at the start of the sentence.

<sup>56</sup> Pp. 89-90. Although allowed to hunt with guns, many aristocrats preferred other forms of hunting. King James I told his son that "hare hunting, namely with running hounds," was the "most honourable and noblest" form of hunting. In contrast, it was "a thievish form of hunting to shoot with guns or bows." PATRICK M. MALONE, *THE SKULKING WAY OF WAR: TECHNOLOGY AND TACTICS AMONG THE NEW ENGLAND INDIANS* 53-54 (1991) (quoting JOSEPH STRUTT, *THE SPORTS AND PASTIMES OF THE PEOPLE OF ENGLAND* 5 (J. Charles Cox ed., 1903)).

<sup>57</sup> The statute provided:

That no Man great nor small, of what Condition soever he be, except the King's Servants in his Presence, and his Ministers ... and also upon a Cry made for Arms to keep the peace ... 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 ....

Statute of Northampton, 1328, 2 *Edw.* 3, ch. 3.

<sup>58</sup> P. 105 (quoting Letter from the Earl of Sunderland to the Earl of Burlington (Dec. 6, 1686) in *CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1686-1687*, at 314 (1964)).

in line for the throne. Those hopes were shattered, however, when the Queen delivered a baby boy on June 10, 1688, and James II named the Pope godfather (p. 110). Shortly thereafter, a secret committee invited William of Orange, a Dutch prince, to invade England. He set sail under English colors, with his ship bearing the motto "the Protestant Religion and the Liberties of England" (pp. 110-11). William made no claim on his own behalf, but called only for a free Parliament and a study of whether James II's new son really was a son or had been smuggled into the birthing room in a warming pan. King James II's professional and mercenary army collapsed and deserted within a month after William had landed, and James II fled the country. Barely a shot had been fired in the "Glorious Revolution" (pp. 111-12).

#### IV. THE ENGLISH BILL OF RIGHTS

In January 1689, the "Convention Parliament" assembled. It intended to select a new monarch, which it did by speedily recognizing William of Orange and his wife Mary, the Protestant daughter of James II, as King and Queen. The Convention had a second purpose, to ensure that the abuses of the preceding century never recurred, by drafting "a new magna charta."<sup>59</sup>

The Convention debates vented national frustration at the oppressions of previous monarchs. The Militia Act of 1662 had allowed militia officers to disarm persons at their discretion. The debaters attacked the Act not only for disarming the monarchy's critics but also for perverting the militia from an instrument of popular sovereignty into an instrument of national absolutism. Speakers discussed the necessity of possession of firearms for personal defense, but discussion focused more on popular possession of arms as a check against tyranny (pp. 114-16).

The "Convention Parliament" was really an ad hoc body, and it knew that it did not have authority to legislate. Accordingly, the Convention decided to limit itself to declaring and affirming ancient rights, rather than enacting new legislation or repealing old legislation such as the Militia Act of 1662. For this reason, it was necessary to characterize all the rights that the Convention affirmed as (pg.1349) "true, ancient, and indubitable," even though no statute before ever formally recognized the right to arms (pp. 117-18).

The drafting committee soon provided a list of thirteen malignant policies of James II, balanced by thirteen declarations of the rights of British subjects. Items five and six of the monarchial abuses read:

5. By raising and keeping a Standing Army within this Kingdome in time of Peace without Consent of Parlyament.
6. By causing several good Subjects, being Protestants, to be disarmed.<sup>60</sup>

Items five and six of the Declaration of Rights read:

5. That the Raising or Keeping of a Standing Army within the Kingdom in time of Peace, unless it be with the Consent of Parliament, is against Law.

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<sup>59</sup> P. 114 (quoting 2 GILBERT BURNET, BISHOP BURNET'S HISTORY OF HIS OWN TIME 522 (1840)).

<sup>60</sup> P. 118 (quoting 10 H.C. Jour. 21 (1803)).

6. That the Subjects, which are Protestants, may provide and keep Arms, for their common Defence.<sup>61</sup>

The sixth item of the Declaration of Rights was amended, with no opposition, to remove the reference to "common Defence" and to add a qualifier. The final version read: "That the Subjects[,] which are Protestants[,] may have Arms for their Defence[,] suitable to their Conditions [,] [ ] as allowed by Law."<sup>62</sup> The Convention presented the Declaration of Rights to William and Mary the next day, and it became law (pp. 118-19).

Although some modern American gun control advocates read the Declaration of Rights as simply a "collective" right to participate in the militia, Malcolm details the implausibility of such a claim. First, the militia does not even appear in the Declaration. Second, the Convention struck the reference to "common Defence," replacing it with language that simply referred to defense. The duty to defend the state had evolved into a right to have arms for individual protection—including protection against the state (pp. 119-20).

The qualifier to the sixth item of the Declaration of Rights—"suitable to their Conditions and as allowed by law"—opened the way for a host of restrictions short of total disarmament. Although the historical record offers no help, Malcolm suggests that there may have been an intention to keep Henry VIII's property qualification for handgun ownership in force (pp. 119-21).

The government had enforced the Game Act of 1671 sporadically at best, despite royal commands. After enactment of the Bill of Rights, justices of the peace enforced the earlier firearms provisions only against poachers and not against people who simply possessed (pg.1350) guns (p. 127). The Game Acts of 1692 and 1706 omitted guns from the list of items that nonhunters were forbidden to possess.<sup>63</sup>

The Games Acts excluded Catholics—who were afflicted with a civil status somewhat comparable to American communists in the 1950s—from the right to own a gun in light of their supposed loyalty to a foreign potentate (p. 126). This exclusion, however, does not negate the fact that Parliament recognized a right to arms for the vast majority of Great Britain's population. Catholics comprised less than two percent of the population,<sup>64</sup> and in practice, they too were allowed to own defensive home firearms (p. 123).

The Convention Parliament's efforts to protect the rights of Englishmen to arms met with great success over the next centuries. By the middle of the eighteenth century, Blackstone, after describing the three primary rights of Englishmen—personal security, personal liberty, and private property—then pointed to the five auxiliary rights that served to protect the primary ones:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed

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<sup>61</sup> P. 118 (quoting 10 H.C. Jour. 22 (1803)).

<sup>62</sup> P. 119 (quoting 10 H.C. Jour. 29 (1803)).

<sup>63</sup> Pp. 128-29. In 1739, a prosecutor had attempted to use the 1706 Act's prohibition of "other engines" to convict a man, not accused of poaching, of simple gun possession. The King's Bench agreed with the defense that "[a] gun differs from nets and dogs, which can only be kept for an ill purpose, and therefore this conviction must be quashed." P. 129.

Ironically, according to the modern American gun control lobby, keeping a gun to defend one's family against a violent felon is now "an ill purpose," whereas a gun kept for killing animals for sport is a benign "sporting" instrument. According to Handgun Control, Inc. Chair Sarah Brady, "The only reason for guns in civilian hands is for sporting purposes." Tom Jackson, *Keeping the Battle Alive*, TAMPA TRIB., Oct. 21, 1993, (Bay Life Section), at 6.

<sup>64</sup> J.R. JONES, *THE REVOLUTION OF 1688 IN ENGLAND* 77 n.2 (1972).

by law ... and it is indeed a public allowance under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.<sup>65</sup>

Blackstone's treatise immediately became legal orthodoxy in Great Britain and America. He wrote as if he were merely describing an ancient common law right, rather than one that had come into formal existence in 1689. Just as Blackstone had uncritically accepted the Convention Parliament's claim that it was only recognizing old rights, the Anglo-American legal community uncritically accepted Blackstone—at least until Joyce Malcolm came on the scene.

Although the militia eventually withered into nothingness from disuse and a peacetime standing army became normal in Great Britain, the government recognized that the right to arms could be exercised not just by lone homeowners faced with intruders but also by groups. In 1780, after some riots, the Recorder of London— (pg.1351) the city attorney—was asked if the right to arms protected armed groups. He wrote:

The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses, *individually*, may, and in many cases *must*, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.<sup>66</sup>

The right to arms became so commonly regarded as sacrosanct that even Edward Gibbon, a Tory M.P. and close associate of King George III—whose American governors were working hard to disarm disobedient colonials—could remark that: "A martial nobility and stubborn commons,

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<sup>65</sup> 1 BLACKSTONE, *supra* note 2, at \*143-44.

<sup>66</sup> Pp. 133-34 (quoting WILLIAM BLIZARD, DESULTORY REFLECTIONS ON POLICE 59-60 (1785)). The U.S. Supreme Court came to a different conclusion a century later in *Presser v. Illinois*, 116 U.S. 252, 265 (1886). After violent government suppression of peaceful labor strikes in Illinois in the 1870s, many workers began forming self-defense organizations such as *Lehr und Wehr Verein*, a group for German immigrants. In response, the state government outlawed private militias. Working people organized the private militias to protect themselves from governmental violence on account of their exercising their right to withhold their labor; accordingly, these private militias, as defenders of private property against government oppression, were doing exactly what the Second Amendment was intended to protect. Nevertheless, the Supreme Court upheld the Illinois ban on private militias on the grounds that the Second Amendment—like the rest of the Bill of Rights under the Court's theory at the time—was not enforceable against the states. For discussion of *Presser's* inconsistency with the Second Amendment, see CLAYTON E. CRAMER, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS* (1994).

The Court, in dicta, observed that even without the Second Amendment, the Constitution protected individuals against being totally disarmed by their state governments because such disarmament would interfere with federal militia powers contained in Article I, § 8:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government ... the States cannot, even laying the constitutional provision in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resources maintaining the public security, and disable the people from performing their duty to the general government.

*Presser*, 116 U.S. at 265.

*possessed of arms*, tenacious of property, and collected into constitutional assemblies, form the only balance capable of preserving a free constitution against enterprises of an aspiring prince."<sup>67</sup>

Although they should not, some may consider Malcolm's final chapter, detailing the evolution of the 1689 British right to arms (pg.1352) into the 1791 Second Amendment of the U.S. Constitution, the most controversial part of her book. The main body of the book ought to be the portion that attracts controversy: In it Malcolm argues that the 1689 Convention tricked the next three centuries of Britons and Americans with its claim that the British right to arms was "ancient, true, and indubitable," rather than fabricated on the spot as a result of recent experience with oppressive monarchs and their standing armies. Because Malcolm's thesis contradicts the viewpoint of almost every scholar—pro-gun or anti-gun—who has written anything on the British right to arms, one might expect controversy. So far, however, no scholar has challenged Malcolm's conclusion in print.

Malcolm's argument is, on the one hand, irrefutable, because there is no known British legal document prior to 1689 that refers to a right to arms; all the official documents call bearing arms a duty rather than a right (p. 9). But, it is not impossible for a duty and a right to coexist. Jury service was certainly a duty, but many Britons also viewed it as "an ancient, true, and indubitable right."<sup>68</sup> It is possible that deeper inquiry into medieval social history materials might show a similar understanding of a duty-right to arms. While the 1689 Convention may have fabricated a right in a strict legal sense, some kind of rights consciousness regarding arms must have existed beforehand, or else the Convention's assertion of an "ancient, true, and indubitable right" would have been so self-evidently absurd as not to be worth asserting.

By analogy, the provision in the Declaration of Rights against standing armies in times of peace was also novel, rather than "ancient," in that no statute had ever previously affirmed it nor had any part of the common law in any known judicial opinion or legal guidebook. Nevertheless, the declaration against standing armies obviously reflected a long-standing, widely held view about how Britain should organize its society—a viewpoint every monarch had respected until the seventeenth century. Much the same might be said about the right to arms: rights consciousness and statutory affirmation of rights need not go hand in hand, particularly in light of the English theory that the government does not "grant" rights, but rather they arise by long-standing tradition from the ancient past.

Consider, for example, if the U.S. Congress scrapped the volunteer army and replaced it with an army composed entirely of foreign (pg.1353) mercenaries. Is there any real doubt that there would be an immense popular outcry and that many able-bodied, outraged young men would insist that they had a "right" to serve in the American army? From a strictly legal viewpoint, there is not and never has been any "right" to join the army; but long-standing American tradition makes it clear that the American army should be composed of Americans and not foreign mercenaries. If one day the American Constitution were amended to recognize a "right" of the American people to an all-American army, that new right would be both a legal novelty and a recognition of a "proto-right" that had existed in the American tradition from time immemorial. If Malcolm's book had delved

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<sup>67</sup> I EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 53 (Modern Library ed. 1983) (1776-1978) (emphasis added).

<sup>68</sup> The creeping, sometimes galloping, statism in twentieth-century Great Britain that has reduced the right to arms to a small fragment of its former self has had a similarly destructive effect on other traditional British rights, including the right to jury trial and the right to grand jury indictment. To a lesser degree, freedom of speech, freedom of assembly, freedom of the press, and freedom from warrantless search and seizure have also suffered. KOPEL, *supra* note 19, at 67-81.



more fully into the English political and social history of the centuries from the Saxons to the Civil War, a fuller exploration of the duty to arms that created some kind of consciousness of a right to arms long before 1689 might have been possible.

## V. THE SECOND AMENDMENT

The part of *To Keep and Bear Arms* that will attract the most popular attention is Malcolm's final chapter describing the evolution of the 1689 British right into the 1791 American Second Amendment. Here, Malcolm provides a well-written summary that offers almost nothing new to any student of the history of the creation of the Second Amendment. She concludes that Congress intended the Second Amendment to recognize an individual right of all free Americans to possess firearms. Congress designed the Amendment to permit a militia drawn from the whole body of the people, thus ensuring that a uniformed standing army would not be the sole defense of the nation. Although Malcolm's conclusion may startle some television commentators, it fits squarely within the overwhelming scholarly consensus of the last fifteen years.<sup>69</sup> (pg.1354)

But Malcolm's final chapter, though uncontroversial—and almost trivial—from the viewpoint of modern Second Amendment scholarship, is politically incorrect. The chapter caused one publisher to reject the book, while another publisher consented to produce the book only under

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<sup>69</sup> See, e.g., THE RIGHT TO KEEP AND BEAR ARMS, *supra* note 38; STEPHEN HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989) [hereinafter HALBROOK, A RIGHT TO BEAR ARMS]; LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (1988); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991) [hereinafter Amar, *The Bill of Rights as a Constitution*]; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991) [hereinafter Halbrook, *The Right of the People*]; Hardy, *Armed Citizens*, *supra* note 21; Hardy, *Second Amendment*, *supra* note 21; Kates, *Handgun Prohibition*, *supra* note 21; Don B. Kates, Jr., *Second Amendment*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639 (Leonard W. Levy et al. eds., 1986) [hereinafter Kates, *Second Amendment*]; Don B. Kates, Jr., *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143; Kates, *Self-Protection*, *supra* note 21; Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); William Marina, *Weapons, Technology, and Legitimacy: The Second Amendment in Global Perspective*, in FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY 417 (Don B. Kates, Jr. ed., 1984); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); Shalhope, *Armed Citizen*, *supra* note 21; Shalhope, *Ideological Origins*, *supra* note 21.

Notably, two articles that argue that the Second Amendment should no longer guarantee an individual right concede that its original intent was to protect an individual right. David Williams reasons that because governments have neglected their duties to promote responsible gun use through drill in a "well-regulated militia," the right to arms is no longer valid. David C. Williams, *supra* note 55. Donald L. Beschle finds that the Amendment guarantees an individual right of personal security, but suggests that the right can be protected by confiscating all guns. Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69 (1986).

Articles stating that the Second Amendment confers no right on persons are: Cress, *supra* note 21; Ehrman & Henigan, *supra* note 21; Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983).

Forty-three state constitutions include their own right-to-bear-arms provision. See generally Robert Dowlut, *Bearing Arms in State Bills of Rights, Judicial Interpretation and Public Housing*, 5 ST. THOMAS L. REV. 203 (1992); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177 (1982).

One interesting piece of new scholarship argues that an individual right to own handguns for personal protection can be found in the Federal Ninth Amendment. Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

the condition that the final chapter be excised.<sup>70</sup> Happily, Malcolm refused, and Harvard University Press took the opportunity to publish a fine book of English legal history.

Regarding the American right to arms, Malcolm's evidence is persuasive. The most useful parts of the chapter compare and contrast the Second Amendment with its British ancestor. For example, the British right applied only to Protestants, a group that, although it comprised the vast majority of the population, was a narrower group than all the people. The Second Amendment, in pointed contrast, recognizes a right that belongs to "the people."<sup>71</sup>

Having traced the history of the demand for explicit constitutional recognition of the right to keep and bear arms, Malcolm summarizes events as the debate moved from the state ratifying conventions and into Congress:<sup>(pg.1355)</sup>

The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defence and self-preservation. Such an individual right was a legacy of the English Bill of Rights. This is also plain from American colonial practice, the debates over the Constitution, and state proposals for what was to become the Second Amendment. In keeping with colonial precedent, the American article broadened the English protection. English restrictions had limited the right to have arms to Protestants and made the type and quantity of such weapons dependent upon what was deemed "suitable" to a person's "condition." The English also included the proviso that the right to have arms was to be "as allowed by law." Americans swept aside these limitations and forbade any "infringement" upon the right of the people to keep and bear arms.<sup>72</sup>

Malcolm notes, as Blackstone had observed, that the right to arms was not merely for personal security against lone criminals but also to allow popular resistance to a tyrannical government.<sup>73</sup> And what of that Militia Clause in the Second Amendment?

The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public .... A select militia was regarded as little better than a standing army. The argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation. Indeed, it would seem redundant to specify that members of a militia had the right to be armed. A militia could scarcely function otherwise ...

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<sup>70</sup> The author of the book being reviewed provided this information.

<sup>71</sup> Pp. 136-37. In practice, if not in the formal text, the Second Amendment also excluded an important part of the population, because the Constitution generally considered slaves to be beyond the protection of any part of the Bill of Rights. While late eighteenth-century constitutional guarantees of arms, as well as state militia statutes, rarely excluded free Blacks, such exclusions became more common in the nineteenth century. Cottrol & Diamond, *supra* note 69, at 331-38.

<sup>72</sup> P. 162. Like the British Convention Parliament, the U.S. Congress rejected a clause in the arms-rights guarantee that would have limited it to bearing arms "for the common defense." P. 161.

<sup>73</sup> P. 162. More precisely, Congress expected that a well-armed populace would be such a deterrent to tyranny that the need to revolt would likely never arise.

The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army.<sup>74</sup>

In other words, one of the reasons Congress guaranteed the right of the people to keep and bear arms was so that a popular militia could be drawn from the body of the people.<sup>75</sup> The government (pg.1356) would hence be able to rely more on a popular militia for protection and less on a standing army.

Malcolm notes the difficulties of an argument that the Second Amendment, rather than guaranteeing a right of people to keep and bear arms, actually guarantees only the right of state governments to maintain militias. First, the phrase "the people" in the First, Fourth, Ninth, and Tenth Amendments is universally agreed to refer to people, and not to state governments. It would be odd indeed if the authors of the Bill of Rights consistently applied a single meaning to "the people" throughout the Bill of Rights, but anomalously used the phrase "the people" in the Second Amendment to refer to state governments.<sup>76</sup>

Malcolm is particularly effective in correcting the assertion that Congress intended the Second Amendment to reassert state government authority vis-à-vis the federal government over the militia. Malcolm notes that the body of the Constitution gave Congress authority over the training and equipment of the militia—an authority that Congress has virtually never exercised.<sup>77</sup> The Constitution likewise gave Congress authority to call out the militia for specified purposes.<sup>78</sup> Although some anti-Federalists objected to the federal militia powers, no single state-ratifying

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<sup>74</sup> Pp. 162-63. Richard Henry Lee had worried that if "one fifth or one eighth part of the men capable of bearing arms be made a select militia," the select militia would rule over the "defenseless" rest of the population. Therefore, wrote Lee, "the Constitution ought to secure a genuine and guard against a select militia ... to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them." *LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN* 21-22, 124 (Walter Hartwell Bennett ed., 1978) (The author of the letters was originally anonymous but was later determined to be Lee.). Lee sat in the Senate that ratified the Second Amendment. *THE RIGHT TO KEEP AND BEAR ARMS*, *supra* note 38, at 5.

<sup>75</sup> If all this seems obscure today, it was hornbook law during the nineteenth century: The object of this clause [the right of the people to keep and bear arms] is to secure a well-armed militia... But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms. JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 239, at 152 (New York, Hurd & Houghton 3d ed., rev. & enl. 1875).

<sup>76</sup> P. 162. A majority of the Court adopted the common-sense suggestion that "the people" has a consistent meaning throughout the Bill of Rights in a 1990 case involving the Fourth Amendment:

"[T]he people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

*United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (regarding Fourth Amendment's protection of nonresident nonnationals); *see also* Amar, *The Bill of Rights as a Constitution*, *supra* note 69, at 1164 ("Thus, the 'people' at the core of the Second Amendment were Citizens—the same 'We the People' who in conventions had 'ordain[ed] and establish[ed]' the Constitution and whose right to reassemble in convention was at the core of the First Amendment." (alterations in original)).

<sup>77</sup> The Constitution gives Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." U.S. CONST. art. I, § 8, cl. 16.

<sup>78</sup> Congress has the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15.

convention put forth an amendment requesting that some of the power over the militia be returned to the states (p. 163). Roger Sherman, recent research has revealed, did draft an amendment to protect state authority over (pg.1357) the militia, but the congressional committee reviewing the Bill of Rights rejected it.<sup>79</sup> As Stephen Halbrook observes, the "National Guard" interpretation of the Second Amendment amounts to an Orwellian reversal—to treating the enacted Amendment that guarantees the right of the people as having a meaning identical to a proposed but rejected amendment dealing with the rights of states.<sup>80</sup>

Malcolm's chapter is not the definitive history of the origin of the Second Amendment.<sup>81</sup> She wisely chooses not to cover the (pg.1358) same ground that has been well-trod in over fifty law review articles, all but a handful of which agree that the original intent of the Second Amendment was to guarantee an individual right.<sup>82</sup> Nor does her book discuss the critical formative experiences of the American frontier and the American Revolution in shaping the American understanding of the

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<sup>79</sup> Pp. 160-63. Sherman's amendment stated:

The militia shall be under the government of the laws of the respective States, when not in actual Service of the United States, but such rules as may be prescribed by Congress for their uniform organization and discipline shall be observed in officering and training them, but military Service shall not be required of persons religiously scrupulous of bearing arms.

P. 160 (quoting ROGER SHERMAN, PROPOSAL FOR A SEPARATE BILL OF RIGHTS (1789)).

<sup>80</sup> Halbrook, *The Right of the People*, *supra* note 69, at 131-32. Another piece of evidence against the states' rights interpretation is James Madison's original structure of the Bill of Rights proposed interpolating each Amendment into the text of the Constitution, following the pertinent provision. Madison proposed putting the right-to-bear-arms amendment in Article I, § 9, the section that guarantees individual rights, such as habeas corpus, rather than in Article I, § 8, the section dealing with congressional powers over the militia. Kates, *Second Amendment*, *supra* note 69.

The theory that the Second Amendment guarantees a right of state governments is discussed in Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. (forthcoming 1995). The authors note that commentators only used the "states' rights" theory of the Second Amendment to counter attempts to raise the Second Amendment as an individual right. The proponents of the states' rights theory have never bothered to explore exactly what rights the Second Amendment must guarantee if the Amendment benefits states rather than individuals. As Reynolds and Kates explain, the Second Amendment as a "state's right" must be the right of states to maintain and arm state militias in contravention of federal authority. *Id.* Accordingly, a state governor would have the authority within his state to negate existing federal restrictions on ownership of machine guns, grenades, and surface-to-air missiles simply by declaring that he wanted to arm the state militia with such weapons. Of course, militia members would be expected to supply the weapons at their own expense through private purchase, because state militias at the time of the Second Amendment were armed through militiamen supplying their own weapons. *United States v. Miller*, 307 U.S. 174, 179 (1939).

Moreover, the current National Guard, if it is to be considered the "militia" protected by the Second Amendment, must be unconstitutional in its current incarnation, because the Guard is created under the federal government's army power, is armed by the federal government with guns that it can recall at will, and is subject to federalization and to being shipped overseas at the unreviewable discretion of the President. Reynolds & Kates, *supra*. The closer one looks at the "states' rights" theory of the Second Amendment, the less coherent it becomes.

<sup>81</sup> Readers in search of a fuller history of the Second Amendment should start with Cramer's book, which provides a good analysis of the history of judicial interpretation of the rights to keep and bear arms in both the Federal Constitution and in state constitutions. CRAMER, *supra* note 66. Readers might then move to HALBROOK, A RIGHT TO BEAR ARMS, *supra* note 69, which provides the best research regarding the period from the Revolutionary War to the ratification of the Second Amendment. From there, readers should sample the various law review articles listed in *supra* notes 21 and 69. The articles that tend to have the most historical information are those by Cottrol and Diamond, Cress, Halbrook, Hardy, Ehrman and Henigan, Kates, and Shalhope. Halbrook's first book, *THAT EVERY MAN BE ARMED*, was tremendously valuable at the time of publication in 1984, and it remains a useful one-volume history; but, the historical research of the last ten years, including the new research by Halbrook, has fleshed out many issues that Halbrook only briefly addressed in *That Every Man Be Armed*. HALBROOK, *supra* note 38.

<sup>82</sup> See *supra* note 69.

importance of private arms in a free and secure society.<sup>83</sup> But her American chapter does effectively integrate her story about the evolution of the British right to arms into an American context.

## VI. MODERN ENGLAND

An Afterword briefly summarizes the rise and fall of the right to arms in England in the last two centuries. The bearing of arms in England began as a duty that was onerous in practice, but that inspired national pride in the abstract (pp. 1-3). As detailed by Malcolm, the duty evolved into a formal legal right in 1689, in reaction against oppressive weapons laws imposed by absolutist monarchs (pp. 113-19). The right thrived with little controversy for the next one and a half centuries. After the Peterloo Massacre in 1819, Parliament passed the Six Acts to disarm rebels in particular areas. The Six Acts met with furious opposition, though they were limited in geographical scope, and expired in two years. For the rest of the nineteenth century, Britain had no laws at all regarding the peaceful possession or carrying of firearms.<sup>84</sup> The Whig historian Thomas Macaulay reflected the consensus opinion when he observed that the right of English subjects to arms was "the security without which every other is insufficient."<sup>85</sup>

As the twentieth century opened, Britain had essentially no gun laws and no gun crime. The national crime rate was lower than during any period before or since. World War I changed this situation. As Malcolm explains, the British government in the years immediately following World War I no longer trusted the British people. The Cabinet feared, in the words of one member, "Red revolution and blood and war at home and abroad!"<sup>86</sup> Parliament (pg.1359) introduced a licensing system for handguns and rifles, and made knowingly false claims about a gun crime wave. Parliament overwhelmingly enacted the Firearms Act of 1920,<sup>87</sup> with little objection from a public that, after the carnage of World War I, had apparently grown weary of firearms and all they had now come to symbolize (p. 172). Parliament adopted shotgun licensing in 1967 and made the entire gun control system significantly more restrictive in 1989.<sup>88</sup>

The story of the twentieth-century devolution of the British right to own guns to overthrow the government into a mere privilege to possess "sporting" guns under highly restrictive government controls has been told elsewhere,<sup>89</sup> and Malcolm wisely does not choose to repeat it.

The gun-owning public in Britain—about four percent of households legally own guns, and about an equally large number may own unregistered guns<sup>90</sup>—has become almost irrelevant to the gun control debate. With the exception of some writers for British gun magazines, few Britons will

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<sup>83</sup> One of the best treatments of the Americanization of arms practices of the English colonists is MALONE, *supra* note 56; *see also* KOPEL, *supra* note 15, at 307-21.

<sup>84</sup> Pp. 166-70. The one exception was an 1870 law requiring persons who carried handguns outside the home to obtain a tax stamp at the post office. It was conceived of strictly as a revenue measure and was not intended to interfere with people carrying guns. KOPEL, *supra* note 15, at 70-71.

<sup>85</sup> P. 169 (quoting THOMAS MACAULAY, CRITICAL AND HISTORICAL ESSAYS, CONTRIBUTED TO THE EDINBURGH REVIEW 154, 162 (Leipzig, 1850)).

<sup>86</sup> P. 171 (quoting 1 THOMAS JONES, WHITEHALL DIARY 97 (Keith Middlemas ed., 1969)).

<sup>87</sup> Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43 (Eng.).

<sup>88</sup> KOPEL, *supra* note 15, at 75-85.

<sup>89</sup> GREENWOOD, *supra* note 20; KOPEL, *supra* note 19; KOPEL, *supra* note 15.

<sup>90</sup> KOPEL, *supra* note 15, at 89-90.

assert that they have a right to own firearms as an insurance policy against oppressive government. Few will even assert that they have a right to own guns to protect themselves against criminal attack.

## VII. MODERN AMERICA

To an English audience then, Malcolm's description of the development of the right to arms may seem as distant and quaint, and barbaric, as would a law journal's analysis of the right of *utfangthef*—a Saxon lord's right to hang a thief caught with stolen goods. Does the Malcolm book have any greater significance in America where many millions of people still believe in the principle of the British Declaration of Rights—that the ultimate purpose of gun ownership is to resist the government?

First, the book suffers from one major flaw that may limit its appeal to an American audience. Too often Malcolm falls on the wrong side of the dividing line between a monograph and a book. With only 177 pages of text, plus copious endnotes and a good index, *To Keep and Bear Arms* modestly focuses on presenting the author's excellent original research.<sup>91</sup> But even if Malcolm had little (pg.1360) new to present, the literature still could have benefited from a more detailed presentation and analysis of weapons policy in England from Saxon times up through the English Civil War. Had Malcolm chosen to deal with this period in two or three chapters, rather than in one, she might have better illuminated the attitudes that helped make the duty to bear arms evolve into a right to bear arms.

Malcolm writes the book as if the intended audience were mostly scholars of English legal history. She makes references to events such as the Popish Plot,<sup>92</sup> Thomas Venner's rebellions,<sup>93</sup> and the Treaty of Ryswick<sup>94</sup> without explanation, as if such events were as much a part of common knowledge as Pearl Harbor or the Nina, the Pinta, and the Santa Maria. Such events are common knowledge among historians of England, but Malcolm's book will be read not only by professional historians but also by American generalists who are interested in the modern gun control debate;<sup>95</sup> unless these generalists have at least a rough sense of seventeenth-century English history, especially the Civil War period, some passages of *To Keep and Bear Arms* may seem opaque.

Does Malcolm's book help us answer any particular questions in the modern American gun control debate? To at least some degree, the English history helps illuminate the Second Amendment's background. The 1689 Bill of Rights was a reaction against a long string of encroachments by Charles II and James II: gun registration, gun owner registration, disarmament

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<sup>91</sup> At least in the academy, the gun control debate has made great progress to a more scholarly plane in the last several years. Scholars now have access to an excellent survey and analysis of all the social science evidence regarding guns and gun control, GARY KLECK, *POINT BLANK* (1991) (winner of the 1993 American Society of Criminology's Michael Hindelang Award, as the most significant contribution to criminology in the last three years); an explosion of law review articles and books analyzing the Second Amendment, *see supra* notes 21 & 69; a complete documentary collection of all known writings relevant to the origins of the Second Amendment, from 1787 to 1792, *THE ORIGIN OF THE SECOND AMENDMENT* (David E. Young ed., 1991); and a three-volume series that collects the most important cases and articles related to the right to arms, *GUN CONTROL AND THE CONSTITUTION* (Robert J. Cottrol ed., 1993).

<sup>92</sup> P. 95. The Popish Plot was a purported Catholic attempt to assassinate Charles II. Although the plot was a fictitious creation, it aroused a frenzy of anti-Catholic persecutions.

<sup>93</sup> Pp. 38, 44, 99. Venner was a Puritan rebel whose unsuccessful uprising prompted pro-standing army sentiment.

<sup>94</sup> P. 124. This 1697 Treaty, among other things, recognized William III as the legitimate King of England.

<sup>95</sup> Within a few months of publication, the book was in its third printing.

of political or religious "malecontents, fanatics, and sectaries,"<sup>96</sup> disarmament of the poor and middle class through property qualifications, and placement of law enforcement under centralized national control. All of these infringements, which helped cause the overthrow of a king, have rather obvious parallels in the agenda of the modern gun prohibition lobby. It is hard to believe that the people who put the Second Amendment in the American Constitution—and parallel provisions in most state constitutions—would classify as "reasonable regulation" the very infringements that their English forebears had (pg.1361) found so intolerable and that indeed were justification for overthrowing the government.

Although Malcolm's book suggests that the Framers of the Second Amendment would have looked critically at gun registration proposals, the book does not, and cannot, offer us James Madison's thoughts on gun registration; nor can it connect those thoughts to Madison's knowledge of British gun controls of the preceding century. Not surprisingly, the difficulties of relying on original intent become greater and greater as one attempts to make the intent more and more specific.

But what was the general intent of the Second Amendment? Here Malcolm demonstrates convincingly that the intent was to guarantee an individual right to possess firearms for personal security, so that the people could use firearms against both lone criminals and criminal governments. Although American scholars looking at American evidence have already arrived at a consensus supporting this position, Malcolm's careful tracing of the antecedent British right to keep and bear arms provides further validation for this view.

Perhaps Malcolm's greatest contribution is to remind us that the right to bear arms, in both its British and American contexts, is not primarily about shooting sports or hunting. It is primarily about the power relationship between people and government and about ensuring that government cannot overpower the people.

The core right protected by the Second Amendment is the right of the people to resist a tyrannical government and to secure for themselves "a free state." The Second Amendment recognizes the same reality as Mao Zedung's statement "Political power grows out of the barrel of a gun."<sup>97</sup> The underlying objective of the Framers, however, was precisely the opposite of Mao's; the Framers wanted ultimate power to belong to the people and not the government.

Original intent is generally a starting point rather than a conclusion for American constitutional debate, as Malcolm recognizes, and she writes as a legal historian, not as an authoritative interpreter of the Second Amendment in the twentieth century. Still, she warns that "to ignore all evidence of the meaning and intent of one of those rights included in the Bill of Rights is to create the most dangerous sort of precedent, one whose consequences could flow far beyond this one issue and endanger the fabric of liberty" (p. 176). "We are not forced into lockstep with our forefathers," Malcolm concludes, "[b]ut we owe them our considered attention before we disregard a right they felt it imperative to bestow upon us" (p. 177). It is one thing to say that original intent need not be (pg.1362) the only interpretive tool; it is quite another to say that original intent and the text of the Constitution can be brushed aside by a judge's sociopolitical determination that the very rights the Second Amendment was intended to secure are no longer important. Such judicial fiat creates

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<sup>96</sup> See *supra* note 60.

<sup>97</sup> THE OXFORD BOOK OF QUOTATIONS 446 (4th ed. 1992).

not a "living Constitution," but a dead one, an empty shell that provides American citizens no rights that black-robed Platonic philosophers are bound to respect.<sup>98</sup>

Unlike King James II, the government in Washington is not attempting to impose a state religion on a recalcitrant population. Yet, in part as a result of the "war on drugs," the size of the federal law enforcement establishment is the largest in history, and the increasingly large federal and state law enforcement bodies are better armed and more militarized than ever before. It was not too long ago that the F.B.I. used tanks to launch an attack with chemical weapons banned from international warfare against religious "malcontents, fanatics, and sectaries"—including two dozen children—in Waco, Texas, who wanted only to be left alone.<sup>99</sup> Have American politicians become so virtuous that the temptations of power that enthralled their British counterparts of the seventeenth century need not worry modern Americans? Or are the human frailties that convinced Britain in 1689 that the right to arms was a necessary caution against the dangers of government out of control still present today?

Joyce Malcolm does not answer these questions in *To Keep and Bear Arms*. She does remind us that the reason that the people of Britain in 1689 and America in 1791 bequeathed to us the right to keep and bear arms was not so that we could hunt game, but so that we could stay free.

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<sup>98</sup> According to the *Dred Scott* decision, free Blacks had "no rights which the white man was bound to respect." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857). To reinforce the Court's opinion in *Dred Scott* that free blacks had no constitutional rights, Chief Justice Taney conjured a parade of horrors that would result from recognizing free Blacks as citizens. Among the rights of citizens Taney thought Blacks must be denied was the right to "to keep and carry arms wherever they went." *Dred Scott*, 60 U.S. at 417.

The judicial history of the right to keep and bear arms in the United States is not the subject of this essay. But it should be noted that for well over 150 years, some American courts have been just as willing as Chief Justice Taney to perform intellectual pyrotechnics—sometimes dishonestly—to avoid judicial enforcement of the right to keep and bear arms. See CRAMER, *supra* note 66.

<sup>99</sup> See generally DAVID KOPEL & PAUL BLACKMAN, *THE GOD WHO ANSWERS BY FIRE: THE WACO DISASTER AND THE NECESSITY OF THE FEDERAL CRIMINAL JUSTICE REFORM* (forthcoming 1995).