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Natural Rights and the Second Amendment

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NATURAL RIGHTS AND THE SECOND AMENDMENT

STEVEN J. HEYMAN*

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Men uniting into politick societies, have resigned up to the publick the disposing of all their Force, so that they cannot employ it against any Fellow-Citizen, any farther than the Law of the Country directs

—John Locke¹

INTRODUCTION

The Second Amendment is an enigma. Although many aspects of the Bill of Rights are controversial, disputes usually focus on such questions as how far particular rights should extend and how they should apply under modern circumstances. By contrast, there is no consensus on even the most basic meaning of the Second Amendment, which reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."² Instead, the scholarly literature is sharply divided between two opposing views. One position asserts that the Second Amendment was intended to guarantee an individual right to keep and bear arms.³ The other holds that the right is one that belongs to the people collectively, and that the right is essentially connected with the establishment of "[a] well regulated Militia."⁴

1. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. XXVIII, § 10, at 353 (Peter H. Nidditch ed., Clarendon Press 1975) (1700).

2. U.S. CONST. amend. II.

3. See, e.g., STEPHEN B. HALBROOK, THAT EVERY MAN BE ARMED (1994); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) [hereinafter Kates, *Original Meaning*]; Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, J. AM. HIST. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994); Symposium, *Gun Control*, 49 L. & CONTEMP. PROBS. 1 (1986); *A Second Amendment Symposium Issue*, 62 TENN. L. REV. 443 (1995). For a more extensive listing of this literature, see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-11, at 897 n.211 (3d ed. 2000). A valuable overview may be found in Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995). For some critiques of the individual right view, see GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 207-24, 252-60 (1999); Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 LAW & HIST. REV. 567 (1998); Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62; and the articles that appear in 16 CONST. COMMENTARY 221-81 (1999).

4. In addition to many of the articles in this issue, *Symposium on the Second Amendment: Fresh Looks*, 76 CHI.-KENT L. REV. 3 (2000), see, for example, Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991).

In resolving this debate, the most common methods of constitutional interpretation are of limited use. At least to modern readers, the Amendment's language is ambiguous. The subject of the constitutional right, "the people," can be understood either in a collective sense, to refer to the community as a whole, or in an aggregate sense, to refer to all of its members. The reference to the "Militia" points in a collective direction but is not conclusive on its own. As to the broader context of usage within the Constitution and the Bill of Rights, those documents use "the people" in both senses: sometimes collectively, sometimes individually.⁵ Contemporary

5. The Constitution's opening words, "We the People," clearly use the term collectively: only the community is capable of "ordain[ing] and establish[ing]" a constitution for the body politic. U.S. CONST. preamble. The term is also employed collectively in Article I, Section 2, Clause 1, which provides that the members of the House of Representatives shall be elected by "the People of the several States."

Indeed, the original Constitution never uses "people" in any other sense. When the document refers to individuals, it uses the term "person." See U.S. CONST. art. I, § 2, cl. 2 (providing that "no Person shall be a Representative" who shall not have certain specified qualifications); *id.* § 3, cl. 3 (same with respect to Senators); *id.* art. II, § 1, cl. 5 (same with respect to the president); *id.* art. I, § 6, cl. 2 (providing that "no person holding any office under the United States, shall be a member of either House during his Continuance in Office"); *id.* § 7, cl. 2 (providing that, when the House and Senate vote on whether to override the president's veto, "the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively"); *id.* § 9, cl. 1 (barring Congress from prohibiting "[t]he Migration or Importation of such persons as any of the States now existing shall think proper to admit," prior to 1808, but permitting Congress to impose "a Tax or duty . . . on such Importation, not exceeding ten dollars for each Person"); *id.* art. II, § 1, cls. 2-3 (describing the procedure for electing the president); *id.* art. III, § 3, cls. 1-2 (limiting federal power to define and punish treason); *id.* art. IV, § 2, cls. 2-3 (requiring states to deliver up fugitive slaves and fugitives from justice).

In many cases, the Bill of Rights also uses "person," or some other singular term, when referring to individuals. See *id.* amend. III (forbidding the peacetime quartering of soldiers "in any house, without the consent of the Owner"); *id.* amend. IV (requiring that warrants give a particular description of "the persons or things to be seized"); *id.* amend. V (providing that no "person" shall be subjected to certain forms of criminal proceedings, "be deprived of life, liberty, or property, without due process of law," or have property taken for public use without just compensation); *id.* amend. VI (setting forth the rights of "the accused" in criminal prosecutions).

Moreover, the Bill of Rights sometimes uses "the people" in a collective sense. See *id.* amend. X (reserving certain powers to "the States respectively, or to the people"). But not always. It is difficult to deny that the Fourth Amendment's guarantee of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was intended to protect a right of individuals as such. Other uses of "people" within the Bill of Rights might be interpreted as having either an individual or a collective sense, or perhaps both. For example, while the First Amendment "right of the people peaceably to assemble, and to petition the Government for a redress of grievances" is often said to refer to individuals, assembly involves collective activity (which is one reason why the Stuart monarchy regarded it as a threat to government). Similarly, the Ninth Amendment's reference to "other[rights] retained by the people" is not necessarily limited to individual rights, but may also encompass rights retained by the people as a whole when they establish a government.

In short—contrary to claims often made on both sides of the debate—the Second Amendment's reference to "the people" does not, simply as a textual matter, commit us to either an individual or a collective right interpretation of the Amendment. As I shall show,

debates over the Amendment were sparse and generally unilluminating.⁶ And, in contrast to most other provisions of the Bill of Rights, the Supreme Court has rarely addressed the meaning of the Second Amendment.⁷

Faced with these difficulties, constitutional scholars and historians often seek to understand the Second Amendment by situating it within a larger tradition or body of thought. Some scholars, on both sides of the debate, have discussed the Amendment's background in the English legal and constitutional tradition.⁸ Others have connected the right to arms with civic republican thought.⁹ And still others, especially on the individual rights side, have argued that the Amendment reflects natural rights philosophy.¹⁰

This argument—which has been advanced in varying forms by Randy Barnett, Stephen Halbrook, Don Kates, Nelson Lund, Joyce Lee Malcolm, and others¹¹—runs as follows. According to the natural rights tradition, which deeply influenced the American founders, individuals had an inalienable right to defend themselves against violence. It was to protect this right, among others, that society and government were formed. Within society, citizens had a right to defend themselves not only against private violence, but also against tyranny and oppression by the government itself. But this right could not be effectively exercised without arms. According to this view, the Second Amendment was intended, at least in part, to enable individuals to exercise their natural right to self-defense.

however, the Second Amendment was largely derived from comparable provisions in the post-Revolutionary state declarations of rights, and the language of these provisions sheds a good deal of light on the problem. See *infra* Part III.

6. See *infra* text accompanying notes 214-16.

7. The most recent major Supreme Court decision is *United States v. Miller*, 307 U.S. 174 (1939). For a discussion of *Miller* and other cases in the Supreme Court and lower courts, see Michael Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000).

8. See, e.g., MALCOLM, *supra* note 3; Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27 (2000).

9. See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); David C. Williams, *Civic Republicanism and the Civic Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403 (2000).

10. See, e.g., HALBROOK, *supra* note 3; Barnett & Kates, *supra* note 3, at 1176-79; Kates, *Original Meaning*, *supra* note 3, at 229-30, 254; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) [hereinafter Kates, *Self-Protection*]; Nelson Lund, *The Second Amendment, Political Liberty, and the Right of Self-Preservation*, 39 ALA. L. REV. 103, 118-21 (1987).

11. See *supra* note 10.

On its face, this view is a powerful one. Indeed, even Garry Wills, one of the most forceful critics of the individualist interpretation, concedes that arguments for “a natural right to own guns” “might be sound or strong,” though he denies that the Second Amendment was meant to secure such a right.¹²

The object of this Article is to challenge this understanding of the natural rights tradition. While that tradition did hold that individuals in a state of nature had a broad right to use force for self-preservation, that right was not an inalienable one. Instead, when individuals entered into society, they largely gave up this right in return for the protection they obtained under the law. And although the people retained the right to resist tyranny, this was a right that belonged to the community as a whole rather than to individuals. For these reasons, the natural rights tradition provides more support for a collective right than for an individualist interpretation of the Second Amendment.

My discussion will proceed in four parts. Part I begins with John Locke’s classic account of natural rights in the *Second Treatise of Government*.¹³ Part II focuses on Sir William Blackstone’s account of the right to arms,¹⁴ which provides the strongest textual evidence for a natural rights interpretation of the Amendment. Parts III and IV explore the right to arms in post-Revolutionary American thought and in the debates surrounding the Constitution and the Bill of Rights. The Article concludes with some reflections on what this history means for how the Second Amendment should be interpreted today.

I. LOCKE AND THE NATURAL RIGHTS TRADITION

A. *Is There a Right to Arms for Personal Self-Defense?*

The best place to start is with Locke, whose writings laid the foundations for natural rights theory in eighteenth-century England and America. Locke never mentions a right to arms for personal self-defense. At first glance, however, his theory would appear to strongly support such a right. Locke begins by envisioning individuals in a state of nature, before the formation of civil society and

12. WILLS, *supra* note 3, at 259.

13. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

14. 1 WILLIAM BLACKSTONE, COMMENTARIES *144.

government.¹⁵ In that state, individuals are not only entitled to life, liberty, and property¹⁶ but also have a right to do anything necessary to preserve them, within the bounds of the law of nature.¹⁷ In particular, everyone has a natural right to judge for himself whether others are invading his rights, and to vindicate those rights by force if necessary.¹⁸ Indeed, the right to use force is not limited to self-defense. According to Locke, the fundamental law of nature enjoins the preservation not only of oneself but of mankind in general.¹⁹ In a state of nature, everyone is entitled to enforce this law by punishing those who injure other human beings.²⁰

Thus, Locke recognizes a broad natural right to use force for the protection of oneself and others. If one assumes that weapons are useful for this purpose, then Locke's theory seems to provide a powerful justification for an individual right to have them. And if the purpose of government is to protect natural rights, it seems to follow that the law should recognize and secure this right. Of course, that is the conclusion that advocates of the individual right interpretation of the Second Amendment draw from Locke's work.²¹ In my view, however, this conclusion is mistaken. For the thrust of Locke's discussion is not to endorse a broad private right to use force, but exactly the opposite: to show why such a right must be radically restricted.

According to Locke, it is precisely the unrestrained use of force that makes the state of nature intolerable.²² The problem is that when every individual is judge in his own case, he is likely to act out of passion and self-interest, pursuing his own advantage at the expense of the rights of others.²³ The lack of a clear, settled law to govern interactions between individuals aggravates the situation.²⁴ Moreover, even when one is in the right, one may lack sufficient power to protect oneself and one's rights.²⁵ For all these reasons,

15. See LOCKE, *supra* note 13, §§ 4-15, at 269-78.

16. See *id.* §§ 4, 123, at 269, 350.

17. See *id.* §§ 87, 128, 171, at 323-24, 352, 381-82.

18. See *id.* §§ 87, 91, at 323-24, 326-27.

19. See *id.* §§ 6, 159, 183, at 270-71, 374-75, 390-91.

20. See *id.* §§ 7-12, at 271-75.

21. See, e.g., HALBROOK, *supra* note 3, at 28-29; Kates, *Self-Protection*, *supra* note 10, at 90; Lund, *supra* note 10, at 119 n.38.

22. See LOCKE, *supra* note 13, §§ 123-27, at 350-52.

23. See *id.* §§ 13, 90, 125, at 275-76, 326, 351.

24. See *id.* § 124, at 350-51.

25. See *id.* § 126, at 351.

individuals live a most precarious existence in the state of nature, which is constantly in danger of degenerating into a war of all against all.²⁶

The remedy for these evils lies in the social contract, in which individuals agree to form a society for the preservation of their life, liberty, and property.²⁷ The terms of this contract have a crucial bearing on our problem. According to Locke, when an individual enters civil society, “he gives up” his

*Power . . . of doing whatsoever he thought fit for the Preservation of himself, and the rest of Mankind, . . . to be regulated by Laws made by the Society, so far forth as the preservation of himself and the rest of that Society shall require; which Laws of the Society in many things confine the liberty he had by the Law of Nature.*²⁸

In return, the individual obtains all the benefits of society, including the right to be protected by the “whole strength” of the community.²⁹ To make this protection possible, individuals “engage [their] natural force” to assist the community in enforcing the law, as well as defending the society from external danger.³⁰

In short, while there is a broad natural right to use force for self-preservation, this is not an *inalienable* right, that is, a right that individuals can never part with. Indeed, according to Locke, it is only by surrendering this right that human beings are able to form a society at all. For the very notion of political society is that rights should be determined and disputes resolved not through the “private judgement” of each individual, backed by private force, but rather by the public judgment of the community, as expressed in general laws enacted by the legislature, administered by impartial judges, and enforced by the power of the community as a whole.³¹ For these

26. See *id.* §§ 21, 123, 127, at 282, 350, 352.

27. See *id.* §§ 87-89, 123, at 323-25, 350.

28. *Id.* §§ 128-29, at 352-53; see also *id.* § 171, at 381-82. In addition, under the social contract, the individual “wholly gives up” his or her power to punish violations of the law of nature, and transfers this power to the community. *Id.* §§ 130, 171, at 353, 381-82.

29. *Id.* § 130, at 353.

30. *Id.*; see also *id.* §§ 88-89, at 324-25 (stating same principle).

31. *Id.* §§ 87-88, at 323-25. Locke’s view is well summarized in the following passage:

Man being born . . . with a Title to perfect Freedom, and an uncontrouled enjoyment of all the Rights and Priviledges of the Law of Nature, equally with any other Man, or Number of Men in the World, hath by Nature a Power, not only to preserve his Property, that is, his Life, Liberty and Estate, against the Injuries and Attempts of other Men; but to judge of, and punish the breaches of that Law in others, as he is perswaded the Offence deserves, even with Death it self, in Crimes where the heinousness of the Fact, in his Opinion, requires it. But because no *Political Society* can be, nor subsist without having in it self the Power to preserve the Property, and in order thereunto punish the Offences of all those of that Society; there, and there only is *Political Society*, where every one of the Members hath quitted this natural Power,

reasons, Locke determines that the right to use force is an *alienable* right—a right that individuals give up when they form the social contract.

This point emerges clearly when we compare this right with the liberty of conscience, which Locke regards as the paradigmatic inalienable right. In his *Letter Concerning Toleration*, he argues that the capacity to form one's own beliefs is inherent in and inseparable from the human mind—in a strict sense, it is impossible to part with this freedom.³² Holding one's own religious beliefs does no injury to others.³³ Nor is there anything to be gained by relinquishing this right, for salvation can be attained only through sincere belief and worship.³⁴ For these reasons, freedom of belief is an inalienable right. And these arguments can be generalized to apply to freedom of thought more broadly.³⁵ By contrast, the liberty to use force against others, particularly with weapons, is not inseparable from individuals, and does impact on the rights of others. And there is a great deal to be gained by surrendering this right, for as a rule individuals are much more likely to attain security and preservation when the private use of force is excluded. It follows that the right to use force, unlike liberty of thought and belief, is an alienable right. This point is summed up in Locke's remark that "though Men uniting into politick societies, have resigned up to the publick the disposing of all their Force, so that they cannot employ it against any Fellow-Citizen, any farther than the Law of the Country directs; yet they still retain the power of Thinking" as they like,³⁶ since that right is an inalienable one.³⁷

resign'd it up into the hands of the Community in all cases that exclude him not from appealing for Protection to the Law established by it. And thus all private judgement of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties; and by Men having Authority from the Community, for the execution of those Rules, decides all the differences that may happen between any Members of that Society, concerning any matter of right; and punishes those Offences, which any Member hath committed against the Society, with such Penalties as the Law has established . . .

Id. § 87, at 232-24.

32. See JOHN LOCKE, A LETTER CONCERNING TOLERATION 26-27 (James Tully ed., Hackett Publishing Co. 1983) (William Popple trans., 1st ed. 1689).

33. See *id.* at 46-47.

34. See *id.* at 26-28.

35. For an exploration of Locke's views on freedom of thought, see Steven J. Heyman, *The Liberty of Rational Creatures: Lockean Natural Rights and the Freedom of Speech and Thought* (Nov. 1999) (unpublished manuscript, on file with author).

36. LOCKE, *supra* note 1, bk. II, ch. XXVIII, § 10, at 353. For other passages in which Locke draws such a contrast, see LOCKE, *supra* note 32, at 26-28, 47-48 (asserting that when individuals enter society, they "arm[the Magistrate] with the Force and Strength of all his Subjects" for the protection of their rights to life, liberty, and property, but retain the

The implications of our discussion for a right to arms should be clear. If individuals had an inalienable right to use force for self-preservation, they might also have a right to possess and use weapons for that purpose. But this argument fails if the right to use force is one that individuals surrender when they enter into society.

There is, however, an important exception to the general rule that the right to use force is an alienable one. Individuals give up this right only in those cases in which they are able to appeal to the law for protection.³⁸ For this reason, Locke holds that when an individual faces an imminent attack on his life or person, he has a right to use all necessary force to defend himself.³⁹ To this extent, the right to self-defense is an inalienable one which is retained within civil society. If this is true, however, does it not follow that individuals also have an inalienable right to own arms for self-defense?

There is no way to know what Locke would have thought of this argument, for he never addressed the issue. The logic of this view, however, is hardly compelling from a Lockean perspective. The difficulty with the argument is that it confuses two different questions: what an individual may rightfully do when he is subject to imminent attack, and what measures the legislature may properly take *ex ante* to protect the lives and safety of citizens. When a person is assaulted, he may do anything reasonably necessary to defend himself. This includes not only using his own natural force, but also using anything else in his possession, such as a deadly weapon. It does not follow, however, that the legislature cannot properly make a prospective judgment that citizens would enjoy a higher level of security if the possession of such weapons were restricted or even banned. To be sure, such a law would not be justified if weapons could be employed only for lawful self-defense. But that obviously is not the case, since they can also be used to wrongfully assault others. Under these circumstances, it is an empirical question whether the community would be safer with or without restrictions on guns. And that would

inalienable right to liberty of conscience).

37. It follows that individual right scholars are mistaken when they suggest that the natural rights tradition regarded the right to use force for self-preservation as no less fundamental than the rights protected by the First Amendment. See Lund, *supra* note 10, at 119 ("In liberal theory, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial, and due process of law."); *id.* at 123 ("[T]he right of self-defense is more fundamentally rooted in our political traditions than are First Amendment rights.").

38. See LOCKE, *supra* note 13, §§ 87-88, 171, at 323-25, 381-82.

39. See, e.g., *id.* §§ 19, 207, at 280-81, 403-04.

seem to be a question for the legislature to decide.

To summarize, Lockean theory holds that when individuals establish a society, they give up the right to use force against others in return for the protection they receive from the community. Immediate self-defense is an exception to this principle, for in that case there is no opportunity to appeal for protection. But one way in which the government can protect its citizens is by regulating the possession and use of weapons. For this reason, such regulation appears to fall on the alienable, not the inalienable, side of the line.

To put the point another way, Locke does not regard the ability of individuals to use force in their own defense as an end in itself. Instead, it is a means to the fundamental end of natural law—the preservation of oneself and of mankind in general.⁴⁰ Indeed, as Locke's account of the state of nature demonstrates, the unrestrained right to use force according to one's own private judgment actually undermines, rather than furthers, the goal of self-preservation by leading to a war of all against all.⁴¹ Rational individuals would therefore choose to give up this right and to form a society for mutual preservation.⁴² Just as preservation is the reason why human beings institute government in the first place, so it also constitutes the "end or measure" of the government's power.⁴³ It follows that if the legislature reasonably determines that restrictions on weapons would advance this end, such restrictions would not violate the Lockean conception of natural rights.

That is not to say, of course, that Locke can be counted as a supporter of gun control laws, for he never addressed the issue. Instead, the point is simply that it is a mistake to assume, as many adherents of the individual right interpretation do, that the issue can be resolved through an appeal to the notion of inalienable rights. Instead, from a Lockean perspective, the matter is one that appears to fall within the legislature's power to regulate for the common good.

B. The Lockean Rights of Resistance and Revolution

Thus far the question has been whether, on a Lockean view, individuals have a right to arms in order to defend themselves against

40. See, e.g., *id.* § 16, at 278-79 (deriving the right to self-defense from "the Fundamental Law of Nature," the preservation of mankind).

41. See, e.g., *id.* §§ 13, 21, at 275-76, 282.

42. See *id.* §§ 123-31, at 350-53.

43. *Id.* § 171, at 381-82.

private violence. Now let us consider whether they have such a right in order to defend themselves against the government itself.

Locke holds that, under the social contract, all political power is initially vested in the community as a whole.⁴⁴ This includes the authority not only to make laws but also to direct the force of all the members of the community in order to execute those laws, as well as to defend against external dangers.⁴⁵ In turn, the community usually delegates this political power to a particular government.⁴⁶ The power is given with the trust that it be used only for the public good.⁴⁷ Yet it is the nature of rulers, no less than other human beings, to pursue their own self-interest.⁴⁸ For this reason, there is a danger that the rulers may come to perceive themselves as having “a distinct interest from the rest of the community.”⁴⁹ The government may then become tyrannical and seek to assert “absolute Arbitrary Power” over the people.⁵⁰

In this situation, Locke argues that the people have a right to resist tyranny and to overthrow the government. Indeed, the immediate polemical purpose of the *Two Treatises* was to justify the Glorious Revolution of 1688, in which the absolutist King James II was driven out of England and replaced by William and Mary of Orange.⁵¹ In this Section, I will briefly explore Locke’s account of resistance and revolution, and then discuss whether, as some scholars contend, his theory supports an individual right to keep and bear arms to oppose tyranny.⁵²

This portion of the *Second Treatise*, which was written in the midst of a revolutionary upheaval, is far from a model of clarity, nor is it free from a certain degree of conflict and inconsistency. I believe, however, that Locke’s position can fairly be described as follows.

The right of the people to resist oppression is a major theme of the *Second Treatise*. When rulers become tyrannical, they exercise force beyond the bounds of their rightful authority⁵³ and thereby

44. See *id.* § 87, at 323-24.

45. See *id.* §§ 3, 88-89, at 268, 324-25.

46. See *id.* §§ 132, 134, at 354, 355-57.

47. See *id.* §§ 3, 131, 135, 171, at 268, 353, 357-58, 381-82.

48. For Locke’s view that human beings are impelled to pursue their own interests, see LOCKE, *supra* note 1, §§ 41-55, at 258-70.

49. LOCKE, *supra* note 13, § 143, at 364; see also *id.* § 138, at 360-61.

50. *Id.* §§ 135-37, at 357-60.

51. See *id.* at 137.

52. See, e.g., HALBROOK, *supra* note 3, at 28-29.

53. See LOCKE, *supra* note 13, §§ 199, 202, at 398-99, 400-01.

place themselves in a state of war with their subjects,⁵⁴ who are entitled to defend themselves under the fundamental natural law of self-preservation.⁵⁵ The question then arises as to whether Locke conceives of this right to resistance as an individual or a collective one.

In principle, Locke holds that this right to resistance may be exercised not only by the community but also by private individuals.⁵⁶ For several reasons, however, he puts little stock in a private right of resistance. First, such resistance is almost certain to be futile, for it is unreasonable to believe that a few individuals will be able to prevail against the force of the government.⁵⁷ Second, Locke recognizes that his position is vulnerable to the objection that it would promote unjustified uprisings and rebellions, which, by plunging a country into civil war, are among “the greatest Crime[s] . . . a Man is capable of.”⁵⁸ Locke’s response to both of these concerns is the same: resistance is unlikely to occur unless a majority of the people come to regard the government as tyrannical and oppressive.⁵⁹ Thus for Locke resistance turns out to be collective in nature. This is certainly true as a practical matter, and it may well reflect considerations of principle as well. After all, the purpose of the social contract is to avoid a state of war by excluding “all private judgement” and private force, and ensuring that disputes are resolved as far as possible by the public judgment of the community.⁶⁰ A private right to determine that the government is tyrannical and should be resisted is, of course, in some tension with this purpose. But a right of the community to make this judgment is entirely consonant with it.⁶¹

For all of these reasons, Locke’s account strongly focuses on the right of *the people as a whole* to resist tyranny. Indeed, the right of resistance is almost inextricably connected with the right of revolution—the right to determine that the government has forfeited its authority and ought to be replaced with a new one.⁶² And that is

54. See *id.* §§ 155, 222, 232, 242, at 370-71, 412-14, 419-20, 427.

55. See *id.* §§ 149, 168, 222, at 366-67, 379-80, 412-14.

56. See *id.* §§ 168, 208, at 379-80, 404.

57. See *id.* §§ 208, 230, at 404, 417-18.

58. *Id.* § 230, at 418; see *id.* §§ 203, 208, 230, at 401, 404, 417-18.

59. See *id.* §§ 208-09, 230, at 404-05, 417-18.

60. *Id.* § 87, at 324; see *supra* text accompanying note 31.

61. For one passage that takes a similar approach, see LOCKE, *supra* note 13, § 242, at 427 (suggesting that, if possible, controversies between the ruler and a portion of the people should be submitted to the judgment of “the Body of the People”).

62. See *id.* §§ 149, 212, 220, 222, 240-43, at 366-67, 407-08, 411, 412-14, 426-28.

clearly a right that belongs only to “the *Community*” or “the *People*” as a whole.⁶³ As Locke expresses it, although the legislative is the supreme power within

a Constituted Commonwealth, . . . there remains still *in the People a Supream Power* to remove or *alter the Legislative*, when they find the *Legislative* act contrary to the trust reposed in them. For all *Power given with trust* for the attaining an *end*, being limited by that end, whenever that *end* is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*, and the *Power* devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.⁶⁴

Locke concludes by connecting this right to revolution with the “Fundamental, Sacred, and unalterable Law of *Self-Preservation*,” which empowers the community to preserve itself and its members against oppression.⁶⁵

Now let us consider the implications for a right to arms. Locke’s views on a private right to resistance are highly ambivalent and hardly provide a strong basis for an individual right to arms to resist the government. Instead, he generally presents resistance as a collective rather than an individual activity. When the community determines that the government has become oppressive, it has a collective right to resist this oppression by force, to overthrow the government, and to institute a new one. Implicit in the rights to resistance and revolution is the right to take up arms against a tyrannical government. This too is a right that belongs to the people as a whole, not to individuals as such.

In asserting these rights under revolutionary conditions, the people can appeal to the natural law of self-preservation, a law that is “antecedent and paramount to all positive Laws” and constitutions.⁶⁶ Do the people also have a right to have arms within a “Constituted Commonwealth,” to use for self-defense in the event that the government becomes tyrannical? Once again, this is a question that Locke himself does not address. Presumably, the people would insist on retaining such a right if it would be to their advantage to do so. It is unclear, however, whether this would be to their advantage. Arms involve dangers as well as benefits, since they can be used not only for

63. *Id.* § 149, at 367.

64. *Id.* at 366-67; *see also id.* § 240, at 427 (arguing that “*The People [should] be Judge*” in such situations, “for who shall be *Judge* whether his Trustee or Deputy acts well, and according to the Trust reposed in him, but he who deposes him, and must, by having deputed him have still a Power to discard him, when he fails in his Trust?”).

65. *Id.*

66. *Id.* § 168, at 380.

legitimate self-defense and revolution, but also for unlawful violence and rebellion. Whether the path of greater safety lies in retaining a right to arms or not cannot be determined by natural rights theory, i.e., by reason alone, but only by the people themselves when they establish a positive constitution. For this reason, it is necessary to look to the constitution itself to determine the existence and bounds of any such right.

Suppose, however, that there were a way to ensure that weapons could not be used for improper or factional purposes, but were strictly subject to the collective control of the people. In that event, a right to arms would seem clearly to the people's advantage, for there would be no danger that the arms would be used for unlawful violence or illegitimate rebellion. Under these circumstances, insisting on a right to arms would enhance the people's capacity for self-preservation without any corresponding disadvantages—assuming, that is, that citizens were willing to undergo the discipline and burdens incident to bearing arms within this collective context. In Parts III and IV, I shall suggest that this notion throws light on the meaning of the Second Amendment. That provision can be understood to protect the collective right of the people to have arms, subject to collective discipline and control within the context of “[a] well regulated Militia.” A right of this sort makes sense within a Lockean analysis, and also makes sense of the language of the Constitution itself.

C. Conclusion

Locke holds that individuals have a natural right to self-preservation, yet his thought provides little support for an individual right to arms. The community as a whole, however, may have such a right. Although these conclusions may appear paradoxical, they actually reflect some of the deepest themes of the natural rights tradition. Individuals have a right to protect themselves and their rights, yet they cannot effectively do so on their own. If they are to live in peace and security, disputes must be resolved not by private force but by the public judgment of an organized community. To make such a community possible, individuals must largely give up the right to use force against others. In return, the community undertakes to protect all of its members, not only against private violence, but also against governmental oppression. For the natural rights tradition, then, the locus of legitimate force lies not in private individuals but in the community as a whole. This is why the tradition

provides more support for a collective than for an individual right to arms.

Finally, it is crucial to see such a right in proper perspective. Locke does not regard the revolutionary use of force as the only, or even as a particularly desirable, means of preventing tyranny. On the contrary, he regards the dissolution of government and the need for violent revolution as among the worst calamities that can befall a nation.⁶⁷ A major purpose of Lockean political theory is to outline the features of a liberal constitutional state that are capable of preserving liberty without resort to revolution. For Locke, such a state must rest on the consent of the people,⁶⁸ and must not transgress the limits established by the constitution and the fundamental principles of natural law.⁶⁹ To prevent an undue concentration of authority, there should be a separation between the legislative, executive, and judicial powers.⁷⁰ The legislative power should be entrusted to a collective body of persons who are subject to the laws that they themselves make.⁷¹ The legislature should be at least in some degree representative of the people⁷² and should be shielded from coercion or undue influence by the executive.⁷³ Elections should be free.⁷⁴ The legislature should govern through “settled standing Laws”⁷⁵ that apply to all citizens equally.⁷⁶ Although the legislature may regulate property rights, it may not take private property, even through taxation, without the consent of the people or their representatives.⁷⁷ The executive should be subject to the law,⁷⁸ and safeguards should be adopted to prevent abuse of power.⁷⁹ When individuals suffer injury at the hands of the government, they should have legal avenues of redress.⁸⁰ The laws should be administered by

67. *See id.* § 230, at 417-18.

68. *See id.* §§ 22, 95-104, 134, 171, at 283-84, 330-36, 355-57, 381-82.

69. *See id.* §§ 131, 134-42, 149, 171, at 353, 355-63, 366-67, 381-82.

70. *See id.* §§ 91, 107, 143-44, at 326-27, 338-39, 364-65.

71. *See id.* §§ 94, 138, 143, at 329-30, 360-61, 364.

72. *See id.* §§ 140, 142, 158, 222, at 362, 363, 373-74, 412-14.

73. *See id.* §§ 155, 222, at 370-71, 412-14.

74. *See id.* § 222, at 412-14.

75. *Id.* §§ 136-37, at 358-60 (emphasis removed).

76. *See id.* §§ 22, 87, 142, at 283-84, 323-24, 363. On the Lockean roots of the concept of equal protection of the laws, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 563-65 (1991).

77. *See* LOCKE, *supra* note 13, §§ 138-40, 142, at 360-62, 363.

78. *See id.* §§ 90-91, 94, 147, 153, at 326-27, 329-30, 365-66, 369-70.

79. *See id.* §§ 111, 162, at 342-43, 376.

80. *See id.* §§ 20, 90-91, 93, 207, at 281-82, 326-27, 328, 403-04.

independent judges.⁸¹ Finally, there must be room for dissent⁸²—a notion that Locke's eighteenth-century radical Whig followers developed into the right to freedom of speech.⁸³ For Locke, these principles of liberal constitutionalism and the rule of law form the principal line of defense against tyranny. It is only when these institutions fail that the people are thrown back on the ultimate rights of resistance and revolution, with all the violence and bloodshed that they involve. In short, Locke's account is not meant to endorse a broad right to use force but, so far as possible, to make such force unnecessary.

II. BLACKSTONE AND THE ENGLISH CONSTITUTIONAL TRADITION

Now let us turn to Blackstone's views on the right to arms. In the first book of his *Commentaries on the Laws of England*, he observes that this right of Englishmen is rooted in "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."⁸⁴

This passage is crucial for those who argue that the Second Amendment was intended to protect an individual natural right to self-defense. According to Don Kates and Nelson Lund, "Blackstone placed the right to arms among 'the absolute rights of individuals at common law.'"⁸⁵ "[U]nquestionably," Kates writes, "what Blackstone was referring to was individuals' rights to have and use personal arms for self-protection."⁸⁶ Similarly, Joyce Malcolm writes that "Blackstone emphatically endorsed the view that keeping arms was necessary both for self-defense, 'the natural right of resistance and self preservation,' and 'to restrain the violence of oppression.'"⁸⁷ "Blackstone's comments on this subject are of the utmost importance," Malcolm continues, "since his work immediately

81. See *id.* §§ 91, 131, at 326-27, 353.

82. See *id.* §§ 13, 92-93, at 275-76, 327-28 (criticizing absolutist governments in which no one has "the least liberty . . . to question or controule those who Execute" the will of the sovereign, and in which "the Sword presently silence[s] all those that dare question it").

83. See, e.g., 1 JOHN TRENCHARD & THOMAS GORDON, *CATO'S LETTERS* NO. 15, at 110 (Ronald Hamowy ed., Liberty Fund 1995) (1755); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1283-84 (1998).

84. 1 BLACKSTONE, *supra* note 14, at *144.

85. Kates, *Self-Protection*, *supra* note 10, at 93; see Lund, *supra* note 10, at 120 (asserting that "Blackstone classified the right to have suitable arms for self-defense . . . among the five 'absolute rights of individuals'").

86. Kates, *Self-Protection*, *supra* note 10, at 93.

87. MALCOLM, *supra* note 3, at 130 (quoting 1 BLACKSTONE, *supra* note 14, at *144).

became *the* great authority on English common law in both England and America.”⁸⁸ Indeed, the case can be put even more forcefully. In this passage, Blackstone was describing a right that was protected by an article of the English Bill of Rights of 1689⁸⁹—a provision that in turn is a plausible antecedent of the Second Amendment. If Blackstone interpreted this English provision in individual right terms, that would be important evidence that the Second Amendment should be read in the same way.⁹⁰

Although this understanding of Blackstone is superficially attractive, a closer reading shows that it fundamentally misunderstands his position. In fact, Blackstone provides even less support for an individualist interpretation of the right to arms than does Locke.

Blackstone’s discussion of the right to arms reads (in full) as follows:

The fifth and last auxiliary right of the subject . . . is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2. c. 2 [i.e., the Bill of Rights], 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.⁹¹

In exploring this passage, let us begin with Kates’s assertion that “Blackstone placed the right to arms among ‘the absolute rights of individuals at common law.’”⁹² I think it is fair to say that no one who reads Blackstone carefully could come to such a conclusion. It is true that Blackstone discusses the right to arms in a chapter entitled “Of The Absolute Rights of Individuals.”⁹³ As Blackstone makes perfectly clear, however, these consist of the following three articles:⁹⁴ (1) the right to personal security, which “consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his

88. *Id.*; see also Robert T. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1011 (1995) (describing Blackstone as “[u]ndoubtedly the most important of the eighteenth-century commentators to discuss the right to arms”).

89. Bill of Rights, 1 W. & M. stat. 2, ch. 2, § 7 (1689) (“That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.”).

90. See Cottrol & Diamond, *supra* note 88, at 1010 n.65.

91. 1 BLACKSTONE, *supra* note 14, at *143-44.

92. Kates, *Self-Protection*, *supra* note 10, at 93. Although Kates places quotation marks around the phrase “the absolute rights of individuals at common law,” no source for the quotation is identified, and the phrase does not seem to appear in Blackstone.

93. See 1 BLACKSTONE, *supra* note 14, at *121.

94. See *id.* at *129.

health, and his reputation";⁹⁵ (2) the right to personal liberty or freedom of movement;⁹⁶ and (3) the right to private property.⁹⁷ In other words, Blackstone's "absolute rights" correspond to the classic natural rights of life, liberty, and property. The right to arms, on the other hand, is not an "absolute right" but is one of the "auxiliary subordinate rights of the subject"⁹⁸—a concept to which we shall return shortly.

It is also important to observe that, in Blackstone's usage, "absolute rights" means something quite different than what the term would mean to us.⁹⁹ For Blackstone, absolute rights are those that pertain to the individual as such; they are rights that persons would enjoy even in a state of nature, before the formation of society.¹⁰⁰ Such rights are contrasted with relative rights, which are those that arise from various social relationships.¹⁰¹ In designating certain rights as "absolute," however, Blackstone does not mean to suggest that they can never properly be restricted. On the contrary, he makes clear that these rights are subject to regulation to protect others and promote the common good.¹⁰² Consistent with this principle, Blackstone notes that the right to arms is limited to "such as are allowed by law."¹⁰³

Finally, we should note that (contrary to Kates's assertion) Blackstone nowhere suggests that the right to arms derives from "the common law."¹⁰⁴ Instead, this is a right that is secured by "the constitution,"¹⁰⁵ and in particular by the Bill of Rights.¹⁰⁶

What is the nature of this right? Contrary to the position taken

95. *Id.*

96. *Id.* at *134 (defining "personal liberty" as "the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law").

97. *Id.* at *138.

98. *Id.* at *141.

99. See Heyman, *supra* note 76, at 533.

100. 1 BLACKSTONE, *supra* note 14, at *123.

101. *Id.* at *124-25.

102. See, e.g., *id.* at *134, *138 (observing that personal liberty and private property are subject to limitation by "by due course of law" or "the laws of the land"); *id.* at *133 (noting that the right to life can be forfeited by committing a capital crime). As Blackstone explains, the "absolute rights" of individuals are simply aspects of their natural liberty. See *id.* at *125. Within civil society, that liberty is transformed into civil liberty, which he defines as "natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public," including the protection of others. *Id.* at *125-26.

103. *Id.* at *143-44.

104. Kates, *Self-Protection*, *supra* note 10, at 93.

105. 1 BLACKSTONE, *supra* note 14, at *140-41.

106. See *id.* at *143-44 (citing Bill of Rights, 1 W. & M. stat. 2, ch. 2 (1689)).

by Kates, Lund, and Malcolm, there is no reason to believe that Blackstone views it as encompassing an individual right to use arms for self-defense against private violence. Blackstone discusses the personal right to self-defense at three main points in the *Commentaries*: in connection with the right to life,¹⁰⁷ with defense against tortious injury,¹⁰⁸ and with the law of homicide.¹⁰⁹ In none of these passages does he mention a right to possess or use arms for self-protection. The reasons for this omission are not difficult to discern in light of our previous discussion. Although Blackstone holds that individuals are naturally free to “act[] as [they] think fit, without any restraint or control, unless by the law of nature,” he agrees with Locke that this natural liberty is self-defeating, undermining rather than securing individual self-preservation.¹¹⁰

For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life.¹¹¹

For this reason, when individuals enter into society, they give up a portion of their natural liberty in exchange for protection under the law, and oblige themselves “to conform to those laws, which the community has thought proper to establish.”¹¹² Individuals do retain a right to defend themselves against imminent violence, for “[s]elf-defence . . . is justly called the primary law of nature,” and “is not, neither can it be, in fact, taken away by the law of society.”¹¹³ But this right is limited to “sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law.”¹¹⁴ In all other cases, Blackstone holds that natural liberty is subject to regulation for the preservation of the society and its members.¹¹⁵ As we have seen, the question of whether individuals should be permitted to own weapons would seem to fall within this general power of the legislature to regulate for the public good, rather than within the narrow exception for imminent self-

107. See *id.* at *130-31.

108. See 3 *id.* at *3-4.

109. See 4 *id.* at *180-88.

110. 1 *id.* at *125.

111. *Id.*

112. *Id.*

113. 3 *id.* at *4.

114. 4 *id.* at *184.

115. See 1 *id.* at *125.

defense.¹¹⁶ Nothing in Blackstone's *Commentaries* suggests the contrary.

It appears, then, that Blackstone does not mention an inalienable right to arms for private self-defense because he does not recognize such a right.¹¹⁷ And this is entirely consonant with his general social and jurisprudential views.¹¹⁸ For Blackstone, human nature is fallen, and human beings are prone to violence and disorder in the absence of effective social constraints. Liberty cannot long exist in the state of nature, which is a "wild and savage" condition,¹¹⁹ but only within a strong legal and social order. Thus, in contrast to Locke, Blackstone emphasizes not the inalienability of natural rights, but the necessity for those rights to be regulated for the common good. Indeed, Blackstone does not regard even liberty of speech and press as inalienable rights.¹²⁰ Under these circumstances, it would be surprising if he considered the possession of arms to be such a right.

If Blackstone's right to arms is not an "absolute right of individuals," or a right of personal self-defense, then how should it be understood? To answer this question, we must begin with his description of this right as an "auxiliary right."¹²¹ After outlining the three absolute rights, Blackstone remarks that those rights would be a "dead letter" if the constitution had taken no effective steps

to secure their actual enjoyment. It has, therefore, established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.¹²²

Blackstone proceeds to describe these auxiliary rights as follows:

1. The constitution, powers, and privileges of parliament
2. The limitation of the king's prerogative, by bounds, so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. . . . The former of these, keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the

116. See *supra* text following note 39.

117. For a persuasive argument that Article VII of the English Bill of Rights, upon which Blackstone relies, see *supra* text accompanying notes 89-91, was not concerned with such a right either, see Schworer, *supra* note 8.

118. The following discussion draws on Heyman, *supra* note 83, at 1285-87.

119. 1 BLACKSTONE, *supra* note 14, at *125.

120. See 4 *id.* at *151-53; Heyman, *supra* note 83, at 1286-87.

121. 1 BLACKSTONE, *supra* note 14, at *143.

122. *Id.* at *140-41.

executive power, by restraining it from acting either beyond or in contradiction to the laws

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. . . .

4. If there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances.¹²³

The list then concludes with the “fifth and last auxiliary right,” the right of subjects to “hav[e] arms for their defence”¹²⁴ When viewed in this context, it is clear that what Blackstone is referring to is not personal self-defense but defense against tyranny. That is what he means when he says that the right becomes important “when the sanctions of society and laws are found insufficient to restrain *the violence of oppression*.”¹²⁵

In short, Blackstone follows Locke in recognizing a “natural right of resistance and self-preservation” against tyrannical rulers.¹²⁶ The question then arises as to the nature of this right: is it one that belongs to private individuals or to the people as a whole? Kates, Lund, and Malcolm seem to assume that since it is described as a “natural right,” it must be a right of individuals. Traditionally, however, natural rights could be predicated of collectivities as well as of individuals. For example, Locke declares that, under the fundamental natural “Law of *Self-Preservation*,” “the *Community*” as a whole has a right

123. *Id.* at *141-43.

124. *Id.* at *143-44.

125. *Id.* at *144 (emphasis added). That this is Blackstone’s meaning is made unmistakably clear in the conclusion to this chapter, which summarizes the various rights and their relationship to one another. After referring to the rights of personal security, personal liberty, and private property, Blackstone writes:

So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary, that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire; unless where the laws of our country have laid them under necessary restraints.

Id. There can be no doubt that the auxiliary rights which are described in this passage, including the right to arms, are intended as protections against “compulsive tyranny and oppression” by the government.

126. *Id.*

to defend itself against tyranny.¹²⁷ Likewise, while some of Blackstone's auxiliary rights are said to pertain "to every individual,"¹²⁸ others, such as the "constitution, powers, and privileges of parliament," are public rather than private in nature.¹²⁹ When Blackstone refers to the latter as "rights of the subject," then, he must be using "the subject" in a representative or collective sense, not to refer to individuals as such.

Unfortunately, nothing in Blackstone's discussion of auxiliary rights sheds much light on how the right to resistance is to be understood. Yet he returns to the subject later in Book I, and there he makes his position crystal clear. The question is what may be done "when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression"¹³⁰—language that echoes his earlier discussion.¹³¹ Here Blackstone rejects two contrary positions. The first is the absolutist doctrine of "unlimited passive obedience," which he derides as slavish and absurd.¹³² Yet he also rejects "the other extreme": a view that would "allow to every individual the right of determining [when resistance is appropriate], and of employing private force to resist even private oppression."¹³³ This doctrine, Blackstone asserts, is

productive of anarchy, and (in consequence) equally fatal to civil liberty as tyranny itself. For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.¹³⁴

Instead, Blackstone holds that "resistance is justifiable" only "when the being of the state is endangered, and the public voice proclaims such resistance necessary."¹³⁵

127. LOCKE, *supra* note 13, § 149, at 366-67. As this quotation suggests, not only natural rights but also natural law can also be said to apply to collective entities. See, e.g., *id.* § 134, at 355-57 (stating that "the first and fundamental natural Law, which is to govern even the Legislative it self, is the preservation of the Society, and (as far as will consist with the publick good) of every person in it").

128. 1 BLACKSTONE, *supra* note 14, at *143 (discussing the right to petition).

129. *Id.* at *141. At least to some extent, the same is true of the second auxiliary right: "[t]he limitation of the king's prerogative" within clearly defined bounds. *Id.*

130. *Id.* at *251.

131. See *id.* at *144 (discussing the right to resistance "when the sanctions of society and laws are found insufficient to restrain the violence of oppression").

132. *Id.* at *251.

133. *Id.*

134. *Id.*

135. *Id.* Indeed, as Blackstone makes clear elsewhere, those who take up arms against the

This position dovetails with Blackstone's broader constitutional theory. According to that view, government is founded on an "original contract between king and people," under which the latter promise allegiance and obedience while the former undertakes to protect his subjects.¹³⁶ If the king should violate this contract, as James II was found to have done,¹³⁷ then it is the people as a whole who are the injured party and who have a right to resist tyranny.¹³⁸

In short, Blackstone's doctrine is not one of private resistance by individuals but of "national resistance by the people."¹³⁹ And this in turn provides the key to understanding his view of the right to arms. As we have seen, Blackstone describes this right as simply "a public allowance" of the right to resist oppression.¹⁴⁰ If the right to resistance is one that essentially belongs to the people as a whole, then the same is true of the right to arms. To be sure, Blackstone does not discuss how such arms are to be held: whether by individuals or by the community (for example, in public stores belonging to the militia). But this would appear to be essentially a practical question. As a matter of principle, Blackstone's position is clear: the right to arms recognized by the English Bill of Rights is not intended to allow individuals to possess weapons for their own purposes, but rather to ensure that the people as a whole have the means to resist tyranny. This is a collective right and is subject to collective control. For this reason, there is no conflict between this right and the qualification, recognized by the Bill of Rights as well as by Blackstone, that the right may be regulated by law.¹⁴¹ Because the right is one that belongs to the people as such, they have the authority to regulate and control that right through their representatives in Parliament.

In conclusion, a close reading of Blackstone's *Commentaries* reveals that his view is similar to Locke's.¹⁴² Blackstone does not

Crown under any other circumstances are guilty of treason:

For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly [to redress grievances real or pretended]; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract between the king and his people.

4 *id.* at *82.

136. 1 *id.* at *233-36.

137. *Id.* at *211, 233.

138. See 4 *id.* at *81-82, quoted *supra* note 135.

139. 1 *id.* at *251.

140. *Id.* at *144.

141. *Id.* at *143-44.

142. Blackstone's view is, however, narrower than Locke's in at least two important

recognize an inalienable right to have arms for private self-defense, and he understands the right to resistance in collective rather than individual terms. If, as Malcolm argues,¹⁴³ Blackstone had a profound influence on the American conception of the right to arms, then this provides powerful evidence against—rather than for—the individual right interpretation of the Second Amendment.

III. THE MILITIA AND THE RIGHT TO ARMS IN THE EARLY AMERICAN REPUBLIC

After declaring independence from Great Britain, Americans set about the task of drafting constitutions and declarations of rights for their new state governments.¹⁴⁴ These documents provide an invaluable window into American political thought during the period, and shed important light on the meaning of the Second Amendment.

A. *The Right to Arms*

How was the right to arms understood in post-Revolutionary America? We can attain great insight on this point by exploring the Massachusetts Constitution of 1780.¹⁴⁵ This document, which was drafted by John Adams, contains the most carefully written of all the state declarations of rights and constitutes one of the best statements “of the fundamental rights of Americans at the end of the Revolutionary period.”¹⁴⁶

respects. First, Blackstone denies that private persons have a right even in principle to take arms against the government. *See supra* text accompanying notes 130-41. Second, Blackstone recognizes a popular right of resistance, but not necessarily of revolution. Distancing himself from Locke’s theory of revolution, Blackstone writes that

however . . . just this [view] may be, in theory, we cannot practically adopt it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing. . . . No human laws will . . . suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual.

Id. at *161-62. It follows that while Blackstone’s right to arms allows for popular “resistance and self-preservation,” *id.* at *144, it does not necessarily extend to revolution.

143. *See supra* text accompanying note 88.

144. *See generally* WILLI PAUL ADAMS, *THE FIRST STATE CONSTITUTIONS* (Rita Kimber and Robert Kimber trans., 1980); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 125-255 (1969).

145. The preamble and declaration of rights of the Massachusetts Constitution of 1780 appear in 5 WILLIAM SWINDLER, *SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS* 93-96 (1975) [hereinafter *STATE CONSTITUTIONS*], and are reproduced in the Appendix to this Article, *infra* p. 284.

146. 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 339 (1971).

In its preamble, the Massachusetts Constitution sets forth the relationship between society and its members. The “people” or “the body-politic” are “formed by a voluntary association of individuals,” who come together through “a social compact.” What is most remarkable is that, having distinguished between the “people” and “the individuals who compose it,” the document then uses these terms in a consistent way throughout. This makes it possible to discern with great clarity how the various rights were understood, and whether they were viewed in individual or collective terms.

The following are some examples of provisions that ascribe rights to “individuals,” or to related terms such as “men,” “persons,” or “subjects”:¹⁴⁷

Art. I.—ALL MEN are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II.— . . . [N]O SUBJECT shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience

. . . .

X.—EACH INDIVIDUAL OF THE SOCIETY has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws

. . . .

XII.— . . . [N]O SUBJECT shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

. . . .

XIV.—EVERY SUBJECT has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. . . .

On the other hand, these are some of the passages relating to the rights to “the people”:

IV.—**The people** of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State

V.—All power residing originally in **the people** and being derived

147. In the following passages, I have marked references to individuals in small capitals, and references to “the people” in bold. For a fuller analysis of the document, see Appendix, *infra* p. 284.

from them, the several magistrates and officers of the government vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

....

VII.—Government is instituted for the common good, for the protection, safety, prosperity, and happiness of **the people** . . . ; therefore **the people** alone have an incontestable, unalienable, and infeasible right to institute government, and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it.

VIII.—In order to prevent those who are vested with authority from becoming oppressors, **the people** have a right at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.

In this way, the Massachusetts declaration draws a clear and uniform distinction between the rights that belong to individuals and those that belong to the people as a whole. This distinction is followed so carefully that it is observed even when both sorts of rights are implicated. Thus, Article XXIX declares that the independence of the judiciary is essential “for the security of the rights of the people, and of every citizen.”

Article XVII of the Massachusetts declaration reads as follows:

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

In view of the declaration’s careful usage, there can be no question that the “right to keep and bear arms” that it recognizes is one that belongs not to private individuals but to the people in their collective capacity. This is made even more clear by the fact that the right is to bear arms “for the common defence,” as well as by the overall concern of the provision: to control the military force of the community and guard against the danger of military tyranny.¹⁴⁸

I have chosen to focus on the Massachusetts Constitution because of the precision of its language, which strongly illuminates the nature of the rights that it contains. Yet the same distinction

148. For a similar provision, see N.C. DECLARATION OF RIGHTS of 1776, art. XVII, in 7 STATE CONSTITUTIONS, *supra* note 145, at 402, 403, which opens with the assertion “[t]hat the people have a right to bear arms, for the defence of the State.”

between “individuals” (or cognate terms) and “the people” is also generally, although not invariably, observed in the other post-Revolutionary state declarations of rights. When these documents recognize a right to bear arms, they always describe it as a right of “the people,” rather than of every “individual” or “man.”¹⁴⁹ This is strong evidence that the right was understood in collective terms.

B. *The Militia*

How did the people exercise their collective right to bear arms? The answer is through the militia. Indeed, most of the state constitutions speak not of a right to bear arms, but rather of the importance of a citizen militia.¹⁵⁰ The model for these provisions was established by the Virginia Bill of Rights, which asserted:

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.¹⁵¹

It should be observed that, apart from the first clause, this provision is substantially identical to that contained in the Massachusetts Declaration. In fact, it is not clear that there was any essential difference in meaning between the two versions. Within the militia, the people had a right to bear arms, and they exercised this right through the militia. It seems likely that, for late eighteenth-century Americans, assertions of the importance of the militia and of the people’s right to bear arms were merely two different ways of saying the same thing.

Although never mentioned by Locke, the militia held an important place in eighteenth-century American political thought, with its characteristic synthesis of liberalism and civic republicanism.

149. In addition to the Massachusetts Declaration, see N.C. DECLARATION OF RIGHTS of 1776, art. XVII, in 7 STATE CONSTITUTIONS, *supra* note 145, at 403; PA. CONST. of 1776, DECLARATION OF RIGHTS, art. XIII, in 8 STATE CONSTITUTIONS *supra* note 145, at 277, 279; VT. CONST. of 1777, ch. I, art. XV, in 9 STATE CONSTITUTIONS *supra* note 145, at 487, 490. These and other antecedents of the Second Amendment are collected in THE COMPLETE BILL OF RIGHTS 183-85 (Neil H. Cogan ed., 1997).

150. See DEL. DECLARATION OF RIGHTS of 1776, § 18, in 2 STATE CONSTITUTIONS, *supra* note 145, at 197, 198; MD. DECLARATION OF RIGHTS of 1776, art. XXV, in 4 STATE CONSTITUTIONS *supra* note 145, at 372, 374; N.H. CONST. of 1784, pt. I art. XXIV, in 6 STATE CONSTITUTIONS *supra* note 145, at 344, 346; N.Y. CONST. of 1777, art. XL, in 7 STATE CONSTITUTIONS *supra* note 145, at 168, 179; VA. BILL OF RIGHTS of 1776, § 13, in 10 STATE CONSTITUTIONS *supra* note 145, at 48, 50.

151. VA. BILL OF RIGHTS of 1776, § 13, in 10 STATE CONSTITUTIONS *supra* note 145, at 50.

One way to understand the idea of the militia is through a comparison with the distribution of political authority in the state. According to social contract theory, all political power initially belongs to the community at large.¹⁵² Although it has the right to retain that power, the community generally chooses to delegate it to a particular government.¹⁵³ This government need not be democratic in form: nothing in natural rights theory precludes the community from establishing a monarchy, an aristocracy, or some other form of government.¹⁵⁴ As the republican tradition taught, however, if the people were wise, they would not alienate all of their power to the government but would retain as much as possible for themselves. By the time of the Revolution, this had become an article of political faith for Americans.

The idea of a citizen militia can be understood in similar terms. According to Locke, when individuals enter into society, they not only give up the broad right to use force for self-preservation; they also promise to use their “natural force” to assist the community in enforcing the laws and defending against foreign attack.¹⁵⁵ In this way, the community acquires a power to direct the force of all its members.¹⁵⁶ This power is subsequently entrusted to the government.¹⁵⁷ But just as there is a danger that the government will abuse its political authority, so there is also a danger that it will misuse its control over the force of the community by invading the rights of citizens and tyrannizing over them.¹⁵⁸

For this reason, liberal republicans concluded that it was essential to impose strict constraints on the military power of government.¹⁵⁹ In particular, the community should rely, to the extent possible, not on a regular army but on a militia composed of “the body of the people.”¹⁶⁰ Under this regime, the people would retain as

152. See, e.g., LOCKE, *supra* note 13, § 87, at 323-24.

153. See *id.* § 132, at 354.

154. See *id.*

155. *Id.* § 130, at 353; see also *id.* §§ 88-89, at 324-25.

156. See *id.* § 88, at 324-25; LOCKE, *supra* note 32, at 26; JOHN LOCKE, A THIRD LETTER FOR TOLERATION, in THE WORKS OF JOHN LOCKE 212, 214, 217-18 (12th ed. 1823).

157. See LOCKE, *supra* note 13, §§ 143-44, at 364-65.

158. See *id.* §§ 13, 137, 143, 218, at 275-76, 359-60, 364, 410.

159. See, e.g., VA. BILL OF RIGHTS of 1776, § 13, in 10 STATE CONSTITUTIONS, *supra* note 145, at 50.

160. *Id.* This principle was accepted not only by radical Whigs but also by conservative Whigs like Blackstone. See 1 BLACKSTONE, *supra* note 14, at *408-13 (praising the institution of the citizen militia, and describing it as “the constitutional security, which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence”).

much military power as they could in their own hands.¹⁶¹ This approach, it was believed, would protect liberty in two important ways. First, the existence of a well-armed, trained, and disciplined militia would minimize the need to establish a standing army¹⁶²—an institution that all too easily could come to have a separate interest from that of the people and be made an instrument of tyranny.¹⁶³ By contrast, militia members were citizens first and soldiers second;¹⁶⁴ there was little reason to fear that they would turn their arms against themselves, their families, and their neighbors.¹⁶⁵ Second, if the government did seek to tyrannize over the people, its forces would not be able to prevail (so it was hoped) against the united force of the community as embodied in the militia.¹⁶⁶

This notion of a citizen militia represented an advance in natural rights theory in two respects. First, whereas Locke tended to view the people as an ultimate but dormant power existing outside the government,¹⁶⁷ liberal republicanism integrated the people into the state through the militia, just as they were also integrated through republican political institutions.¹⁶⁸ In this way, liberty was made more secure. Second, if a danger of tyranny should arise, the militia provided an effective means through which the people could exercise their collective rights to resistance and revolution—rights that were

161. For a good summary of this position, which brings out the inseparable connection between the right to bear arms and the militia, see the following statement made during the debate over ratification of the Constitution:

It is a capital circumstance in favour of our liberty, that the people themselves are the military power of our country. In countries under arbitrary government, the people oppressed and dispirited, neither possess arms nor know how to use them. Tyrants never feel secure, until they have disarmed the people. They can rely upon nothing but standing armies of mercenary troops for the support of their power. But the people of this country have arms in their hands; they are not destitute of military knowledge; every citizen is required by Law to be a soldier; we are all martialled into companies, regiments, and brigades, for the defence of our country. This is a circumstance which encreases the power and consequence of the people; and enables them to defend their rights and privileges against every invader.

"*The Republican*" to the People, in 1 THE DEBATE ON THE CONSTITUTION 710, 712 (Bernard Bailyn ed., 1993).

162. See, e.g., sources cited *infra* note 193.

163. See, e.g., 2 TRENCHARD & GORDON, *supra* note 83, NOS. 94-95, at 669-87.

164. See 1 BLACKSTONE, *supra* note 14, at *408.

165. See, e.g., THE FEDERALIST No. 29, at 180 (Alexander Hamilton) (Modern Library ed., n.d.); Williams, *supra* note 9, at 578.

166. See, e.g., THE FEDERALIST No. 46, at 310 (James Madison), quoted *infra* text accompanying note 199.

167. See LOCKE, *supra* note 13, §§ 149, 243, at 366-67, 427-28.

168. See Williams, *supra* note 9, at 554.

affirmed by many of the state constitutions.¹⁶⁹ By contrast, while Locke and Blackstone recognized the people's right to resist tyranny, they were vague about how this could be done.¹⁷⁰

In these ways, the institution of the militia was intended both to make the people's liberty more secure and to provide a concrete, effective way in which to exercise their natural right to self-preservation in cases of necessity. This was the ideal that was embodied in the state constitutional provisions we have looked at, whether they were phrased in terms of the people's right to bear arms or the importance of the militia. On this reading, these provisions are fully consonant with a collective understanding of the right to arms.

C. An Examination of Some Evidence for the Individual Right Interpretation

Before leaving this subject, we should consider two pieces of evidence that are often said to support a right to arms for individual self-defense. The first is Article XIII of the Pennsylvania Declaration of Rights of 1776, which states that "the people have a right to bear arms for the defence of themselves and the state."¹⁷¹ Unlike the other

169. Thus, the Virginia Bill of Rights asserted

[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

VA. BILL OF RIGHTS of 1776, § 3, in 10 STATE CONSTITUTIONS, *supra* note 145, at 49. For similar provisions, see DEL. DECLARATION OF RIGHTS of 1776, § 5, in 2 STATE CONSTITUTIONS *supra* note 145, at 198; MASS. CONST. of 1780, pt. I, art. VII, in 5 STATE CONSTITUTIONS, *supra* note 145, at 94; PA. CONST. of 1776, DECLARATION OF RIGHTS, art. V, in 8 STATE CONSTITUTIONS, *supra* note 145, at 278; VT. CONST. of 1777, ch. I, art. VI, in 9 STATE CONSTITUTIONS, *supra* note 145, at 489. "The doctrine of non-resistance, against arbitrary power and oppression," added the Maryland and New Hampshire Declarations, "is absurd, slavish, and destructive of the good and happiness of mankind." MD. DECLARATION OF RIGHTS of 1776, art. IV, in 4 STATE CONSTITUTIONS, *supra* note 145, at 372-73; N.H. CONST. of 1784, pt. I, art. X, in 6 STATE CONSTITUTIONS, *supra* note 145, at 345. For other assertions of the rights of resistance and revolution in the context of the Revolutionary conflict, see GA. CONST. OF 1777, preamble, in 2 STATE CONSTITUTIONS, *supra* note 145, at 443-44; N.J. CONST. of 1776, preamble, in 6 STATE CONSTITUTIONS, *supra* note 145, at 449-50; N.Y. CONST. of 1777, preamble, in 7 STATE CONSTITUTIONS, *supra* note 145, at 168-72; PA. CONST. of 1776, preamble, in 8 STATE CONSTITUTIONS, *supra* note 145, at 277-78; VT. CONST. of 1777, preamble, in 9 STATE CONSTITUTIONS, *supra* note 145, at 487-89.

170. See, e.g., 4 BLACKSTONE, *supra* note 14, at *82 (observing that "in cases of national oppression the nation has very justifiably risen as one man").

171. PA. CONST. of 1776, DECLARATION OF RIGHTS, art. XIII, in 8 STATE CONSTITUTIONS, *supra* note 145, at 279.

provisions we have considered, this one is ambiguous. The question is what the declaration means by “the defence of themselves.” On one hand, as Malcolm and others contend, this language could be read to endorse a right to arms for personal self-defense.¹⁷² On the other hand, “the defence of themselves” could be read to refer to the collective right of the people to defend themselves against internal disorder, external invasion, or governmental oppression.

Although the former possibility cannot be dismissed, I believe that a strong case can be made for the latter interpretation. First, as in the other state declarations, the Pennsylvania language on the right to arms appears in a provision that also condemns standing armies and asserts that the military must be strictly subordinate to the civil power.¹⁷³ This strongly suggests that the entire provision is concerned with the military power of the state, rather than with the rights of individuals to self-defense.

This interpretation finds further support in the broader context of the provision, the declaration as a whole. After declaring that “every member of the society hath a right to be protected in the enjoyment of life, liberty and property,” Article VIII goes on to assert that every individual is therefore “bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary.”¹⁷⁴ The provision recognizes an exception to this principle in cases of religious objection: no “man who is conscientiously scrupulous of bearing arms, [can] be justly compelled thereto, if he will pay [an] equivalent.”¹⁷⁵ In this way, Article VIII equates “bearing arms” with the “personal service” that is required of citizens—that is, with the Lockean duty to employ one’s natural force to assist the government in enforcing the laws and protecting the community from attack.¹⁷⁶ This strongly suggests that the declaration uses “bear arms” in a military sense, and that it is in this sense that “the people have a right to bear arms for the defence of themselves

172. See MALCOLM, *supra* note 3, at 148.

173. The provision as a whole consists of a single sentence, which reads:

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

PA. CONST. of 1776, DECLARATION OF RIGHTS, art. XIII, in 8 STATE CONSTITUTIONS, *supra* note 145, at 279.

174. *Id.*, art. VIII, in 8 STATE CONSTITUTIONS, *supra* note 145, at 278.

175. *Id.*

176. See *supra* text accompanying note 30.

and the state.”¹⁷⁷ Indeed, the first state constitutions never clearly use the term “bear arms” in any other sense.¹⁷⁸

In my view, then, there is no persuasive reason to believe that the meaning of Article XIII of the Pennsylvania declaration was substantially different than that of the other declarations we have seen. If, however, that provision is read to encompass a right to arms for individual self-defense, this was a distinctly minority position among the states.¹⁷⁹ And while this language appears in a constitutional amendment recommended by a minority of the Pennsylvania Ratifying Convention, it does not appear in the amendments proposed by the majority of any state convention,¹⁸⁰ nor in any version of the Second Amendment as it evolved in the First Congress.¹⁸¹ Therefore, even if the Pennsylvania provision bore an individual right meaning, there is little reason to believe that this meaning was incorporated in the Second Amendment.

Finally, recognizing that most state declarations did not expressly recognize an individual right to arms, Malcolm argues that such a right was implicit in other provisions of the state declarations.¹⁸² For example, the first Article of the Massachusetts declaration asserted:

177. This interpretation finds further support in a subsequent provision of the Pennsylvania Constitution:

The freemen of this commonwealth and their sons shall be trained and armed for its defence under such regulations, restrictions, and exceptions as the general assembly shall by law direct, preserving always to the people the right of choosing their colonel and all commissioned officers under that rank, in such manner and as often as by the said laws shall be directed.

PA. CONST. of 1776, PLAN OR FRAME OF GOVERNMENT, § 5, *in* 8 STATE CONSTITUTIONS, *supra* note 145, at 279. From the language used (“The freemen of this commonwealth . . . shall be trained and armed for its defence”), it seems reasonable to infer that this provision, Article VIII of the Declaration of Rights (on the duty to “yield [one’s] personal service” through “bearing arms” for the “protection” of the members of society), and Article XIII of the declaration (on “the people[s]’ right to bear arms for the defence of themselves and the state”), are all meant to refer to the same activity—participation in a citizen militia. Similarly, “the people” who have a right to choose their officers under section 5 would appear to be the same “people” who have “a right to bear arms” under Article XIII.

178. *See, e.g.*, GA. CONST. of 1777, art. XXXV, *in* 2 STATE CONSTITUTIONS, *supra* note 145, at 447 (organizing the militia of each county based on the number of men “liable to bear arms”); N.Y. CONST. of 1777, art. XL, *in* 7 STATE CONSTITUTIONS, *supra* note 145, at 179 (exempting Quakers from “the bearing of arms” in defense of the community). For further discussion of the military meaning of “bearing arms,” *see* WILLS, *supra* note 12, at 256-59.

179. Apart from Pennsylvania, only Vermont adopted the “defence of themselves” language. *See* VT. CONST. of 1777, DECLARATION OF RIGHTS, art. XV, *in* 9 STATE CONSTITUTIONS, *supra* note 145, at 490. Vermont was not recognized as a state of the Union until 1791.

180. The proposals of the state conventions are collected in THE COMPLETE BILL OF RIGHTS, *supra* note 149, at 181-83.

181. The evolution of the Amendment’s text is traced in *id.* at 169-81.

182. MALCOLM, *supra* note 3, at 148-49.

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and *defending* their lives and liberties; that of acquiring, possessing, and *protecting* property; in fine, that of seeking and obtaining their safety and happiness.¹⁸³

“It is difficult,” Malcolm observes, “to see how the right to defend one’s life could be fully exercised if citizens were deprived of the right to be armed.”¹⁸⁴ She concludes that “the individual’s right to be armed, [even] where not specifically mentioned, is unmistakably assumed.”¹⁸⁵

This argument is unconvincing. To begin with, only a handful of the state declarations refer to a right of “defending their lives and liberties.”¹⁸⁶ Most of the declarations contain *neither* this right *nor* the Pennsylvania language that supposedly recognizes an individual right to “bear arms.”¹⁸⁷ Moreover, the language will not bear the interpretive weight that Malcolm places on it. When a state declaration speaks of an “unalienable right” to defend life and liberty, that cannot mean that individuals retain as sweeping a right to use force against others as they possess in the state of nature, for such a right would be inconsistent with the very existence of civil society. According to Locke, an individual in the state of nature who judges another to pose an ongoing threat to his life has a right to destroy the other—a right that is unbounded by time or place. This conflict is

183. MASS. CONST. of 1780, pt. I, art. I, in 5 STATE CONSTITUTIONS, *supra* note 145, at 93 (emphasis added).

184. MALCOLM, *supra* note 3, at 149.

185. *Id.* at 148.

186. As Malcolm observes, *see id.* at 149, this language was adopted in Massachusetts, *see supra* note 183 and accompanying text, and in Pennsylvania; *see* PA. CONST. of 1776, DECLARATION OF RIGHTS, art. I, in 8 STATE CONSTITUTIONS, *supra* note 145, at 278. Of the original thirteen states, the only other state to recognize a natural right of “defending life” was New Hampshire, which did not describe the right as an inalienable one. *See infra* note 190. Malcolm claims that the “defending life” language also appears in the first section of the Delaware Declaration of Rights. *See* MALCOLM, *supra* note 3, at 149, 215 n.68. In this she is mistaken. Like many other slaveholding states, Delaware chose not to open its declaration of rights with a ringing statement of the natural rights of mankind. *See* DEL. DECLARATION OF RIGHTS of 1776, in 2 STATE CONSTITUTIONS, *supra* note 145, at 197. The language does appear in the Vermont declaration. *See* VT. CONST. of 1777, ch. I, art. I, in 9 STATE CONSTITUTIONS, *supra* note 145, at 489.

187. This is true of Connecticut, Delaware, Maryland, North Carolina, and Virginia. *See* CONN. CONST. of 1776, art. I, in 2 STATE CONSTITUTIONS, *supra* note 145, at 144; DEL. DECLARATION OF RIGHTS of 1776, in 2 STATE CONSTITUTIONS, *supra* note 145, at 197; MD. DECLARATION OF RIGHTS of 1776, in 4 STATE CONSTITUTIONS, *supra* note 145, at 372; N.C. DECLARATION OF RIGHTS of 1776, in 7 STATE CONSTITUTIONS, *supra* note 145, at 402; VA. BILL OF RIGHTS of 1776, in 10 STATE CONSTITUTIONS, *supra* note 145, at 48. The remaining states—New Jersey, New York, Rhode Island, South Carolina, and Georgia—adopted no bills of rights.

what Locke calls the state of war. "To avoid this State of War," Locke explains, "(... wherein every the least difference is apt to end, where there is no Authority to decide between the Contenders) is one great *reason of Mens putting themselves into Society*, and quitting the State of Nature."¹⁸⁸ Within civil society, the right to use force in self-defense is a narrow one, and does not necessarily include a right to arms.¹⁸⁹ When the opening articles of the Pennsylvania and Massachusetts declarations speak of an inalienable right to defend life, one cannot assume that they mean more than this.¹⁹⁰ Therefore, even if we view these articles solely in doctrinal terms, they do not endorse an individual right to arms.

It would be a mistake, however, to approach these articles solely on a doctrinal level. For their primary purpose is not to secure a specific set of legal rights, but rather to proclaim the natural freedom and equality of individuals and to articulate the fundamental objectives they seek to attain when they establish society and government. Of course, these objectives include defending and protecting their lives, liberties, and properties. But the main way in which individuals do so is not through the use of private force, but through the formation of a social order that will protect their rights under the law. It is in this way, above all, that individuals are capable of "seeking and obtaining their safety and happiness."¹⁹¹ In other words, Article I should be read together with the rest of the Pennsylvania Declaration of Rights, and in particular with the statement that "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."¹⁹²

In short, there is little reason to believe that an individual right to arms was implicit in the language of the few state declarations that

188. LOCKE, *supra* note 13, § 21, at 282.

189. See *supra* text following note 39.

190. This is even more clearly true of the New Hampshire declaration, which lists "the enjoying and defending of life and liberty" as a natural right, but adds, "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others." N.H. CONST. of 1784, pt. I, arts. II-III, in 6 STATE CONSTITUTIONS, *supra* note 145, at 344. While the Declaration asserts that other rights, such as those of conscience, "are in their very nature unalienable," it does not say that this is true of the right to use force in self-defense. *Id.* arts. IV-V.

191. MASS. CONST. of 1780, pt. I, art. I, in 5 STATE CONSTITUTIONS, *supra* note 145, at 93.

192. MASS. CONST. of 1780, pt. I, art. X, in 5 STATE CONSTITUTIONS, *supra* note 145, at 94. The Pennsylvania Declaration contains substantially similar language. See PA. CONST. of 1776, DECLARATION OF RIGHTS, art. VIII, in 8 STATE CONSTITUTIONS, *supra* note 145, at 278; see also MASS. CONST. of 1780, preamble, in 5 STATE CONSTITUTIONS, *supra* note 145, at 92-93 (expressing the ideal "that every man may, at all times, find his security in [the laws]").

mentioned a natural right of “defending life and liberty.” Even if there were, however, this would do nothing to advance the case for an individualist reading of the Second Amendment. The “defending life and liberty” language appears in none of the amendments proposed by the state ratifying conventions, nor does it appear in the amendments introduced by Madison in the First Congress. Instead, these proposals speak of “the enjoyment of life and liberty.”¹⁹³ And as finally adopted, of course, the Bill of Rights contains no provision of this kind. Thus if, as Malcolm suggests, the individual right to arms is to be found in the “defending life” language, one can only conclude that this right was not made a part of the federal Constitution.

IV. THE RATIFICATION DEBATE AND THE ADOPTION OF THE SECOND AMENDMENT

In late-eighteenth-century America, then, the right to bear arms was generally understood to be a collective right that was exercised through a citizen militia. This is the right that was secured by the Second Amendment.

A. *The Debate over the Constitution*

When the federal Constitution was proposed in 1787, it was immediately attacked for creating too powerful a national government. Two objections are of particular relevance for our purposes. First, Antifederalists objected that Congress would have the power to raise a standing army that could be used to destroy

193. The proposal of the Virginia convention read:

That there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

Amendments Proposed by Virginia Convention, Declaration of Rights, first, in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST CONGRESS* 17, 17 (Helen E. Veit et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*]. Similar (or identical) proposals were made by the conventions of New York, see Amendments Proposed by New York Convention, in *CREATING THE BILL OF RIGHTS*, *supra*, at 21, and North Carolina, see Amendments Proposed by North Carolina Convention, Declaration of Rights, art. 1, in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 243, 243 (Jonathan Elliot ed., 2d ed. 1863) [hereinafter *ELLIOT'S DEBATES*]. Madison's proposal would have “prefixed to the constitution a declaration”:

That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

Madison Resolution, in *CREATING THE BILL OF RIGHTS*, *supra*, at 11.

public liberty and erect a military despotism.¹⁹⁴ Second, they criticized the provisions of Article I that empowered Congress to provide for organizing and calling forth the militia in order "to execute the Laws of the Union, suppress Insurrections and repel Invasions."¹⁹⁵

In response, Federalists argued that, far from being a defect in the Constitution, Congress's powers regarding the militia were favorable to liberty, for the best way to avoid the need for a standing army was to have an effective militia.¹⁹⁶ A small army, they argued, might be necessary to defend the country from insurrection or attack.¹⁹⁷ Yet they ridiculed the notion that, within the democratic system envisioned by the Constitution, there was reason to fear the establishment of a military tyranny. As Madison put it in the forty-sixth *Federalist*:

That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to every one more like the

194. See, e.g., *A Democratic Federalist*, in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 161, at 74-76; *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican*, NO. 2 [hereinafter *Federal Farmer*], in 2 THE COMPLETE ANTI-FEDERALIST 214, 233 (Herbert J. Storing ed., 1981); *Essays of Brutus*, Nos. VIII-X, in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 358, 405-17; *Dissent of the Minority of the Pennsylvania Convention* [hereinafter *Pennsylvania Minority*], in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 161, at 526, 549-50.

195. U.S. CONST. art. I, § 8, cls. 15-16. For some Antifederalist criticisms, see 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 508-09 (Merrill Jensen ed., 1976-78) [hereinafter DOCUMENTARY HISTORY] (statement of John Smilie in Pennsylvania Ratifying Convention) ("The last resource of a free people is taken away; for Congress are to have the command of the militia."); *Pennsylvania Minority*, *supra* note 194, at 550-51 (arguing that "under the guidance of an arbitrary [federal] government, [the militia] may be made the unwilling instruments of tyranny").

196. See, e.g., THE FEDERALIST NO. 29, *supra* note 165, at 176-77 (Hamilton); 2 ELLIOT'S DEBATES, *supra* note 193, at 521 (statement of James Wilson in Pennsylvania Ratifying Convention); 3 *id.* at 381, 412-14 (statements of James Madison in Virginia convention); *id.* at 392, 428 (statements of George Nicholas); *id.* at 401 (statement of Edmund Randolph) ("In order to provide for our defence, and exclude the dangers of a standing army, the general defence is left to those who are the object of defence.").

197. See, e.g., THE FEDERALIST NO. 24, *supra* note 165, at 150-52 (Hamilton); *id.* NO. 25, at 156 (Hamilton); *id.* NO. 28, at 170-73 (Hamilton); *id.* NO. 41, at 261-63 (Madison); 2 ELLIOT'S DEBATES, *supra* note 193, at 520-21 (statement of James Wilson in Pennsylvania Ratifying Convention); 3 *id.* at 389-90 (statement of George Nicholas in Virginia convention); *id.* at 401 (statement of Edmund Randolph); *Answers to Mason's "Objections": "Marcus" [James Iredell]*, NO. IV, in 1 DEBATE ON THE CONSTITUTION, *supra* note 161, at 392-94.

incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism.¹⁹⁸

Madison added that, even if one were to make such an “[e]xtravagant . . . supposition,” the largest standing army that Congress would be able to raise would be no match for “a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.”¹⁹⁹ Of course, this statement reflects precisely the same view as the state declarations of rights: it portrays the people as possessing and using arms as members of a citizen militia, for the purpose of collective self-defense.²⁰⁰

Another Antifederalist objection proved more difficult to meet. Article I, Section 8, Clause 16 empowered Congress to

provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.²⁰¹

But suppose, asked George Mason and Patrick Henry in the Virginia Ratifying Convention, that “the general government should neglect to arm and discipline the militia?”²⁰² Could not Congress by that method effectively disarm and destroy the state militias?²⁰³ In response, Madison denied that the Constitution, in “giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive.”²⁰⁴ Yet this was hardly the only reasonable interpretation, and it failed to reassure Mason and Henry, who demanded that the

198. THE FEDERALIST NO. 46, *supra* note 165, at 310 (Madison). In arguing that a conspiracy to impose military despotism was highly improbable, Madison followed Hamilton, *see id.* NO. 26, at 164-65, who concluded that “[i]n reading many of the publications against the Constitution, a man is apt to imagine that he is perusing some ill-written tale or romance”:

There is something so far-fetched and so extravagant in [such objections] that one is at a loss whether to treat [them] with gravity or with raillery; whether to consider [them] as a mere trial of skill, like the paradoxes of rhetoricians; as a disingenuous artifice to instil prejudices at any price; or as the serious offspring of political fanaticism.

Id. NO. 29, at 179-80 (Hamilton).

199. THE FEDERALIST NO. 46, *supra* note 165, at 310 (Madison).

200. *See supra* text following note 150.

201. U.S. CONST. art. I, § 8, cl. 16.

202. 3 ELLIOT’S DEBATES, *supra* note 193, at 380 (statement of George Mason).

203. *See id.* at 379-80; *id.* at 386 (statement of Patrick Henry); *see also id.* at 418 (statement of William Grayson) (same).

204. *Id.* at 382 (statement of James Madison).

Constitution be amended to make clear that the states retained a power to arm the militia.²⁰⁵

B. The Adoption of the Second Amendment

Presumably, it was concerns of this sort that led the Virginia convention to propose the following amendment to the Constitution:

[VIRGINIA PROPOSAL]

That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.²⁰⁶

This recommendation, which was soon endorsed by the ratifying conventions of New York and North Carolina,²⁰⁷ became the starting point for the Second Amendment. When Madison introduced his draft of the Bill of Rights in the First Congress in June 1789, he included the following amendment:

[MADISON DRAFT]

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.²⁰⁸

205. See *id.* at 380 (statement of George Mason) ("I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them. With this single exception, I would agree to this part, as I am conscious the government ought to have the power."); *id.* at 386-87 (statement of Patrick Henry) (arguing that the Constitution should be amended to expressly recognize concurrent state power to arm and discipline the militia).

206. Amendments Proposed by the Virginia Convention, Declaration or Bill of Rights, Seventeenth, in *CREATING THE BILL OF RIGHTS*, *supra* note 193, at 19. In addition to amendments in the nature of a bill of rights, the convention proposed others that related to the powers of the federal and state governments. Several of these amendments also sought to restrict Congress's power to create a standing army and to reinforce state power over the militia. See Amendments to the Body of the Constitution, Ninth-Eleventh, *in id.* at 20.

207. See Amendments Proposed by the New York Convention, in *CREATING THE BILL OF RIGHTS*, *supra* note 193, at 22; Amendments Proposed by North Carolina Convention, Declaration of Rights, No. 17, in 4 *ELLIOT'S DEBATES*, *supra* note 193, at 244. The various state proposals are collected in *THE COMPLETE BILL OF RIGHTS*, *supra* note 149, at 181-83.

208. Madison Resolution, in *CREATING THE BILL OF RIGHTS*, *supra* note 193, at 12.

As adopted by the House of Representatives, the provision read:

[HOUSE VERSION]

A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.²⁰⁹

The Amendment received its final form in the Senate, where it was altered to read:

[SECOND AMENDMENT]

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.²¹⁰

What light does this legislative history shed on the meaning of the Second Amendment? To begin with, it is clear that the language proposed by the Virginia, New York, and North Carolina conventions was drawn from the state declarations of rights. As we have seen, those declarations recognized the collective right of the people to bear arms through the militia.²¹¹ This is strong evidence that the Second Amendment was meant to be understood in the same way.

This interpretation finds further support in the phraseology of the various drafts of the Amendment. First, in exempting conscientious objectors, Madison's draft and the House version both equate "bear[ing] arms" with "render[ing] military service in person." The clear implication is that the right to "bear arms" relates to service in the militia. Second, both the Virginia proposal and the House version refer to a militia "composed of the body of the people." This usage suggests that "the people" who have a "right to keep and bear arms" are the same as "the body of the people trained to arms" that constitutes the militia. As in the state declarations of rights, references to the militia and to the people's right to bear arms appear to be two different ways of saying the same thing.²¹² Nor is this usage an uncommon one: in the Virginia convention, Madison himself is on record as using "the people" and "the militia" synonymously.²¹³

209. House Resolution and Articles of Amendment, art. 5, in *CREATING THE BILL OF RIGHTS*, *supra* note 193, at 38.

210. Articles of Amendment, as Agreed to by the Senate, art. 4, in *CREATING THE BILL OF RIGHTS*, *supra* note 193, at 48. The drafting and evolution of the Amendment is traced in *THE COMPLETE BILL OF RIGHTS*, *supra* note 149, at 169-81.

211. See *supra* Part III.

212. See *supra* text following note 150.

213. In explaining the constitutional provision authorizing Congress to provide for calling forth the militia, Madison stated:

In these ways, the development of the constitutional text lends further support to a collective right interpretation. As for the recorded debates over the Amendment in the First Congress, they are rather brief and unhelpful, focusing largely on the question of religious exemption from military service.²¹⁴ They do, however, tend to confirm the view that the Amendment was concerned with the institution of the militia and the right to bear arms in that context.²¹⁵

If resistance should be made to the execution of the laws, . . . it ought to be overcome. This could be done only in two ways—either by regular forces or by *the people*. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, *the people* ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put *the militia* on a good and sure footing, and enable the government to make use of their services when necessary.

3 ELLIOT'S DEBATES, *supra* note 193, at 378 (statement of James Madison in Virginia Ratifying Convention) (emphasis added). Similarly, in responding to Antifederalist charges that federal control over the militia might lead to tyranny, Edmund Randolph, the governor of Virginia (who was soon to become the first attorney general of the United States), asked, "Shall we be afraid that the people, this bulwark of freedom [as Patrick Henry had called the militia], will turn instruments of slavery? The officers are to be appointed by the states. Will you admit that they will act so criminally as to turn against their country?" *Id.* at 400 (statement of Edmund Randolph). For another example, see "*The Republican*" to the People, *supra* note 161, at 712 ("[T]he people themselves are the military power of our country. . . . [E]very citizen is required by Law to be a soldier; we are all martialled into companies, regiments, and brigades, for the defence of our country.").

It is likely that this is what the Federalist Noah Webster meant when he wrote (in a passage frequently quoted by supporters of the individualist interpretation of the Second Amendment) that military tyranny is possible only when the government possesses a

military force . . . superior to any force that exists among the people, or which they can command; for otherwise this force would be annihilated, on the first exercise of acts of oppression. Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination*, to resist the execution of a law which appears to them unjust and oppressive.

A Citizen of America [Noah Webster], in 1 DEBATE ON THE CONSTITUTION, *supra* note 161, at 129, 155. It seems most unlikely that Webster would have suggested—or would have expected his readers to believe—that unorganized individuals would clearly "constitute a force superior to any band of regular troops that can be . . . raised in the United States." See *infra* note 236 and accompanying text. Instead, when he referred to the superior force that can be exerted when "the whole body of the people are armed," he evidently meant the people acting as an organized, disciplined force, i.e., as a militia.

214. The House debates may be found in CREATING THE BILL OF RIGHTS, *supra* note 193, at 182-85, 198-99, and THE COMPLETE BILL OF RIGHTS, *supra* note 149, at 185-91. At this time, debates in the Senate were not public and went unrecorded.

215. For example, Elbridge Gerry objected to the religious-exemption clause on the ground that it would allow the rulers to "declare who are those religiously scrupulous, and prevent them from bearing arms." CREATING THE BILL OF RIGHTS, *supra* note 193, at 182 (statement of Representative Gerry). This statement makes sense only if "bearing arms" refers to military service, for exclusion from the militia would not prevent individuals from having arms for their own purposes. Similarly, Representative Scott argued that if there were a right to religious exemption, "you can never depend upon your militia. This will lead to the violation of another

On the other hand, the debates give no indication that the Amendment was meant to protect an individual right to have arms for one's own purposes, or outside the context of the militia.²¹⁶

C. *The Meaning and Purposes of the Second Amendment*

If this analysis is correct, then the Second Amendment recognizes the collective right of the people to keep and bear arms through a civic militia. One virtue of this interpretation is that it is able to read the language of the Amendment as a coherent whole. By contrast, supporters of the individual right interpretation are forced to argue that the Amendment "was meant to accomplish two distinct goals": to secure an individual right to arms and to recognize the importance of the militia.²¹⁷ On the view developed in this Article, the Amendment does not consist of two disparate parts, but expresses a single unified principle, protecting a right of the people as a whole.

What purposes was this constitutional right meant to serve? First, it was clearly meant to reaffirm the importance of the militia and to ensure that the federal government could not disarm it. In this way, the Amendment sought to reduce the need for a standing army.²¹⁸

article in the constitution, which secures to the people the right of keeping arms" *Id.* at 198 (statement of Representative Scott). Again, it is difficult to see how this could be true unless the right in question is to keep arms in the context of the militia.

216. Observing that the Senate rejected a proposal to insert the words "for the common defence" after "bear arms," see *THE COMPLETE BILL OF RIGHTS*, *supra* note 149, at 174-75, Halbrook and Malcolm argue that the Amendment must have been intended to recognize an individual right to arms for self-defense, or even for hunting. See HALBROOK, *supra* note 3, at 81; MALCOLM, *supra* note 3, at 161. As Wills points out, however, a more likely explanation is that on the national level, the phrase "for the common defence" had come to be used to refer to the defense of the country as a whole. See WILLS, *supra* note 12, at 256, 340 n.5. For example, the Articles of Confederation provided that "[a]ll charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states" ARTICLES OF CONFEDERATION, art. VIII (emphasis added); see also *id.* art. VII (prescribing how officers should be appointed "[w]hen land-forces are raised by any state for the common defence") (emphasis added). (The text of the Articles of Confederation may be found in 1 *DEBATE ON THE CONSTITUTION*, *supra* note 161, at 954-64.). Of course, the phrase bears the same meaning in the original Constitution. See U.S. CONST. preamble (declaring that one object of the Constitution is "to provide for the common defence"); *id.* art. I, § 8, cl. 1 (providing that Congress shall have power "[t]o lay and collect Taxes . . . , to pay the Debts and provide for the common Defence and general Welfare of the United States"). Since there was no intention to restrict the militias' right to bear arms to cases in which they were defending the nation as a whole, it would have been inappropriate to add "for the common defence." See WILLS, *supra* note 12, at 256.

217. MALCOLM, *supra* note 3, at 162-64.

218. As Elbridge Gerry put it, "the use of a militia" was "to prevent the establishment of a standing army, the bane of liberty." *CREATING THE BILL OF RIGHTS*, *supra* note 193, at 182

A more difficult question is whether the Amendment was intended to enable the people to resist the national government if it should become tyrannical. Many of the state constitutions recognized the rights of resistance and revolution,²¹⁹ and some of the state ratifying conventions urged the adoption of amendments to reaffirm those rights.²²⁰ In his June 8, 1789, speech, Madison proposed an amendment to declare “[t]hat the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.”²²¹ Congress declined, however, to include such a provision in the Bill of Rights. As we have seen, Federalists regarded Antifederalist fears of tyranny as “extravagant” and “far-fetched.”²²² In the wake of Shays’s Rebellion and other uprisings, Federalists were more concerned about the danger of unlawful insurrections and insisted that the government must have adequate power to suppress them.²²³ Nonetheless, even Federalists recognized

(statement of Rep. Gerry). Yet the Second Amendment did not purport to take away Congress’s authority under Article I, Section 8, to establish an army. The Federalist George Nicholas expressed the point more clearly in the Virginia Ratifying Convention when he stated that, by granting Congress this authority while at the same time preserving the institution of the militia, the Constitution had taken the best course:

Till there be a necessity for an army to be raised, militia will do. And when an army will be raised, the militia will still be employed, which will render a less numerous army sufficient. By these means, there will be a sufficient defence for the country, without having a standing army altogether, or oppressing the people [by relying solely on the militia].

3 ELLIOT’S DEBATES, *supra* note 193, at 389-90 (statement of George Nicholas).

219. See *supra* note 169.

220. Virginia, seconded by North Carolina, proposed the following amendment:

That Government ought to be instituted for the common benefit, protection and security of the People; and that the doctrine of non-resistance against arbitrary power and oppression is absurd slavish, and destructive of the good and happiness of mankind.

Amendments Proposed by the Virginia Convention, Declaration or Bill of Rights, third, *in* CREATING THE BILL OF RIGHTS, *supra* note 193, at 17; Amendments Proposed by North Carolina Convention, Declaration or Bill of Rights, No. 3, 4 ELLIOT’S DEBATES, *supra* note 193, at 243 (with minor differences in punctuation). New York suggested a declaration “[t]hat the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness.” Amendments Proposed by the New York Convention, *in* CREATING THE BILL OF RIGHTS, *supra* note 193, at 21.

221. Madison Resolution, CREATING THE BILL OF RIGHTS, *supra* note 193, at 11-12.

222. THE FEDERALIST NO. 46, *supra* note 165, at 310 (Madison); *id.* NO. 29, at 179 (Hamilton); see *supra* text accompanying note 195.

223. See, e.g., THE FEDERALIST NO. 16, *supra* note 165, at 100 (Hamilton); *id.* NO. 27, at 167-68 (Hamilton); *id.* NO. 28, at 170-72 (Hamilton); *id.* NO. 29, at 181-82 (Hamilton); 3 ELLIOT’S DEBATES, *supra* note 193, at 378, 413-14 (statements of Madison in Virginia Ratifying Convention) (“If resistance should be made to the execution of the laws, . . . it ought to be overcome.”). For further discussion, see Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61 (2000); Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000). As Saul

in principle that the federal government might become tyrannical, and that in such case the people would have a natural right of resistance—a right that they could exercise most effectively through the state militias.²²⁴ On the whole, it seems reasonable to conclude that while the Second Amendment itself does not recognize a right of resistance, it was intended to protect an institution, the militia, through which the people could exercise that right if necessary.²²⁵

In this way, the Amendment indirectly secured the collective right to self-preservation discussed by Locke and Blackstone. On the other hand, there is very little reason to believe that the Amendment was intended to protect an individual right to arms for personal self-defense or other purposes. That is not to say, of course, that the possession of arms for these purposes necessarily was unlawful at the time. As this Article has shown, however, the natural rights tradition provided little support for an inalienable individual right to arms, and there is no persuasive evidence that the Second Amendment was intended to secure such a right. Indeed, there was no reason to address this issue in a federal bill of rights: the question of whether and to what extent individuals should be allowed to have weapons for private purposes was properly a matter for the states, through the exercise of their police powers.²²⁶

It is sometimes argued that even if Second Amendment rights applied only within the militia, the arms themselves were to be provided and owned by individuals.²²⁷ It is true that this was a traditional method of arming the militia, an approach that can be traced from medieval England through the militia laws of the American colonies.²²⁸ By the time of the American Revolution, however, this approach had begun to give way to the more modern view that arming the militia was a public responsibility. In the

Cornell has shown, fears of insurrection were not limited to Federalists, but were shared by some leading Antifederalists as well. See Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221, 240-45 (1999).

224. See, e.g., THE FEDERALIST, *supra* note 165, NO. 26, at 163-64; *id.* NO. 28, at 173-75 (Hamilton); *id.* NO. 29, at 181 (Hamilton); *id.* NO. 46, at 308-11 (Madison).

225. For a similar position, see David C. Williams, *The Constitutional Right to "Conservative" Revolution*, 32 HARV. C.R.-C.L. L. REV. 413, 416 n.9, 426 n.45 (1997) (expressing view that the Second Amendment was intended to "guarantee a right of arms for revolution, but . . . not necessarily . . . the right of revolution itself").

226. See Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000).

227. See, e.g., Barnett & Kates, *supra* note 3, at 1206.

228. On the English militia laws, see 1 BLACKSTONE, *supra* note 14, at *411; MALCOLM, *supra* note 3, at 3-9. On colonial American laws, see MALCOLM, *supra* note 3, at 138-41.

Articles of Confederation, for example, each state engaged to “always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and [to] provide and constantly have ready for use, in public stores, . . . a proper quantity of arms, ammunition and camp equipage.”²²⁹

Public provision of arms was not merely an ideal, it was a necessity. As the historian Michael Bellesiles has shown, the new nation suffered from a desperate shortage of firearms, and even most of the militia lacked such arms.²³⁰ Under these conditions, it was wholly impractical to expect individuals to acquire weapons on their own; if the militia was to be armed, it could only be through governmental action.²³¹ As Jack Rakove has observed, the Federalists and Antifederalists were in complete accord on this point; their disagreement focused on whether the states or the federal government should have the greatest authority in this area.²³²

That is not to say, however, that the Second Amendment mandated that arms be provided or owned by the public rather than by individuals. The object of the Amendment was to ensure that the national government would not *disarm* the militia—not to specify

229. ARTICLES OF CONFEDERATION art. VI, para. 4. Similarly, New York sought to ensure that its militia should always “be armed and disciplined, and in readiness for service,” by ordaining “that a proper magazine of warlike stores, proportionate to the number of inhabitants, be, forever hereafter, at the expense of this State, and by acts of the legislature, established, maintained, and continued in every county of this State.” N.Y. CONST. of 1777, art. XL, in 7 STATE CONSTITUTIONS, *supra* note 145, at 179. For further discussion, see WILLS, *supra* note 3, at 259 (discussing the common practice of keeping the militia’s arms in public arsenals).

230. See Bellesiles, *supra* note 223; Michael A. Bellesiles, *The Origins of the Gun Culture in the United States, 1760–1865*, 83 J. AMER. HIST. 425 (1996). As Bellesiles notes, for example, an 1803 government census of firearms found—after more than a decade of intensive federal efforts to promote domestic gun production—that

[i]n a country with 524,086 official militiamen, . . . [there were only] 183,070 muskets; 39,648 rifles; and 13,113 other firearms, for a total of 235,831 guns That was enough guns for forty-five percent of the militia, one quarter of the white male population, and just 4.9 percent of the nation’s total population. Half of all these guns were in the hands of the federal government, with about one-quarter in state arsenals.

Bellesiles, *supra* note 223, at 86 (citing 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 162, 198-99, 215-17). For a fuller account of Bellesiles’s research, see MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000).

231. See Bellesiles, *supra* note 223, at 81-89.

232. See Rakove, *supra* note 226, at 125-26. As we have seen, much of the debate over the Constitution and the Second Amendment makes sense only on the assumption that the militia was to be armed by the government itself. See, e.g., *supra* text accompanying notes 202-05 (discussing the objection of George Mason and Patrick Henry that Congress could disarm the state militias simply by failing to arm them); text accompanying notes 215 (discussing remarks of Reps. Gerry and Scott in House debate); see also 3 ELLIOT’S DEBATES, *supra* note 193, at 421 (statement of John Marshall) (“If Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia-men?”).

how the militia's arms should be provided, how they should be held, or who should own them. These matters were left to be settled by militia laws at the state and federal level.²³³ Thus, it is not true that the Second Amendment established an individual right to own arms for militia purposes.

Let us conclude by considering a final objection to the thesis that the Second Amendment right was intended to apply only within the context of the militia. Blackstone connected the right to arms with the collective right to resist tyranny, but he did not expressly connect those rights with a citizen militia.²³⁴ Is it possible that the Second Amendment protects a right to arms not merely within the militia but also for purposes of collective resistance outside that context? Although this possibility cannot be excluded, there is good reason to be skeptical of it. As we have seen, the right to resistance was one that belonged to the people *collectively*. If the people lack effective institutions through which to exercise this right, they can only do so in an informal, unorganized way. If, however, the people have institutions through which to formulate and work their will, including representative government and a citizen militia, then it is natural for the collective right to resistance to be exercised through those channels.²³⁵ Not only is this the most legitimate course, it is also the

233. Throughout the debates over the Constitution and the Second Amendment, Federalists argued that constitutional provisions on the militia should contain only general principles, not specifics that were more appropriately left to legislation. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 193, at 421 (statement of John Marshall in Virginia Convention) (rejecting the notion that "a militia law is to be ingrafted on the scheme of government, so as to render it incapable of being changed"); *id.* at 426 (statement of George Nicholas) (stating that the Constitution's militia clauses confer general powers, and that "particular instances must be defined by the legislature"); CREATING THE BILL OF RIGHTS, *supra* note 193, at 184 (statement of Rep. Benson in House debate) (arguing that the Second Amendment should deal only with "fundamentals," and that all other issues "ought to be left to the discretion of the government").

234. It is possible, however, to read Blackstone to implicitly make such a connection. Compare 1 BLACKSTONE, *supra* note 14, at *143-44, and 4 *id.* at *81-82 (recognizing a limited right to take up arms against the government), with 1 *id.* at *408 ("[I]n free states, . . . no man should take up arms, but with a view to defend his country and it's laws" through service in the militia.).

235. For the assumption that this is how the right would be exercised within the federal system, see THE FEDERALIST NO. 28, *supra* note 165, at 174 (Hamilton); *id.* NO. 46, at 310 (Madison), quoted *supra* text accompanying note 199. As Hamilton explained:

It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. . . . The legislatures will have better means of information [than the people at large]. They can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

most effective one, for as both Federalists and Antifederalists recognized, the unorganized people stand little chance of prevailing against a standing army.²³⁶ At the same time that a right to arms for unorganized resistance has much less value, it also poses greater dangers, since it might well facilitate unlawful insurrections, something that was of great concern during the founding period.²³⁷

For all of these reasons, it cannot be merely assumed that those who adopted the Bill of Rights desired to recognize a right to arms for unorganized resistance and revolution. To determine whether they did in fact recognize such a right, we must look to the language of the Amendment itself. And, as I have argued, that language is most reasonably construed to secure a right to arms within the context of a "well regulated Militia."

Finally, even if the right to arms for collective resistance was not limited to the militia, that should not place the right beyond the bounds of regulation. As a right that would belong to individuals as members of the people as a whole, the right would be subject to collective control and discipline. Otherwise, the situation that would be created would be the very antithesis of the "well regulated Militia," which it is the stated purpose of the Amendment to promote. Moreover, even on this interpretation, the legislature would retain the power to regulate any possession or use of arms that is unrelated to the purpose of collective self-defense.

CONCLUSION

In common with Locke and Blackstone, eighteenth-century Americans believed that the fundamental law of nature was the preservation of mankind. But this was a goal that could not be achieved by relying on private force, but only through the united force of the community. Americans further believed that, in a

Id. NO. 28, at 174. Similarly, when Patrick Henry declared, "The great object is, that every man be armed," he was referring to the state militia. 3 ELLIOT'S DEBATES, *supra* note 193, at 386. It was that, and not some form of unorganized resistance, that he regarded as "our ultimate safety." *Id.* at 385; see also 2 DOCUMENTARY HISTORY, *supra* note 195, at 508-09 (statement of John Smilie in the Pennsylvania Ratifying Convention) (describing the militia as "[t]he last resource of a free people").

236. See, e.g., THE FEDERALIST NO. 28, *supra* note 165, at 173-74 (Hamilton); 3 ELLIOT'S DEBATES, *supra* note 193, at 380 (statement of George Mason) ("When, against a regular and disciplined army, yeomanry are the only defence,—yeomanry, unskilful and unarmed,—what chance is there for preserving freedom?"); *id.* at 386-87 (statement of Patrick Henry) (arguing that in the absence of a well-armed and disciplined militia, nothing "will . . . save you, when a strong army of veterans comes upon you").

237. See *supra* text accompanying note 223.

republican government, the people should retain as much control over this force as possible. In this way, they could avoid the dangers posed by a standing army and would also be in a position to resist the government if it should become tyrannical. These functions were performed through a well-regulated militia. It was in this context that the people had a right to bear arms, and it was this right that the Second Amendment was meant to protect.

Finally, let me say a few words about how we should understand the Second Amendment today. The idea of a universal civic militia seems very remote from the conditions of modern warfare. And we no longer rely on such a militia to protect us from tyranny. This should not be a subject of regret. Locke, Blackstone, and the American founders regarded armed revolution as a last resort. It meant the breakdown of the constitutional order and a return to the state of war, in which disputes could be resolved only through force. Instead, the founders sought to prevent tyranny primarily through such institutions as representative government, the separation of powers, an independent judiciary, and constitutional protections for individual rights. These institutions have worked so well that the notion of armed revolution has become anachronistic. This is a sign of strength, not weakness, in our constitutional system. In short, the right to arms has evolved from an “auxiliary right”²³⁸ to an archaic one.

That is not necessarily to say that a citizen militia could not be revived.²³⁹ But this can be done only by the people themselves, through their representatives in the state and federal governments. The right secured by the Second Amendment is a collective one which can be asserted only by the people as a whole. This cannot be done by judicial fiat, any more than the courts are capable of creating other basic social and political institutions. If the Supreme Court were to read an individual right to arms into the Second Amendment, the result would be precisely the opposite of what the founders intended—to entrust the use and regulation of force to the community as a whole.

238. 1 BLACKSTONE, *supra* note 14, at *143-44.

239. See, e.g., Reynolds, *supra* note 3, at 487 (suggesting that, if Second Amendment presupposed a universal civic militia which no longer exists, the solution is to revive that institution).

APPENDIX

MASSACHUSETTS CONSTITUTION OF 1780: PREAMBLE AND
DECLARATION OF RIGHTS*

PREAMBLE

The end of the institution, maintenance and administration of government is to secure the existence of **the body-politic**; to protect it, and to furnish THE INDIVIDUALS WHO COMPOSE IT with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life; And whenever these great objects are not obtained **the people** have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

The body-politic is formed by a voluntary association of INDIVIDUALS; It is a social compact by which **the whole people** covenants with EACH CITIZEN and EACH CITIZEN with **the whole people** that all shall be governed by certain laws for the common good. It is the duty of **the people**, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that EVERY MAN may, at all times, find his security in them.

We, therefore, **the people of Massachusetts**, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain and establish the following declaration of rights and frame of government, as the Constitution of the Commonwealth of Massachusetts.

* In 5 STATE CONSTITUTIONS, *supra* note 145, at 92-96. To highlight the nature of the rights contained in this document, I have marked references to individuals in small capitals, and references to "the people" in bold. For discussion of the document, see *supra* Part III.A.

PART THE FIRST. A DECLARATION OF THE RIGHTS OF THE
INHABITANTS OF THE COMMONWEALTH OF MASSACHUSETTS

Art. I.—ALL MEN are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II.—It is the right as well as the duty of ALL MEN in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And NO SUBJECT shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.

III.—As the happiness of **a people**, and the good order and preservation of civil government essentially depend upon piety, religion and morality, and as these cannot be generally diffused through **a community**, but by the institution of the public worship of God, and of public instructions in piety, religion and morality: Therefore, To promote their happiness and to secure the good order and preservation of their government, **the people of this commonwealth** have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily.

And **the people of this commonwealth** have also a right to, and do, invest their legislature with authority to enjoin upon ALL THE SUBJECTS an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided notwithstanding, That the several towns, parishes, precincts, and other bodies-politic, or religious societies, shall at all times have the exclusive right of electing their public teachers and of contracting with them for their support and maintenance.

And all moneys paid by THE SUBJECT to the support of public worship and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

And every denomination of Christians, demeaning themselves peaceably and as GOOD SUBJECTS OF THE COMMONWEALTH, shall be equally under the protection of the law: And no subordination of any one sect or denomination to another shall ever be established by law.

IV.—**The people of this commonwealth** have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled.

V.—All power residing originally in **the people** and being derived from them, the several magistrates and officers of government vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

VI.—NO MAN NOR CORPORATION OR ASSOCIATION OF MEN have any other title to obtain advantages, or particular and exclusive privileges distinct from those of **the community**, than what arises from the consideration of services rendered to **the public**, and this title being in nature neither hereditary, nor transmissible to children or descendants or relations by blood; the idea of a man born a magistrate, lawgiver, or judge is absurd and unnatural.

VII.—Government is instituted for the common good, for the protection, safety, prosperity, and happiness of **the people**, and not for the profit, honor, or private interest of ANY ONE MAN, FAMILY, OR CLASS OF MEN; therefore **the people** alone have an incontestable, unalienable, and infeasible right to institute government, and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it.

VIII.—In order to prevent those who are vested with authority from becoming oppressors, **the people** have a right at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and

to fill up vacant places by certain and regular elections and appointments.

IX.—All elections ought to be free; and ALL THE INHABITANTS OF THIS COMMONWEALTH, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

X.—EACH INDIVIDUAL OF THE SOCIETY has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary; but no part of the property of ANY INDIVIDUAL, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of **the people**. In fine, **the people of this commonwealth** are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of ANY INDIVIDUAL should be appropriated to public uses, he shall receive a reasonable compensation therefor.

XI.—EVERY SUBJECT OF THE COMMONWEALTH ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws.

XII.—NO SUBJECT shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and EVERY SUBJECT shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election. And NO SUBJECT shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject ANY PERSON to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

XIII.—In criminal prosecutions, the verification of facts, in the

vicinity where they happen, is one of the greatest securities of the life, liberty, and property of THE CITIZEN.

XIV.—EVERY SUBJECT has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.

XV.—In all controversies concerning property, and in all suits between two or more PERSONS, except in cases in which it has heretofore been otherways used and practised, THE PARTIES have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

XVI.—The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth.

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

XVIII.—A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty and to maintain a free government. **The people** ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth.

XIX.—**The people** have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative

body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

XX.—The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

XXI.—The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of **the people**, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

XXII.—The legislature ought frequently to assemble for the redress of grievances, for correcting, strengthening, and confirming the laws, and for making new laws, as the common good may require.

XXIII.—No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of **the people**, or their representatives in the legislature.

XXIV.—Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

XXV.—NO SUBJECT ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.

XXVI.—No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

XXVII.—In time of peace, no soldier ought to be quartered in any house without the consent of THE OWNER; and in time of war, such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature.

XXVIII.—NO PERSON can in any case be subjected to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature.

XXIX.—It is essential to the preservation of the rights of EVERY INDIVIDUAL, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of EVERY CITIZEN to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of **the**

people, and of EVERY CITIZEN, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

XXX.—In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.