# The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms"

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The present essay seeks to work at the intersection of law and history, a meeting point where interpretation of the Second Amendment has been more characterized by collision than confluence. Analysis brought to bear on the historical meaning of "the right of the people to keep and bear arms"[1] has coalesced around two competing normative interpretations: either that the amendment guarantees a personal, individual right to bear arms, or that it applies only collectively to the effectiveness of the militia. It is a premise of this essay that both these models are historically unsatisfactory, the products of present-day normative agendas that have polarized the debate into two competing and largely ahistorical models—a type of historians' fallacy that David Hackett Fischer has labeled the "fallacy of false dichotomous questions." Fischer's description aptly describes the current controversy over the historical meaning of the Second Amendment: in addition to being "grossly anachronistic," its two opposing positions "are mutually exclusive, and collectively exhaustive, so that the there is no overlap, no opening in the middle, and nothing is omitted at either end."[2] It is not with-

1. "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" (U.S. Constitution, amend. 2; ratified December 15, 1791).

2. David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (New York: Harper & Row, 1970), 9–12.

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out challenge on just these grounds, however, as a recent call for a "new more sophisticated paradigm"[3] attests. This essay seeks to provide that new model and to do so by grounding the "right of the people to keep and bear arms" in eighteenth-century concepts of rights, not those of the twenty-first century, and to contextualize the right to bear arms in an eighteenth-century political struggle now largely ignored but well known to constitutional polemicists framing the Constitution and the Bill of Rights: Parliament's rebuilding of an English militia while denying the Scots the right to do so, despite Scotland's history and its claimed constitutional rights according to its coequal status in Great Britain. That struggle nevertheless remains a missing context that prefigured American debates over constituting and guaranteeing local militias in the coequal states of the federal union established by the United States Constitution in 1787 and 1788. Once the time came for seeking a written guarantee of local militia effectiveness in the federal Constitution, the language and substance of this transatlantic legacy had great influence. As experience, they gave political urgency to the drafting and ratification of the Second Amendment; as a theory of rights, they embodied an eighteenth-century individual right exercised collectively.

It is no accident that the Second Amendment begins with a preamble that resonates with the preamble to the Militia Act sought by the Scots, for the framers of the Amendment were responding to a similar political and constitutional crisis. In the shared political culture of provincial Britons on both sides of the Atlantic, proponents of organized local militia expressed concerns about the past, present, and future effectiveness of a citizen militia. In common, distrust of a central government that denied localities the right to arm and organize their own militia units aroused fears that they would be unable to resist oppression from the center, invasion from abroad, or insurrection from within. The protection being sought, this shared transatlantic discourse reveals to us, lay in the maintenance of well-regulated militias consisting of able-bodied men bearing their own arms for that purpose. Indeed, to serve in the militia and participate in this civic duty was more than a duty: it was a civic right of a peculiarly eighteenth-century nature unlike either the "individual" or "collective" models argued for today. On neither side of the Atlantic, that is, did the debate concern itself with this right in the present-day sense of an "individual" or personal constitutional right; but at the same time, its common emphasis on widespread individual arms-bearing for public service distinguishes it from today's narrowly applied "collective" application to the National Guard. No individual right existed unrelated to service in a well-regulated militia; no ef-

3. Saul Cornell, "'Don't Know Much About History': The Current Crisis in Second Amendment Scholarship," *Northern Kentucky Law Review* 29 (2002): 657.

fective militia could serve its purpose without an armed citizenry. This type of right may appear paradoxical to us today, but it fitted "the inner coherence of a given system of beliefs"[4] held by people in the past, and which made sense to those familiar with the concept of an individual right exercised collectively.

It is their context that this essay seeks to uncover and to add to our understanding of that right. Explaining the need to derive meaning from context, Quentin Skinner writes, "We need to begin by recreating as sympathetically as possible a sense of what was held to connect with what, and what was held to count as a reason for what, *among the people we are studying.*"[5] These people were scarcely a monolithic group of "framers"—a concept recognized as ahistorical not only today[6] but for centuries by those attempting to understand the meaning and intent of lawmakers. Writing in the sixteenth century of the need to apply statutes by inquiring and acting *ex mente legislatorum,* Sir Thomas Egerton admitted that such an inquiry was plagued by the participation of "so manie heades as there were, so many wittes; so many statute makers, so many myndes." Even so, he pushed on, for "notwithstanding, certen notes there are by which a man maie knowe what it was."[7]

This essay seeks to uncover and examine an overlooked historical context of the Second Amendment so that we "maie know what it was" when we try to understand its historical meaning. It does not present a normative interpretation of the Second Amendment, although the context it uncovers has inescapable meaning to today's originalist debate and the goals of its protagonists.[8] This is not the first time, to be sure, that interpretation of the Sec-

4. Quentin Skinner has ably explained how apparent historical paradoxes can deflect us from unspoken but fundamental underlying political beliefs and lead us to fail "to identify some local canon of rational acceptability." Quentin Skinner, "A Reply to My Critics," in *Meaning and Context: Quentin Skinner and His Critics,* ed. James Tully (Princeton: Princeton University Press, 1988), 244.

5. Ibid. Emphasis added.

6. Neil Richards warns against such a fallacy and expressly eschews capitalizing "framers" ("Clio and the Court: A Re-Assessment of the Supreme Court's Uses of History," *Journal of Law & Politics* 13 [1997]: 845). For a succinct summary of the way the plurality of viewpoints among both Federalists and Antifederalists has undergone "homogenizing" into two distinct groups, see Saul A. Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828* (Chapel Hill: University of North Carolina Press, 1998), 6–8.

7. *A Discourse upon the Exposicion & Understanding of Statutes: With Sir Thomas Egerton's Additions,* ed. Samuel E. Thorne (San Marino: Huntington Library, 1942), 151. Lest one be guilty of an ahistorical use of Egerton, it must be noted that his work referred to "the Exposicion and Understanding of Statutes," and not to their "interpretation," a term that connoted far more judicial authority than he or anyone else at the time would have accepted.

8. The term "originalism" dates from 1980, when Paul Brest introduced it in a strenuous critique of "the familiar approach to constitutional adjudication that accords binding authority

ond Amendment has had recourse to history: what is now settled Constitutional doctrine as to the meaning of "the right of the people to keep and bear arms" drew on historical sources in 1939, when the Supreme Court, in *Miller v. U.S.,* held that the amendment protected only those rights having "some reasonable relationship to the preservation or efficiency of a well regulated militia." Since that time the Court has not expressed any opinions on the merits of that decision or on challenges arguing that the framers in 1791 had established any individual right of a private person "to keep and bear arms."[9]

This historically grounded definition from 1939 is now under serious challenge, as many scholars have put forward a contrary interpretation advancing the right as an individual one. The various strands of scholarship supporting this argument have been anointed the "Standard Model" of Second Amendment interpretation by its proponents: a unified theory that saw the amendment as articulating not only the right and obligation of armed citizens to defend the state against invasion, but to protect themselves collectively against the tyranny of the state and individually against the violence of their neighbors.[10]

At the very least, the present essay aims to provide a deepened and broadened context for "the complexes of thought lying behind the words and clauses of the Constitution, because that history feeds directly into the originalism that has been in the ascendant since the early 1980s."[11] As used here, therefore, "historical context" is an intellectual, political, and constitution-

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to the text of the Constitution or the intentions of the adopters." Brest was responding, of course, to an argument already "familiar," and since 1980 the debate over that term has generated a vast literature of articles, books, and law review symposia. See, for example, Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: A. A. Knopf, 1996), esp. chap. 1, "The Perils of Originalism," 3–22; also, his collection of a range of opinions on both sides of the controversy in *Interpreting the Constitution* (Boston: Bedford Books, 1990). See also the special symposium issue, "Fidelity in Constitutional Theory," *Fordham Law Review* 65 (1997).

9. 307 U.S. 174, at 178. In his opinion, Associate Justice James McReynolds cited "the debates in the [Constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators," including one contemporary historian (ibid., 178–82). In 1983 the Supreme Court denied certiorari in *Quilici v. Village of Morton Grove,* holding that the Second Amendment did not apply to the possession of handguns at issue (695 F. 2d 261 [7th Cir. 1982], cert denied, 464 U.S. 863 [1983]). One cannot infer an opinion on the merits of a case from a denial of certiorari, however.

10. On the emergence of this controversy in the legal academy, see Carl T. Bogus, "The History and Politics of the Second Amendment: A Primer," *Chicago-Kent Law Review* 76 (2000): 3–25. For a chronologically arranged bibliography of the competing interpretations, see the table and appendix to Robert J. Spitzer, "Lost and Found: Researching the Second Amendment," in ibid., 384–401. Glenn Harlan Reynolds offers the term "Standard Model" in his "A Critical Guide to the Second Amendment," *Tennessee Law Review* 62 (1995): 461–512.

11. Stuart Banner, "Legal History and Legal Scholarship," *Washington University Law Quarterly* 76 (1998): 37, 40.

al context known and available to the political community arguing for the right in question, and whose relevance to the discussions was apparent to those taking part in them. It seeks to recover a commonly recognized and explicitly cited tradition that allowed participants in the political process to frame their local, ongoing events within a larger process of which they knew and acknowledged they were a part.[12] Finally, it must remain strictly within the temporal parameters of the people being studied, sharply and clearly limited by the *terminus ad quem* of 1791, and unaffected by subsequent political events that forced reassessments or introduced new motivations and factors that changed the very meaning of words themselves.[13]

## I. The Scottish Example and the British Background of the Militia Debate

It is a commonplace among historians that Revolutionary Americans saw themselves as fighting for the rights of Englishmen. Indeed, one scholar has argued that the "English influence on the Second Amendment is the missing ingredient that has hampered efforts to interpret its intent correctly."[14] Americans were not, however, truly "English" so much as they were British, a distinction they knew was much more than semantic, especially when

12. Jack N. Rakove puts its clearly in describing his goals in finding the "meaning" of the Constitution's text: "[T]to what extent did the structure of debate and decision-making in 1787–88 enable a coherent set of intentions and understandings to form around the text of the Constitution?"; and "[W]hen we do ask what the framers and ratifiers thought about particular subjects, how do we reconstruct their ideas and concerns?" (*Original Meanings,* xiv). Jack P. Greene addresses the way people in the past attempted to articulate their place in history as "the daunting task of trying to render it comprehensible, both to those who belong to it and those who do not, . . . by identifying and defining those common features of behavior and belief, of collective and individual experience. . . ." ("The Intellectual Reconstruction of Virginia in the Age of Jefferson," in *Jeffersonian Legacies,* ed. Peter S. Onuf [Charlottesville: University Press of Virginia, 1993], 225).

13. For this reason, the present essay does not deal with questions concerning the subsequent impact of the fierce political contests of the Federalist era. Nor does it address the impact of the Fourteenth Amendment and the incorporation of the amendment, discussed by Akhil Reed Amar in *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 46–59, 257–66, and by David Yassky, "The Second Amendment: Structure, History, and Constitutional Change," *Michigan Law Review* 99 (2000): 651–60; nor does it discuss the proposition that the amendment might be "translated" to contemporary issues, as suggested in the general model presented by Lawrence Lessig, "Fidelity as Translation: Fidelity as Constraint," *Fordham Law Review* 65 (1997): 1365–1433, with comments to 1517; or by Jeffrey Rosen, "Translating the Privileges and Immunities Clause," *George Washington University Law Review* 6 (1998): 1241–68, with comments to 1297.

14. Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge: Harvard University Press, 1994), xii.

matters constitutional were at issue.[15] It is this transatlantic British context, therefore, that is missing. Americans shared the experience of those who had claimed the coequal rights of Englishmen only to see them denied by a metropolitan government that regarded those living outside England—and even many of those living in the "country" beyond the court at London—as rude provincials bearing the "stigmas" of inferior culture and lesser constitutional status. "A sense of inferiority pervaded the culture of the two regions," write Bernard Bailyn and John Clive of Scotland and North America, "affecting the great no less than the common." For good reason the American Revolutionaries proudly claimed the British legacy of "Whigs." Once a term of derision that some associated with the Scots,[16] it became the proud name of the parliamentary opposition that stood against the Stuarts in the 1670s; when a Whig oligarchy proved no less dangerous to liberty in the eighteenth century, they became "True Whigs" or "Real Whigs" continuing the struggle.[17]

To British North Americans, their constitutional history thus included not only England's experience, but that of a Greater Britain whose exam-

15. John Phillip Reid, perhaps the most notable scholar of the transatlantic antecedents of American Revolutionary legal thought, notably discusses "The Britishness of Liberty" in his *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988), 14–17. See, generally, Linda Colley, *Britons: Forging theNation, 1707–1837* (New Haven: Yale University Press, 1992), 30–43. In recent years, historians have shown how a broadened "British" perspective illuminates the history of both the British Isles and its far-flung colonies. See "Forum: The New British History in Atlantic Perspective," *American Historical Review* 104 (1999): 426–500. Especially pertinent are the contributions of David Armitage, Ned Landsman, and Eliga Gould.

16. Bernard Bailyn and John Clive, "England's Cultural Provinces: Scotland and America," *William and Mary Quarterly,* 3d. ser., 11 (1954): 209–10. On the "'country' vision of English politics" held by "anti-Court independents within Parliament and the disaffected without," see Bernard Bailyn, *Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967): 35–36. Scottish radicals chafed at their country's subordination under what they sneeringly called "the celebrated *Union,*" and the American Revolution provided not only a democratizing example to emulate, but an argument that the Scots, too, should seek "a wise, virtuous, and *independent* government" for Scotland (Michael Durey, *Transatlantic Radicals and the Early American Republic* (Lawrence: University Press of Kansas, 1997), 74; *Oxford English Dictionary,* http://dictionary.oed.com, s.v. "whig").

17. Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (New York: Atheneum, 1959). Robbins labels this group as small and ultimately unsuccessful in English politics, but important for having "served to maintain a revolutionary tradition there and to link the histories of English struggles against tyranny in one century with those of American efforts in another. The American constitution employs many of the devices the Real Whigs vainly besought Englishmen to adopt and in it must be found their abiding memorial" (ibid., 4). On "Power and Liberty: A Theory of Politics" in Revolutionary America, see Bailyn, *Ideological Origins*, chap. 3, 55–93.

ple loomed large in their awareness.[18] Historians have amply demonstrated the "varied ways the intellectual bond linking America and Great Britain in the colonial period could make its presence manifest," and how "events of that period frequently come more sharply into focus when British history on a similar subject is examined." Constitutional issues in particular reveal "wholesale borrowing of the slogans, metaphors, and images" of earlier British disputes.[19]

The life and writings of James Burgh, who left the University of St. Andrews for London and whose circle in the capital's radical community included Joseph Priestley, Richard Price, and Benjamin Franklin, illustrate this transatlantic connection. With the empire in political crisis in the 1770s, Burgh explicitly merged the inferiority of all provincial British identities when he addressed part of his *Political Disquisitions* "to the independent Part of the people of GREAT-BRITAIN, IRELAND, and the Colonies" in 1775.[20] Cited in *The Federalist,* Burgh's work was widely read in America because of its sympathetic evocation of shared ideas and grievances. Burgh's writings, note Oscar and Mary Handlin, had special resonance in North America, bearing "striking resemblances to that which Americans reached by positive generalizations about the institutions which had in actuality evolved about them." Aware of the common grievances of provincial Scots and Americans, Burgh sent his 1774 London edition to John Adams, who wrote back to Burgh thanking him and lavishing praise on his

18. On how colonial Americans recognized their role in the larger sweep of the history of liberty, see David Thomas Konig, "Constitutional Contexts: The Theory of History and the Process of Constitutional Change in Revolutionary America," in *Constitutionalism and American Culture: Writing the New Constitutional History,* ed. Sandra F. VanBurkleo, Kermit Hall, and Robert J. Kaczorowski (Lawrence: University Press of Kansas, 2002), 3–28.

19. Paul S. Boyer, "Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754," *William and Mary Quarterly,* 3d. ser., 21 (1964): 328–51. The episode in question reached back to a British controversy of 1733.

20. James Burgh, "Conclusion," in *Political Disquisitions: An Enquiry into Public Errors, Defects, and Abuses. Illustrated by, and established upon Facts and Remarks, extracted from a variety of Authors, ancient and modern. Calculated to draw the timely attention of Government and People to a due Consideration of the Necessity, and the Means, of Reforming those Errors, Defects, and Abuses; of Restoring the Constitution, and Saving the State,* 3 vols. (Philadelphia, 1775), 3: 267. Burgh's and Franklin's mutual affinity is worth noting, especially in view of the similarities between the former's *Dignity of Human Nature* (1754) and the latter's *Poor Richard's Almanack,* which was published from 1733 to 1758. In fact, the authorship of "The Colonist's Advocate" letters (1770) has been attributed to both men. Carla Hay, "Benjamin Franklin, James Burgh, and the Authorship of 'The Colonist's Advocate' Letters," *William and Mary Quarterly,* 3rd ser., 32 (1975): 111–24. Whoever the author, what is significant for a proper appreciation of this shared transatlantic political culture is that this work, like so many others at the time, was "a work of compilation rather than an original effort." Hay, ibid., 120, reminds us that sharing and borrowing were characteristic of eighteenth-century political discourse.

"invaluable" gift. Circulating the volumes to his friends, Adams wrote to Burgh, "I have contributed somewhat to make the Disquisitions more known and attended to in several parts of America, and they are held in as high estimation by all my friends as they are by me. The more they are read, the more eagerly and generally they are sought for."[21]

Adams's efforts must have been successful: two years later, the residents of the western Massachusetts town of Pittsfield, demanding a new constitution for the former colony, rested their hopes on "some of the Truths we firmly believe and are countenanced in believing them by the most respectable political writers of the last and present century, especially Mr. Burgh in his political Disquisitions for the publication of which one half of the Continental Congress were subscribers."[22] Indeed, demand for the work was such that Robert Bell, a Scottish bookseller in Philadelphia who would publish Thomas Paine's *Common Sense* in 1776, undertook a 1775 American edition whose prepublication "Encouragers" included George Washington, Samuel Chase, John Dickinson, Silas Deane, John Hancock, Thomas Jefferson, Thomas Mifflin, Thomas McKean, Robert Morris, Roger Sherman, John Sullivan, James Wilson, and Anthony Wayne. Fifteen years later, Jefferson recommended it to his new son-in-law Thomas Mann Randolph, especially as a practical demonstration of political theory.[23]

For Burgh, "history was an inexhaustible mine out of which political knowledge was to be brought up."[24] His second volume, "which treats of the colonies," was largely devoted to the way parliamentary corruption had poisoned the government of the colonies. Directly addressing the question of constitutional subordination within the empire, Burgh maintained that "the colonists do not deserve to be deprived of the native right of *Britons.*"

21. *The Federalist* #56. The edition cited herein is that of Jacob E. Cooke, *The Federalist* (Middletown: Wesleyan University Press, 1961), citation at 382. Bailyn labels Burgh's work the "key book" of the Revolutionary generation (*Ideological Origins,* 41). Oscar and Mary Handlin, "James Burgh and Revolutionary Theory," *Proceedings of the Massachusetts Historical Society* 73 (1961): 52. John Adams, *The Works of John Adams, Second President of the United States: with a Life of the Author, Notes and Illustrations by his Grandson Charles Francis Adams,* 10 vols. (Boston: Little, Brown, 1850–56), 9: 350–51.

22. May 29, 1776. *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780,* ed. Oscar and Mary Handlin (Cambridge: Harvard University Press, 1966), 91.

23. I am indebted to Prof. Richard Sher for bringing Bell's edition of *Common Sense* and the list of subscribers in the Philadelphia edition of the *Disquisitions* to my attention. The list can be found at the beginning of volume III. In advertising the American edition, Burgh announced that this newly completed third volume was "peculiarly necessary at this Time for all the Friends of CONSTITUTIONAL LIBERTY, whether *Britons* or *Americans.*" Jefferson To Thomas Mann Randolph, May 30, 1790, *The Papers of Thomas Jefferson,* ed. Julian P. Boyd et al., 28 vols. (Princeton: Princeton University Press, 1950– ), 16: 449.

24. Robbins, *Commonwealthman,* 364–65.

With good reason he warned that grounding liberties on one's status as "*English*" was a dangerous presumption for anyone not living in England: the term privileged metropolitan rights at the expense of those claimed by provincials on both sides of the Atlantic. He noted the "affectation of calling the *British* parliament the *English* parliament, as was usual and proper before the union; but ridiculous so long as the union subsists."[25] For British North Americans, this shared history loomed large as a cautionary tale of how provinces might be submerged, suppressed, and oppressed by a metropolitan center or how, from a union of supposed equals, one partner might come to dominate another and enslave it under the heel of military threat. It was in this shared historical experience as *Britons* that the constitutional goals of the Revolutionary era must be seen, and especially so within the context of forming the federal union. "The history of Great Britain," wrote John Jay in *The Federalist,* "is the one with which we are in general the best acquainted, and it gives us many useful lessons. We may profit by their experience, without paying the price which it cost them."[26]

The right to bear arms was a deeply cherished right whose value lay firmly embedded in the history of the peoples of Britain. Contextualizing this right purely within the *English* experience may mislead us,[27] because for Scots, as provincial Britons, the issue had special meaning and epitomized their grievances as constitutionally subordinate. Its loss represented not merely a theoretical possibility, but a historically demonstrable fact. That history, moreover, was still unfolding before their eyes, and the Scottish experience therefore had special resonance at the drafting of the Constitution and the Bill of Rights.[28] The history of Scottish subordination at the hands of the English was common currency among those British North Americans who traveled to Britain or who were educated by the many

25. Burgh, *Political Disquisitions,* 2: vii; "Conclusion," 279, 3: 336.

26. John Jay, *The Federalist* #5, 24.

27. Malcolm, *To Keep and Bear Arms,* largely confines itself to the seventeenth century and then leaps forward in time to 1791 without mention of the profound eighteenth-century events and struggles that intervened and provided a powerful cautionary history lesson to those whose reservations about the Constitution led to the drafting and ratification of the Second Amendment. For a critique, see Lois Schwoerer, "To Hold and Bear Arms: The English Perspective," *Chicago-Kent Law Review* 76 (2000): 27–60.

28. Daniel Walker Howe argues for a Scottish social and intellectual, though less explicitly political, perspective in "Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution," *Comparative Studies in Society and History* 31 (1989): 572–87. For Scottish Enlightenment influence on state constitutions, see Durey, *Transatlantic Radicals,* 51. Scottish radicals chafed at their country's subordination under "the celebrated *Union,*" and the American Revolution provided not only a democratizing example to emulate, but an argument that the Scots, too, should seek "a wise, virtuous, and *independent* government" for Scotland (ibid., 74). Also useful is Andrew Hook, *Scotland and America: A Study of Cultural Relations, 1750–1835* (Glasgow and London: Blackie, 1975).

Scottish emigrés who brought their resentments with them.[29] Especially proud of their military heritage, Scots lamented the way the militias of Lowland Scotland had been allowed to deteriorate and were not reconstituted at the Act of Union. Various efforts to do so were frustrated, and passage of a bill to restore the Scottish militia in 1708 prompted the last exercise of the royal veto.[30] Seven years later Parliament went a step farther and disarmed the Highland counties after the failure of the "late unnatural rebellion" supporting the royal claims of the ousted Stuarts in 1715. The "act for more effectual securing the peace of the Highlands in Scotland" exempted those owning the large sum of £400 in property, or who voted, but made it a criminal offense, punishable by fine and forfeiture, for anyone else in those counties "to have in his or her custody, use or bear broad sword, or target, poynard, whingar, or durk, side-pistol or side-pistols, or gun, or any other warlike weapons, in the fields, or in the way, coming or going to, from, or at any church, market, fair, burials, huntings, meetings, or any other occasion whatsoever . . . or to come into the *Low-Countries* armed, as aforesaid. . . ."[31]

Jacobite insurrection erupted again in 1745, and after that "most audacious and wicked rebellion," Parliament strengthened its ban on keeping and bearing weapons in the Highlands. Though it continued to exempt those that it had in 1715, in 1746 it no longer distinguished between arms kept at home and those borne publicly. Instead, it set out an elaborate program of notification of summons to deliver weapons and provided fines, imprisonment, conscription into "his Majesty's forces in *America*" or transportation "to any of his Majesty's plantations beyond the seas" for "all persons summoned to deliver up their arms as aforesaid, who shall, from and after the time in such summons prefixed, hide or conceal any arms, or other warlike weap-

29. James Madison's education at Princeton, whose president the Scot John Witherspoon exerted enormous influence over students, is but one example. Irving Brant, *James Madison. The Virginia Revolutionist,* 6 vols. (Indianapolis: Bobbs-Merrill, 1941), 1: 77. Witherspoon suggested readings that were heavily weighted toward the Scottish Enlightenment. William Smith of Aberdeen became the first provost of the College of Philadelphia, and fellow Aberdonian William Small was Thomas Jefferson's mentor at the College of William and Mary. Robbins, *Commonwealthman,* 194. Born and educated in Scotland, James Wilson was deeply influenced by the education he received at St. Andrews and Edinburgh. Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1798* (Columbia: University of Missouri Press, 1997), 8–9. For a survey of the importance accorded this connection in American historiography, see Richard Sher's remarks in Richard B. Sher and Jeffrey R. Smitten, eds., *Scotland and America in the Age of the Enlightenment* (Princeton: Princeton University Press, 1990), 1–13.

30. John Robertson, *The Scottish Enlightenment and the Militia Issue* (Edinburgh: J. Donald, 1985), 6. J. R. Western, *The English Militia in the Eighteenth Century. The Story of a Political Issue, 1660–1802* (London: Routledge & Kegan Paul, 1965), 162.

31. 1 Geo. I, c. 54 (1715).

ons, in any dwelling-house, barn, out-house, office, or any other house, or in the fields, or any other place whatsoever, and all persons who shall be necessary or privy to the hiding or concealing such arms. . . ."[32]

The law again provided specific description of weapons banned: the Duke of Cumberland, who had led the Hanoverian military forces in punishing Scotland, expressly requested "swords to be named particularly as they won't understand them to be arms."[33] So broadly was the notion of "arms" construed that one court is said to have found bagpipes to be "an instrument of war."[34]

Scottish historians saw in their nation's forlorn past many object lessons of how metropolitan England, dominated first by tyrannical monarchs and then by a corrupt and arrogant Parliament, could suppress and exploit hapless and defenseless provincials. William Robertson, who had joined other Scottish volunteers in a vain attempt to halt the Jacobite assault on Edinburgh in 1745, identified the galling treachery of the Scots' own "native Prince" in destroying local military power. In the conclusion to his *History of Scotland,* he lamented how James VI of Scotland, once he became James I of England, had undermined the military power of the Scottish people organized and led by their feudal lords. "As long as the military genius of the feudal government remained in vigor," he wrote, the Crown could not become "the supreme law of Scotland" and had to respect local rights. But "the military ideas, on which these rights were founded, being gradually lost or disgraced, nothing, remained to correct or mitigate the rigour with which they were exercised."[35]

James Burgh, reminding the "independent Part of the people" of Britain's provinces on both sides of the Atlantic of Scotland's lost pride and independence, recalled, "The *Scots* in those days, when the spirit of liberty ran highest, were always called by the parliaments, our brethren; not as now, the slavish, beggarly, itchy, thieving *Scots.*" Charles II and James II also had "debauched the militia," but an armed citizenry organized and led by its local lairds had nevertheless managed to demonstrate the enduring value of a militia in the next century. The failures of militia at various battles on both sides of the Atlantic might give pause to its advocates, but

32. 19 Geo. II, c. 39 (1746).

33. W. A. Speck, *The Butcher: The Duke of Cumberland and the Suppression of the 45* (Oxford: Blackwell, 1981), 173.

34. Peter Hume Brown, *History of Scotland,* 3 vols. (Cambridge: Cambridge University Press, 1909), 3: 328n.

35. William Robertson, *The History of Scotland during the Reigns of Queen Mary, and King James VI. Till his Accession to the Crown of England, with a Review of Scottish History to that Period,* 11th edn. (1787; reprint Aberdeen: G. Clark and Son, 1847), 386–87. The first edition appeared in 1761. A New York edition appeared in 1787.

Burgh offered as counterexamples their successes in the Jacobite rising of 1745, in which "two remarkable victories gained by the ruffian rebels, A.D. 1745, over the king's troops, shew that a militia is not so contemptible as the friends of a standing army affect to think." He described, too, the "New England militia, which took Louisbourgh, A.D. 1745," and later emphasized the point by praising the militias "in our own plantations." American readers could scarcely ignore the point. As they struggled to learn from history in the drafting of their own state governments, and later a national structure, they constantly encountered denunciations of standing armies and calls for a vigorous militia. Indeed, this policy was a staple of conventional theory—part of "the common stock of European political thought," in the words of one close student of the subject.[36]

Crushing the "Forty-Five" produced a bloodbath of punitive suppression in the Highlands. Hanoverian forces under the Duke of Cumberland destroyed the Scottish forces at Culloden in April 1746 in a battle where, an English participant admitted, "our men have been pretty severe and gave no quarter." The duke followed his victory with orders to search homes in pursuit of fleeing rebels; his raiding parties became "legendary for brutality and bloodshed," turning Scotland into "virtually occupied territory."[37] This merciless and vengeful campaign of murder and destruction would teach the Jacobites a bitter lesson in loyalty.

It taught another lesson, as well, to those Scots unsympathetic to the rebellion, because the Jacobites scarcely represented a general Scottish political will. Indeed, their rebellion shocked and embarrassed many others as misguided or worse. Scottish reformers had seen not only that the Highlands had lain open and defenseless against the atrocities of English troops under the Duke of Cumberland, but also that loyal Scots in the Lowlands (the majority of the Scottish population) had been militarily helpless at the start of the rebellion to turn back what they saw as wild and lawless Highlanders. "The rebellion was quelled at last," noted Alexander Carlyle; "but not till it had opened the eyes of every thinking man, and shown him our bosom bare and defenceless." An anonymous author, chagrined at the fall of the capital to the Jacobites, wrote a satirical attack on the unarmed and

36. Burgh, *Political Disquisitions,* 3: 351; 2: 412, 417. John Robertson, *Scottish Enlightenment and the Militia,* 9. Robertson provides other examples of British writers whose works enjoyed a wide readership and powerful influence in the American Revolution, especially in the shared opposition to a standing army. Among them were Andrew Fletcher of Saltoun, whose impact will be discussed below.

37. Speck, *The Butcher,* 137–73 (quotations at 145, 169). Linda Colley more dispassionately describes the contemporary impact of this campaign and observes, that "the genocide that had reputedly followed the Battle of Culloden was reminder enough of the English capacity for racialism and hate" (*Britons,* 117).

pacific Lowlanders whose lack of arms had compelled Archibald Stewart ignominiously to hand over the capital to the rebels. The reason was clear to readers: the English had neglected the Scottish militia.[38]

Not only the Scottish militia had suffered by neglect, however. By the middle of the eighteenth century, England's own militia had once again fallen into serious decay, owing to popular resentment of its use for political suppression and the resistance of laborers impoverished by the financial sacrifice of service.[39] War with France in 1756, however, forced Parliament to an extensive overhaul of Britain's military forces, including a rehabilitation of the militia. It voted a million pounds for defense that year,[40] and the next year turned to reviving the militia. Urged on Parliament by William Pitt in efforts to rally the kingdom, its preamble set out the purpose of the bill: "Whereas a well ordered and well-disciplined militia is essentially necessary to the safety, peace and prosperity of this kingdom: and whereas the laws now in being for the regulation of the militia are defective and ineffectual. . . ." Although the act required English county officials to compile lists of "all men" from eighteen to fifty years of age, it limited the numbers actually to be recruited and allowed substitutes to serve in place of those named. The act of 1757 ran to seventy-three sections and included detailed provisions on the conduct and enforcement of recruitment, the selection of officers, the obligation of county lieutenants and their deputies "to meet, and form the militia into regiments," and the entrusting of "arms, clothes, and accoutrements" with the proper officer or chosen personnel.[41]

In spite of the war crisis, the law generated stiff resistance for the same reasons it had done so before. But one omission especially enraged Britons north of the Tweed: no militia regiments were to be organized in Scot-

38. Alexander Carlyle, *The Question Relating to a Scots Militia Considered in a Letter to the Lords and Gentlemen who have Concerted the Form of a Law for that Establishment* (Edinburgh, 1760), 12–13. *A True Account of the Behaviour and Conduct of Archibald Stewart, Esq.; late Provost of Edinburgh* (1748), cited by David R. Raynor, ed., *"Sister Peg": A Pamphlet Hitherto Unknown by David Hume* (Cambridge: Cambridge University Press, 1982), 2. Hume's authorship of "Sister Peg" is open to serious doubt, and Adam Ferguson is the more likely author; on this question, see n. 46, below.

39. T. A. Critchley, *The Conquest of Violence: Order and Liberty in Britain* (London: Constable, 1970), 59–67. Eliga Gould, *The Persistence of Empire: British Political Culture in the Age of the American Revolution* (Chapel Hill: University of North Carolina Press, 2000), 72–105.

40. 29 Geo. II, c. 29 (1756).

41. 30 Geo. II, c. 25 (1757). The law required that "all the muskets delivered for the service of the militia, shall be marked distinctly in some visible place, with the letter M, and the name of the county, riding or place, to which they belong" (ibid., sec. 42). No weapons were to be issued until the unit had been constituted (sec. 35), and militiamen were to return them after exercises (sec. 36). Colonels or county lieutenants were authorized to seize weapons if "necessary to the peace of the kingdom" (sec. 33).

land, thereby excluding the Scots from service and depriving them of the right to organize their own militias.[42] *All* of Scotland, not merely the wild and untrustworthy Jacobite Highlands, was now deprived of a militia. Reflecting the sentiments of a majority of Scots, Scottish members of Parliament tried in 1760 to introduce a militia bill, only to prompt King George III to comment derisively, "Pray, throw it out." To Scottish militia advocates, this rejection was more than a political slight: it was a violation of the constitutional relationship established when the Act of Union created two coequal sovereignties. Insisting that "'the established constitution of Scotland with regard to arms' continued 'unaltered to this day,'" militia proponents demanded the constitutional right of the Scots to bear arms in their own militia. To Alexander Carlyle, "this constitutional law" must pass. "What have we done," he asked, "to forfeit our rights as Britons, even for a single hour?" Calling for "the full completion of the union," he continued, "Happy we should be, if there were no bar in the way to prevent the immediate extension of every constitutional law in this part of the kingdom! Thrice happy, if possessing every privilege of Britons, we knew the value of freedom, the greatest of human blessings, and felt that quiet sense of liberty, which animates our countrymen beyond the Tweed." The economic benefits of union had been great, but the loss of the militia revealed that Scotland's numerical inferiority in Parliament would entail humiliating political inequality and the inability to protect its constitutional rights. As the militia bill wavered in the Commons, Carlyle ruefully remarked "that if the militia-bill, now brought into parliament, does not pass, it had been as good for Scotland that there had been no union." Their efforts availed nothing, and George III had no need to use the royal veto for the same purpose Queen Anne had used it a year after the Act of Union, in 1708. The bill failed miserably in Parliament.[43]

When the Scots demanded a corps that would serve the same purposes as that of England, they sought the extension of the English Militia Act of 1757, whose preamble set out its purpose: "Whereas a well ordered and

42. Gould, *Persistence,* 72–105. Parliament in 1759 had to respond to the "little progress" made in recruiting in some counties (32 Geo. II, c. 20 [1759]). A year later, Parliament was forced to act when recruitment was "suspended" in certain counties owing to a lack of those "qualified and willing to accept commissions" (33 Geo. II, c. 20 [1760]). Not all Scots favored the militia, and many—especially the poor—resented the possibility of enforced service; for the dissenters, see Gould, *Persistence,* 95–96. Nevertheless, the demand for a Scottish militia enjoyed broad support among Scots. Brown, *History of Scotland,* 3: 341–42, describes this support as existing despite lingering fears that a Scottish militia might be turned to Jacobite purposes.

43. Robertson, *Militia Issue,* 143, 157, 108–12. Western, *English Militia,* 167. Carlyle, *Scots Militia,* 19, 29, 30–31, 36. See also "Abstract of a plan for a militia for Scotland," *Edinburgh Chronicle,* March 17 to 19, 1760, at 9.

well-disciplined militia is essentially necessary to the safety, peace and prosperity of this kingdom. . . ." Militia advocates complained loudly that "the highest privilege of Britons" was to bear arms, and they were being stripped of an essential guarantee of their liberty. "It is by arms alone," wrote one Scottish patriot, "that we can preserve to ourselves a name among nations." It was also through arms alone that a civic spirit could be maintained to preserve Scottish liberty in an age of ever-increasing luxury and ease, for, as Adam Ferguson explained, "A people who are disarmed in compliance with this fatal refinement, have rested their safety on the pleadings of reason and justice at the tribunal of ambition and force."[44]

The preamble to the Militia Act was not mere window dressing, but a statement of purpose and a legislative command that its meaning be followed. As Parliament failed to maintain even the English militia, its proponents took up the argument that its statutory language must be honored. Indeed, William Thornton urged the House of Commons in 1751, with the English militia neglected and ineffectual, "Let us no longer acknowledge the importance of a militia in the preamble of many of our statutes, yet render this very militia ineffectual by suffering such destructive clauses to remain, as will reduce the statute itself to a mere form of words, and a dead letter, to the astonishment of other nations, and the disgrace of our own." Thornton called on Parliament to "repeal all the present laws concerning the militia." In their place—and in place of "a mercenary army, that has no motive to defend us, but its pay, and no concern for our liberties"—he urged, "Let us now establish our safety upon a firm foundation, by passing such a law as will furnish this country with a militia equally effective, more easily raised, and maintained at a less expense than that of any other nation of the world. . . ." Thornton, like other advocates of a reformed English militia, saw such a force as a guarantee against what "happened in the year 1745," when Jacobite rebels had embarrassed Edinburgh and London.[45]

Anonymously, Adam Ferguson (or perhaps David Hume) lampooned the way English "John Bull" had left his Scottish "Sister Peg" disarmed and

44. 30 Geo. II, c. 25, Preamble, continuing, "and whereas the laws now in being for the regulation of the militia are defective and ineffectual. . . ." Robertson, *Militia Issue,* 100–101. Adam Ferguson, *An Essay on the History of Civil Society,* ed. Duncan Forbes (1767; reprint Edinburgh: Edinburgh University Press, 1966), 271. The importance of the civic humanist tradition of virtue in the militia cause is the subject of Robertson, *Militia Issue.* Additional discussion can be found in Richard B. Sher, "Adam Ferguson, Adam Smith, and the Problem of National Defense," *Journal of Modern History* 61 (1989): 242–43.

45. Cited by Burgh, *Political Disquisitions,* 2: 419–21. Thornton introduced a militia bill in 1752 and offered vigorous support for it in his pamphlet, *The Counterpoise, being Thoughts on a Militia and Standing Army* (London, 1752).

helpless. Appealing to John and "Mrs. Bull," Peg bemoaned the decline of Scottish autonomy and sibling equality:

> You used to call me proud. I wish I may not have erred on the other extreme. When you cease to be proud, I shall not esteem my brother the more. But whatever weaknesses I may have, how could you for a moment think of reducing me to the necessity of asking as a favour, what is the birth-right of all mankind, liberty to defend myself? I was possessed of this liberty, before I entrusted my affairs to the management of your servants.... It never occurred to me, that you might perhaps resume it yourself, without offering it to me.[46]

For the Scots, left out and looking southward with equal measure of jealousy and suspicion, their exclusion denied them a constitutional right they had expected in agreeing to the Treaty of Union. Now, Parliament had arbitrarily denied that right. Fifteen years had passed since the "Forty-Five," and owing to steps taken "to extinguish every spark of disaffection in the northern counties," Scots were entrusted with arms and expected to serve loyally abroad in defense of Britain, but not at home. Pro-militia pamphleteer George Dempster wrote that Scots bore "reminding . . . of the late conduct of the government towards the inhabitants of the disarmed counties." The "continuance of an invidious distinction" of not bearing arms in a Scottish militia must end. "What Scotchman would consent to a partial militia," he asked, referring to the service of Scots in British wars, "by which those brave men who have been so successfully employed in defending us, are denied arms for their own defence?" With war raging against France, Scotland lacked the means to defend itself as invasion loomed. But the other lesson of 1745—the threat of internal insurrection—also remained a source of the pro-militia campaign. Adam Ferguson raised the specter of another rising like that of 1745 when he observed that with no militia in Scotland, "a few Banditti from the Mountains, trained by their Situation to a warlike Disposition, might over-run the Country, and, in a Critical Time, give the Law to this Nation."[47]

A Scottish militia act remained a patriotic cause from the 1750s through the 1790s, when the dire pressures of the Napoleonic Wars finally overcame English resistance and led to the creation of a Scottish militia.[48] Even

46. *The History of the Proceedings in the Case of Margaret, Commonly called Peg, only lawful Sister to John Bull, Esq.* (London, 1760), 79. Richard B. Sher convincingly disputes Hume's authorship in *Philosophical Books,* 24 (1983): 85–91.

47. [George Dempster,] *Reasons for Extending the Militia Acts to the Disarmed Counties of Scotland* (Edinburgh, 1760), 11, 16, 18, 20. Adam Ferguson, *Reflections Previous to the Establishment of a Militia* (1756), cited by Richard B. Sher, *Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh* (Princeton: Princeton University Press, 1985), 221.

48. J. R. Western, "The Formation of the Scottish Militia in 1797," *Scottish Historical Review* 34 (1955): 1–18. 37 Geo. III, c. 103 (1796). The preamble to this act reads, "Whereas

as the newly independent states across the Atlantic were working to create structures of government that would embody rights and protect their liberties, therefore, Scots were still campaigning for a bill that would extend and guarantee them the right to bear arms in militia service. As would later be the case in the new American states, it was a commonplace in Scotland to declare that "[a] militia is the natural strength of a free people," or to describe it as "the "natural bulwark" of a nation.[49] The influence was more than rhetorical, as important as that might be.

"Influence," like "context," can be one of the most difficult factors to establish in history, especially as a causative link between ideas and actions, and we must be careful to seek deep and underlying elements rather than superficial connections. Reappraising the legacy in America of the debates over the union of Scotland and England in the early eighteenth century, Ned Landsman concedes that it "appears, on the surface at least, to have been practically nil." He cautions, however, that the important historical question is not one of "immediate ramifications," but rather the demonstrably more significant fact that Americans had to come to terms with being "provinces of an enlarged United Kingdom." The question was not a simplistic one of obvious cause and effect, as John Pocock advises: "The American Revolution is not causally a consequence of the Union of England and Scotland, but it is a consequence of a political logic contained within it."[50] This "political logic" shaped American debates and raised many of the same concerns. The discursive and rhetorical similarities cannot be ignored, because both had suffered similar grievances and were responding with similar solutions.

These similarities—the shared suspicions of provincial Britons—emerge from the continuing Scottish skepticism about how a militia law would operate in actual practice. The dispute over retaining control and responsibility in militia affairs generated intractable controversy. Traditionally, county lieutenants raised the militias, but the abolition of the Scottish Privy

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it has been found, from experience, that the well ordering and disciplining the militia in England and Wales, has essentially contributed to the safety of the united kingdom; and whereas it would further contribute to the same purpose, and tend to repel any attempt which the enemies of this country may make to effect a descent upon this kingdom, if a well ordered and disciplined militia were established in that part of the united kingdom called Scotland; and whereas the laws in being for the regulation of the fencible men, or militia, in Scotland, are defective and ineffectual. . . ."

49. Burgh, *Political Disquisitions,* 2: 395. *Edinburgh Chronicle,* March 31–April 2, 1760, 60, col. 3, reprinting an article from the *Westminster Journal* of March 22, 1760.

50. Ned Landsman, "The Legacy of British Union for the North American Colonies: Provincial Elites and the Problem of Imperial Union," in *A Union for Empire: Political Thought and the British Union of 1707,* ed. John Robertson (Cambridge: Cambridge University Press), 297. J. G. A. Pocock, "Empire, State, and Confederation: The War of American Independence as a Crisis in Multiple Monarchy," in ibid., 338.

Council in 1708 left a void in the chain of constitutional authority by which lieutenancies were created; not even the Crown, legal opinion held, could raise or arm militias without such officials. George Dempster emphasized the availability of "many gentlemen of undoubted attachment to the present government, who are both qualified and willing to act as militia-officers," and whose presence would add "authority and weight to the cause of Whiggism." Officials in London disagreed. In the face of Parliament's refusal to yield control to local authority, Burgh voiced the fears of many Scots when he linked control over appointments to funding and training. When Parliament made centralized control from London a condition for a Scottish militia in 1779 and 1780, the Scots refused to support any such plans. The English Militia Act specified royal authority, but as Burgh had warned, this "places it, as everything else is, too much under the power of the court." Though preferred by the English, centralized control alarmed the Scots. Burgh quoted Andrew Fletcher of Saltoun, a vocal Scottish anti-Unionist, who had insisted at Scotland's last parliament in 1706–7: "The essential quality of a militia consistent with freedom, is, That the officers be named, and preferred, and they, and the soldiers maintained, not by the prince but by the people, who send them out." English refusal to yield on the appointment of officers helped doom any potential bill.[51]

The debate over local control epitomized the constitutional gulf between Scotland and England. To the English, according to Eliga Gould, Crown control "represented a substantial step toward integrating the militia into the regular forces of the Crown" and increasing Hanoverian power. The Scots long had recognized the danger of centralized militia control. Andrew Fletcher, a leading opponent of the Union, had warned a half century earlier that Scotland would be treated as a "conquered province" unless barred by express curbs on royal power within a constitutional structure that John Robertson describes as "an equal or confederal union" ("a sort of United Provinces of Great Britain"). Fletcher proposed at Scotland's last parliament before Union that it pass an "Act for the security of the kingdom" specifying twelve "Limitations." Four of these mentioned military

51. Robertson, *Militia Issue,* 52. Rosalind Mitchison, "The Government and the Highlands, 1701–1745," in *Scotland in the Age of Improvement. Essays in Scottish History in the Eighteenth Century,* ed. N. T. Phillipson and Rosalind Mitchison (Edinburgh: University Press, [1970]1996), 40. The Crown would appoint lieutenants in the reconstituted Scottish militia. Dempster, *Reasons for Extending,* 9, 15. Antimilitia legislators objected to local control even over the recommendations of Henry Dundas, the powerful solicitor general of Scotland, dubbed "Henry the Ninth," that a Scottish "melletia" would help stabilize society and end the massive emigration of Scots. Bernard Bailyn, *Voyagers to the West. A Passage in the Peopling of America on the Eve of the Revolution* (New York: Knopf, 1986), 46–51. Burgh, *Political Disquisitions,* 2: 404, 399–400 (quoting Fletcher). Robertson, *Militia Issue,* 136–37.

affairs, including a denial of Crown authority to maintain a standing army or make peace and war except by "consent of parliament," or to grant any "places and offices." One limitation is of particular importance in the present examination of the right to keep and bear arms: "That all fencible men of the nation, betwixt sixty and sixteen, be with all diligence possible armed with bayonets, and firelocks all of a caliber, and continue always provided in such arms with ammunition suitable."[52]

Such a militia generated little, if any, serious support, but Fletcher's demand merits serious attention because it raised an issue fraught with social, political, and constitutional implications: How inclusive should militia membership be? Because Fletcher's plan on its surface arguably appears to support a universal individual right to bear arms,[53] it merits closer contextual study than it has received. Fletcher's militia was to serve as a bulwark of Scottish liberty, for "[a] good militia ... is the chief part of the constitution of any free government" and "will always preserve the publick liberty." But an armed citizenry, by itself, did not constitute the "good militia" called for. Indeed, it had to be well regulated. Fletcher continued, "[I]f the militia be not upon the right foot, the liberty of the people must perish." For this reason, membership in the arms-bearing community required submission to a grueling regimen of basic training in militia "camps," so that the militia could be placed "upon the right foot." There, young men would "be taught the use of all sorts of arms," adhere to a strict diet, and learn "all christian and moral duties, chiefly to humility, modesty, and the pardon of private injuries," all enforced by "severe and rigorous orders," including punishments "much more rigorous than those inflicted for the same crimes by the law of the land." "Such a camp," Fletcher explained, "would be as great a school of virtue as of military discipline. . . ." After one or two years of training, militiamen would meet fifty times a year. Fletcher, therefore, saw the militia as but one part of a comprehensive Scottish nationalist revival, and he remained wary of those who could not be entrusted with the responsibilities of citizenship. To make an example of the most incorrigible vagabonds, in fact, he called for sending several hundred "of those villains" to serve in Venetian galleys. Even with the worst miscreants removed, he lamented the fact that half of Scotland was controlled by men who "in every thing are more contemptible than the vilest

52. Eliga H. Gould, "To Strengthen the King's Hands: Dynastic Legitimacy, Militia Reform and the Idea of National Unity, 1745–1760," *Historical Journal* 34 (1991): 329–48. "Act for the Security of the Kingdom," in Andrew Fletcher, *Political Works,* ed. John Robertson (Cambridge: Cambridge University Press, 1997), 139. Robertson defines "fencible men" as "those capable of bearing arms" (ibid., 139n).

53. As argued, for example, by Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right,* 2nd ed. (Oakland, Cal.: The Independent Institute, 1994), 47.

slaves, except that they always carry arms, because for the most part they live upon robbery."[54]

Support for a Scottish militia thus could not escape the problem of defining a practical public policy by which membership should be limited.[55] Turning the tables on the Stuarts for "causing several Good Subjects, being Protestants, to be Disarmed at the same time, when Papists were both Armed and Imployed contrary to Law," the English Bill of Rights had specified that only those "Subjects which are protestants may have Arms for their Defence suitable to the Condition, and as allowed by law."[56] Limiting militia membership to Protestants with a certain level of property reflected hatred of Catholics and doubts about their loyalty to the Revolutionary settlement, but indicated, too, a distrust of the lowest orders of society. Indeed, there were grounds for the latter suspicion: the Militia Act of 1757 had ignited riots among the English poor, who saw service as a hardship and as exploitation. The act did not propose universal service in any case, as it provided for substitutes to be engaged and capped the number serving.[57]

Burgh's opinion on the composition of the militia reflected this tradition. He addressed his *Political Disquisitions* "to the independent Part of the People of Great-Britain, Ireland, and the Colonies," and in them he articulated a constitutional argument for collective equality within the Empire that included the right of the Scots to organize and serve in their own militia. Scotland must be allowed its own militia, a militia composed of as broad a segment of the population as served in England. Burgh demanded the rights to which all Britons were entitled. "For every *Briton* is born with the heart

54. Andrew Fletcher, "A Discourse of Government With relation to Militia's" [1698], in *Political Works,* ed. Robertson, 24–26. Fletcher, "Two Discourses Concerning the Affairs of Scotland; Written in the Year 1698," ibid., 68–69.

55. Adam Smith, for example, applied his belief in the superiority of the specialization of labor to argue that "the progress of manufactures, and the improvement in the art of war" made universal militia service harmful to the economy and produced a military force inferior to a standing army (*An Inquiry into the Nature and Causes of the Wealth of Nations,* ed. R. H. Campbell and Andrew S. Skinner, 2 vols. [Indianapolis: Liberty Fund, 1981], 2: 689–708).

56. "The Declaration of the Lords Spiritual and Temporal, and Commons Assembled at Westrminster," reprinted in *Declaring Rights. A Brief History with Documents,* ed. Jack N. Rakove (Boston: Bedford Books, 1998), 41–45, with pertinent clauses at 42, 43. Because the Declaration had no constitutional force, Parliament had to enact its provisions into law, and did so; it did not alter the language cited here. 1 Wm. and Mary, sess. 2, c. 2 (1689). Fear of arms-bearing Catholics also infected the debate on an Irish militia, where the inclusion of Catholics was so dreaded that not until 1793 was a bill approved to permit this. Thomas Bartlett, "An End to Moral Economy: The Irish Militia Disturbances of 1793," *Past and Present* 99 (1988): 41–64.

57. 30 Geo. II, c. 25, secs. xvi, xix.

of a soldier and a sailor in him," Burgh asserted; "and wants but little training to be equal on either element, to any veteran of any country." Though not calling for a universal militia composed of all able-bodied men, Burgh emphasized the right of a political community to equality within the constitutional structure and the right of the subject to participate fully. To Burgh, "a militia is the only natural defence of a free country both from invasion and tyranny," but it required capable widespread participation if it were to be truly so. In his opposition to a small, select militia, Burgh was adding his voice to a call made by other writers with broad American readership, quoting at length from the work of Andrew Fletcher, whose militia plan included Scotland and called for organized militia service and training to be as broad as policy allowed: "Mr. *Fletcher* gives the plan for a militia for *Britain*. . . . That every youth of every rank should spend one or two years in the camp, at his coming of age, and perform military exercise once every week afterwards." Despite Fletcher's reference to "every youth of every rank," Burgh would limit service to "all men of property," for a "militia consisting of any others than the men of *property* in a country is no militia; but a mungrel army." For this reason, Burgh could stop short of what we today would acknowledge as truly universal service and still state, without contradicting himself, "There is no law against a free subject's acquiring any laudable accomplishment." Only those capable of being entrusted with the duties of citizenship were entitled to the civic right to participate, but all such men must be allowed to do so. [58]

## II. The Scottish Example and the Shared British Tradition in North America

As one of the many exemplary histories available in the political culture of the eighteenth century, Scotland's constitutional history and its struggle over a militia provided the framers of the Constitution and Second Amendment with a cautionary legacy that appealed to them because it addressed many of the same issues. Reacting to shared concerns, they came up with similar—and similarly worded—responses. As framed, therefore, the Second Amendment defies easy classification in such twenty-first century terms as "individual" or "collective." The differences between such dichotomies and the various ways that eighteenth-century rights were conceived, explains Richard Primus, "suggest that the categories of modern analytic rights philosophy do not produce an adequate framework for historically reconstructing conceptions of rights at the Founding." Grounding

58. Burgh, *Political Disquisitions,* 3: 336, 360–61; 2:391, 401, 402.

eighteenth-century rights in the felt necessities of their time, he prefers to describe them as "oppositional and specific," a concept that suggests that "the most prominent rights at the Founding were substantially conditioned by contemporary opposition to specific British practices."[59] This formulation is especially apt for appreciating the role of the Scottish example in the framing of the Second Amendment.

The British government fed the shared fear of a standing army when its troops began efforts to disarm the Massachusetts militias. Almost six months before the more celebrated raids on Lexington and Concord, British regulars in September 1774 seized arms stored by the province in Cambridge and Charlestown. Though thousands of local militia gathered in Cambridge, New England's first militia resistance took place in New Hampshire. Angered by news that the Crown had barred imports of arms to the province, militia officer John Sullivan led local men in seizing British arms stored at Fort William and Mary at the mouth of the Piscataqua River on December 14.[60]

Two weeks after Sullivan's raid, John Adams wrote to James Burgh thanking him for the *Political Disquisitions* the Scot had sent him and praising its timeliness. "I cannot but think those Disquisitions the best service that a citizen could render to his country at this great and dangerous crisis," he wrote. Adams referred explicitly to the Boston Massacre in 1770 and implicitly to the present troubles, claiming that General Sir Thomas Gage "and all the regiments" then occupying Boston could not crush New England. After speaking of the nation's resolve to sacrifice its blood, he told Burgh, "America will never submit to the claims of parliament and administration. New England alone has two hundred thousand fighting men, and all in a militia, established by law; not exact soldiers, but all used to arms."[61]

Scotland's experience at the hands of British troops was not far from the minds of Americans resisting Britain in the 1770s. Denied their own militia, Scots had been degraded and forced to do the military service of others, and became numbered with the hated "Scotch and foreign mercenaries" that Jefferson denounced in drafting the Declaration of Independence, though he removed the reference when it "excited the ire of a gentleman or two of that country."[62] John Sullivan, appointed a major-general in the

59. Richard Primus, *The American Idea of Rights* (Cambridge: Cambridge University Press, 1999), 85, 97, 102–3.

60. Charles P. Whittemore, *A General of the Revolution: John Sullivan of New Hampshire* (New York: Columbia University Press, 1961), 13.

61. Adams to Burgh, December 28, 1774, *Works,* 9: 351–52.

62. Jefferson to Robert Walsh, December 4, 1818, *The Works of Thomas Jefferson,* ed. Paul Leicester Ford, 12 vols. (New York: G. P. Putnam's Sons, 1904–5), 10: 119–20, where he mistakenly recalls writing "Scotch and other foreign auxiliaries." Carl L. Becker, *The Declaration of Independence. A Study of the History of Political Ideas* (New York: Harcourt, Brace, 1922), 172. Hook, *Scotland and America,* 71n., posits Witherspoon's influence.

Continental Army, joined the list of American "Encouragers" to Burgh's Philadelphia edition and provided a personal testimonial in the advertising circulated to promote it. In Boston, Josiah Quincy, Jr., appreciated that common struggle when he assailed the Boston Port Bill in 1774, praising "that prince of historians, Dr. Robertson" and citing his *History of Scotland* in arguing for "a well-disciplined militia." Robertson's *History of Scotland* had fueled national pride in Scotland and had generated support for the militia there, and Quincy drew on a shared British experience when he asked, "Who would be surprised that princes and their subalterns discourage a martial spirit among the people, and endeavor to render useless and contemptible the militia, when this institution is the natural strength, and only stable safeguard, of a free country?" James Madison requested that the work be included among works to be purchased for the Confederation Congress in 1783. Thomas Jefferson had read Robertson's *History of Scotland* as a young man practicing law and continued to recommend him in his old age. As with other works that exposed human evil, Jefferson appreciated the fact that "when we see or read of any atrocious deed, we are disgusted with it's deformity and conceive an abhorrence of vice."[63]

Americans did not forget either history or experience after the war, nor in the effort to establish a national government. Looking back on England's efforts to subjugate Massachusetts with regular troops before Independence, Elbridge Gerry recalled that Parliament had worked to weaken the colony's militias. In debate on what became the Second Amendment he reminded Congress,

> Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The assembly of Massachusetts, seeing the rapid progress that administration were making, endeavored to counteract them by the organization of the militia, but they were always defeated by the influence of the crown.[64]

63. Stewart J. Brown, "William Robertson (1721–1793) and the Scottish Enlightenment," in *William Robertson and the Expansion of Empire,* ed. Stewart J. Brown (New York: Cambridge University Press, 1997), 20–21. Josiah Quincy, Jr., "Observations on the Act of Parliament Commonly Called the Boston Port Bill; with Thoughts on Civil Society and Standing Armies" [Boston, 1774], *Memoir of the Life of Josiah Quincy, Junior, of Massachusetts Bay: 1744–1775,* ed. Josiah Quincy, 3rd ed., ed. Eliza Susan Quincy (Boston: Little, Brown, 1875), 303, 338. *Journals of the Continental Congress, 1774–1789 edited from the Original Records,* ed. Worthington Chauncey Ford et al., 34 vols. (Washington: Government Printing Office, 1904–37), 24: 83. Jefferson to Robert Skipwith, August 3, 1771, in *The Papers of Thomas Jefferson,* 1: 76–81; Jefferson to John Minor, *Works,* August 30, 1814, 11: 424.

64. *Creating the Bill of Rights: The Documentary Record from the First Federal Congress,* ed. Helen E. Veit et al. (Baltimore: Johns Hopkins University Press, 1991), 182.

Gerry's concerns echoed the most prominent fear about the militias in the state ratifying conventions and in Congress: namely, who would staff, take responsibility for, and control the state militias. It reflected what Don Higginbotham has identified as a powerful concern central to the historical changes that overtook the new nation. Higginbotham, the dean of American Revolutionary War military historians, has shown how important it is to recognize, among other historical developments after 1783, "the shift from the states' total control of their militias to the sharing of that authority under the Constitution, how disturbing this development was to the Antifederalists, [and] how James Madison dealt with Antifederalist concerns in the Second Amendment. . . . "[65]

The end of the war, that is, posed new questions on how to maintain the continued vitality of the state militias as meaningful factors in a federal system. John Sullivan, who became "president" (governor) of New Hampshire after the war, remained committed to the notion of a citizen militia and served as its commander, touring the state and generating support for it. The leader of New England's first defense of local militias in 1774, with independence he saw the keeping and bearing of arms as necessary to the effectiveness of a militia and supported the state law providing arms to all members as guaranteeing a "well regulated militia." Sullivan knew that the collective power of the militia depended on individual exertion: "[W]ere my talents even equal to those of a Frederick," he addressed the freemen of New Hampshire in 1785, "I could do but little towards forming a well regulated militia, without the countenance and aid of the people at large." Bearing arms was an individual act to be exercised in the state's well-organized and disciplined militias, and he repeatedly linked the two in his speeches. Bearing arms without the regulation and discipline that came with group practice, he emphasized, failed to serve the purpose of protecting the gains of the Revolution: "We have already bravely purchased Liberty and Independence, and now make part of an empire where freedom reigns without controul: but what will our late struggles avail, if we suffer the military skill which we have acquired, to expire?" Sullivan went so far as to suggest that school boys be instructed in "the profession of arms," which should be "taught for the purpose of national defence and for the security of dear-bought freedom."[66]

65. Higginbotham continues his observation that the subject also shows "finally, how the issue was gradually resolved in the first half of the nineteenth century," though the present essay stops short of that question. Don Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," *William and Mary Quarterly,* 3rd ser., 55 (1998): 39–58, with quotation at 40.

66. *Letters and Papers of Major-General John Sullivan, Continental Army,* ed. Otis G. Hammond, New Hampshire Historical Collections, 13–15, 3 vols. (Concord, 1930–39), 3: 385–86, 407.

Postwar efforts thus kept the militia issue alive. Although the Articles of Confederation had called on each state to maintain "a well regulated and disciplined militia," failure to do so prompted continued agitation. A New York proposal of March 1786 complained that people had grown "forgetful of the past, and regardless of future dangers." The "rising generation" should be educated "[t]hat every man of the proper age and ability of body, is firmly bound by the social compact, to perform personally his proportion of military duty for the defence of the state." To implement this duty, it suggested "[t]hat all men of the legal military age should be armed, enrolled, and held responsible, for different degrees of military service."[67] All were called on to serve, but the linkage of arms, enrollment, and defense of the state was clear.

If the bearing of arms was so vital that it required constitutional protection, that right was seen as inextricably linked to the collective responsibility of militia service. With the establishment of a national government, few gave any thought to whether the actual individual ownership of arms was a federal matter. Property rights in eighteenth-century America were such that an individual might even own another human being; gun ownership would not be considered any less a matter of law left to the states to regulate as they saw fit. Virginia had enacted many laws to regulate human chattel property and had passed a law in 1772 banning hunting when "numbers of disorderly persons. . . almost destroyed" the colony's deer population.[68]

By contrast, the American colonists' experience, like that of the Scots, had demonstrated that some protection had to be asserted for the right to participate in the creation of a well-regulated militia under local control. These issues pushed the new nation onto the then-uncharted course of federalism in discussing how, in practice and in constitutional law, local military protection and competency could be assured.[69] Even as war raged, leaders had wondered how local militias might not be coopted or neutralized by central control. The Scots had worried about the drafting of militia into the regular army, and Thomas Jefferson raised the same issue in a letter to John Adams in 1777, expressing his relief that heavy volunteer enlistment into the Continental Army had "rendered the recommendation of a draught

67. *A Plan for the General Arrangement of the Militia of the United States* (New York, 1786), in [Charles Evans], *Early American Imprints, 1639–1800,* ed. Clifford K. Shipton, (Worcester: American Antiquarian Society, 1963– ), microcard #20076, at 6, 7.

68. *The Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619,* comp. William Waller Hening [1819–23], 13 vols. (Charlottesville: University Press of Virginia, 1969), 8: 592–93 (1772).

69. Like the Third Amendment, the second must be viewed within the context of federalism. The four states that dealt with the quartering of troops in their own constitutions or declarations of rights all banned it in peacetime but granted to their legislatures the authority to order it in wartime. William S. Fields and David T. Hardy, "The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History," *American Journal of Legal History* 35 (1991): 419–20.

from the militia hardly requisite, and the more so as in this country it ever was the most unpopular and impracticable thing that could be attempted. Our people even under the monarchical government had learnt to consider it the last of all oppressions." Adams "rejoice[d]" at this news, and agreed that "a Draught from the Militia" was "a dangerous Measure, and only to be adopted in great Extremities, even by popular Governments."[70]

The Scottish example of preserving constitutional integrity was not unique in the eighteenth century, when debates over the "conditions of union" took place in many forums across Europe,[71] but the Scottish experience had special resonance among British North Americans. Benjamin Franklin, who had visited Scotland in 1759 at the height of the militia dispute, raised the problem of unequal constitutional status in 1776, when he discussed plans for union that gave more power to larger states: "I hear many ingenious arguments to persuade us that an unequal representation is a good thing. If we were born and bred under an unequal representation, we might bear it; but to set out with an unequal representation is unreasonable. It is said that the great Colonies will swallow up the less. Scotland said the same thing at the union."[72]

The allusion was not lost on his hearers. Indeed, he repeated it in Philadelphia when the Constitutional Convention met there in 1787, citing the "undue influence of the great against the lesser states. This was the apprehension of Scotland when the union with England was proposed."[73] Rufus King disagreed on the extent of the danger, but he conceded that "when the Union was in agitation, the same language of apprehension which has been heard from the smaller States, was in the mouths of the Scotch patriots." Because Scotland had been successfully integrated into the economy of the empire, its historical model provoked disagreement as to its applicability, but its constitutional history was known and taken seriously in debates over federal union. In South Carolina, Rawlins Lowndes referred to the Scots' attempts to preserve their interests after the Union with England, and Edward Rutledge brought up the problem of tax allocation there.[74] The Scot-

70. Jefferson to Adams, May 16, 1777, *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams,* ed. Lester J. Cappon (Chapel Hill: University of North Carolina Press, 1988), 4. Adams to Jefferson, May 26, 1777, ibid., 5.

71. On the extent of this debate, see Robertson, *Union for Empire,* passim.

72. *Journals of the Continental Congress,* 5: 1082.

73. *The Records of the Federal Convention of 1787,* ed. Max Farrand, rev. ed., (New Haven: Yale University Press, 1937), 1: 405. During this visit—he toured again in 1771—Franklin had been entertained by Lord Kames, David Hume, Adam Ferguson, Adam Smith, and William Robertson. Hook, *Scotland and America,* 18–19.

74. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787,* ed. Jonathan Elliot, 5 vols. (1888; reprint New York: Burt Franklin, 1974), 4: 289, 299.

tish model thus could provoke disagreement as to its applicability, but evidence is sufficient to demonstrate that it was known and taken seriously in debates over federalism.

The Scottish experience drew much attention in the Virginia ratification struggle. Patrick Henry tried to deny the analogy at the Richmond ratifying convention,[75] but Edmund Randolph nevertheless admitted that "the circumstances of the two countries are not dissimilar."[76] James Madison, however, gave the subject the most attention when he prepared support for his arguments in favor of ratification. Drawing expressly on Burgh's *Political Disquisitions,* Madison had to counter the reasons Scots had given in opposing their Union with England in 1707. Among the warnings Madison cited were "Departing from independent State, and to be swallowed by England" and that Scotland "[w]ould be outvoted in all questions by England's superiority in Parliament."[77]

Not accidentally, therefore, in deliberations over Article 1, Section 8 (Clauses 15 and 16), as well as over the Second Amendment, Americans adopted not only the language but also the substance of the Scottish demand for a militia. As in Britain, it was common to stress the "natural" quality of the militia: the Virginia Convention, in its proposal of amendments to the federal Constitution, exalted the militia as "the proper, natural and self-defence of a free state." Alexander Hamilton conceded that Americans viewed the militia as a "natural bulwark," and a Maryland Antifederalist, like many others, called the militia "the only natural and safe defence of a free people"—though he mistakenly attributed the term to the English Bill of Rights, where those words do not appear.[78]

This shared experience echoed in the debate at Philadelphia over the militia clauses of Article 1 in August 1787, producing a consensus that the states must retain control over their militias. "The whole authority over the Militia ought by no means to be taken away from the States whose consequences would pine away to nothing after such a sacrifice of power," observed Connecticut Federalist Oliver Ellsworth in agreeing that the feder-

75. Ibid., 3: 319.

76. Ibid., 3: 196.

77. "Additional Memorandum for the Convention of Virginia in 1788, on the Federal Constitution," in *Letters and Other Writings of James Madison, Fourth President of the United States*, 4 vols. (Philadelphia: J. B. Lippincott, 1865), 1: 390–2

78. Veit, *Creating the Bill of Rights,* 19. Though nodding to popular sentiment in this description, Hamilton was taking issue with the importance of the militia in this essay. Hamilton, *The Federalist #25*, 161. A Citizen of the State of Maryland, "Remarks on a Standing Army," April 12, 1787, in *Documentary History of the Ratification of the Constitution,* ed. Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, 19 vols. (Madison: State Historical Society of Wisconsin, 1976– ), 17: 89. The English Bill of Rights declared that "the Subjects which are protestants may have Arms for their Defence suitable to their Condition, and as allowed by law."

al government should step in only when "the states neglect to provide regulations for militia." For Pennsylvanian John Dickinson, the delegates had "come to a most important matter, that of the sword," and he offered his "opinion . . . that the States never would nor ought to give up all authority over the Militia."[79] Madison, however, maintained that in practice the states would assuredly neglect their militias, as many had failed to support their own troops during the Revolutionary War: "The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose. . . . The Discipline of the Militia is evidently a *National* concern, and ought to be provided by a *National* Constitution." As ratified, the militia clause of the Constitution gave Congress the power of "organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States." Significantly, it also paralleled the demand for local control made by Scottish militia advocates so strenuously that its omission had led them to reject Parliament's proposals in 1779–80: Congressional authority to organize, arm, and discipline the militias was granted, "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[80]

Madison's optimistic candor about the advantages of the states' being "consolidated," however, probably did more to inflame fears than allay them. The matter remained a subject of doubt and suspicion, and Federalist leaders had to defend the Federalist issue of Congressional militia control at their state ratifying conventions. John Marshall had to reassure Antifederalists about the militia clauses at Richmond. "The State legislatures had power to command and govern their militia before," he explained to those doubting the ability of the states to retain control, "and have it still, undeniably, unless there be something in this Constitution that takes it away."[81]

And that was precisely the problem: *Was* there anything "in this Constitution" to render the states militarily helpless? Might this danger lie latent in the Congressional power to "provide for organizing, arming, and disci-

79. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Athens: Ohio University Press, 1966), 483.

80. Ibid., 515. Mutinies by troops protesting the failure of their state governments to provision or pay them took place in 1777, 1780, 1781, and 1783. Don Higginbotham, *The War of American Independence: Military Attitudes, Policies, and Practice 1763–1789* (1971; reprint Boston: Northeastern University Press, 1983), 403–5. United States Constitution, art. 1, sec. 8, clause 16. In reciting the legislative history of the militia clauses, Jack Rakove concludes that the discussion surrounding them "explicitly recognized that the militia was to be the joint object of congressional and state legislation" ("The Second Amendment as the Highest State of Originalism," *Chicago-Kent Law Review* 76 [2000]: 129–32).

81. *Documentary History of the Ratification,* 10: 1307.

plining the militia"—a power that might allow Congress, like the Stuarts and then Parliament, to ignore and neglect the militias? Oblique guarantees of this sort were not to be trusted. This historic threat was best not left to future Congressional assurances, because Parliament had provided for a Scottish militia after the Act of Union only to have its bill vetoed by Queen Anne in 1708—the last royal veto before the Revolution, and an action that Americans were reminded of in *The Federalist.*[82]

Seen from a provincial perspective, this suspicion stuck to the Constitution and led many to insist on postratification amendments preventing such a corruption. Massachusetts Antifederalist James Winthrop, writing as "Agrippa," published his remarks to the Massachusetts Convention in the *Massachusetts Gazette* and emphasized the need for the states to retain the fiscal wherewithal to maintain their own militias against federal neglect. Giving the states authority over militias without adequate taxing authority, he warned, gave them but a hollow right: "without this the extremes of the empire will in a very short time sink into the same degradation and contempt with respect to the middle state as Ireland, Scotland, & Wales, are in with regard to England." A New York Antifederalist decried the new limits on state government and asked, "What sovereignty, what power is left to it, when the control of every source of revenue, and the total command of the militia, are given to the general government?" The trope of being "disarmed," like that of being "enslaved" (used so often by others), served him well to exemplify his broader fear that state sovereignty "is swallowed up by the general government; for it is well worth observing, that, while our state governments are held up to us as the great and sufficient security of our rights and privileges, it is carefully provided that they shall be disarmed of all power, and made totally dependent on the bounty of Congress for their support. . . ." In Richmond, William Grayson asked rhetorically, "[W]hat attention had been paid to the militia of Scotland and Ireland, since the Union; and what laws had been made to regulate them?" Answering a question that many already knew the answer to, he continued, "They have 30,000 select militia in England. But the militia of Scotland and Ireland are neglected."[83] Grayson would soon take his seat in the United States Senate as one of a small number of Antifederalists there.

82. *The Federalist* #73, 497. Publius did not specify the bill vetoed, however.

83. "To the Masachusetts Convention," in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification,* comp. Bernard Bailyn, 2 vols. (New York: Library of America, 1993), 2: 159, citing the *Massachusetts Gazette,* February 5, 1788. Elliot, *Debates,* 2: 403. The trope of "slavery" was "a central concept in the eighteenth-century discourse." Bailyn, *Ideological Origins,* 234. It is worthy of note that the slave had been born free but had been degraded to unfree status. *Documentary History,* 10: 1306.

Others turned to the need for a militia to suppress domestic insurrection within their own states, well aware of uprisings that had threatened to plunge new states into chaos. At Philadelphia Roger Sherman of Connecticut "took notice that the States might want for [i.e., lack] defence against invasion and insurrection, and for enforcing obedience to their laws. They will not give up this point." Even Antifederalist Elbridge Gerry agreed and for good reason. Agrarian uprisings in New England had shaken the new republic to its constitutional foundations in 1786 and early 1787 but also had demonstrated the helplessness of states lacking adequate militia. On 20 September 1786, two hundred men demanding currency reform had caught President John Sullivan and the New Hampshire assembly unprepared, confining them for over five hours until they agreed to meet their demands. Once freed, however, Sullivan summoned the militia, crushed the insurrection, and humbled thirty-nine of the rebels by forcing them "with their head uncovered and their hats under their arms, to march twice through the columns [of government soldiers], that in that humiliating condition they might behold a few of the many who were ready to defend government." Writing from Boston, Rev. Jeremy Belknap envied the effectiveness of the militia in his neighboring state. He praised Sullivan for his efforts with the militia while Daniel Shays was embarrassing the helpless commonwealth to its south, where "Massachusetts suffers for want of a militia, and a little more *spunk* in her Executive."[84]

The brief success of the Shaysites demonstrated the difference between a well-regulated militia under state control and the dangers of unorganized armed men claiming to embody the rights secured by the Revolution. As William Pencak has discovered in a careful reevaluation of the response to Shays in Massachusetts, the insurrection aroused indignation at the rebels' claim to be a genuine militia and at their "blatant assumption of the mantle of the Revolutionary army." To their opponents, their acts in no way expressed a constitutional right, but rather a frightening return to a pregovernmental state of nature. The assembly denounced them as "Sons of Fraud and Violence" and as "Sons of Licentiousness." Relatively few Shaysites had fought in the Revolution, and—like the mob in New Hampshire—they had broken and run at the first shots fired. By contrast, the militia had acted with laudable discipline and esprit de corps, so efficiently that there had been no need to punish the countryside as had been required to "terrify the minds of the mountaineers of Scotland or Wales."[85]

84. Madison, *Notes,* 485. David P. Szatmary, *Shays' Rebellion. The Making of an Agrarian Insurrection* (Amherst: University of Massachusetts Press, 1980), 78–79. Whittemore, *General of the Revolution,* 204.

85. William Pencak, "'The Fine Theoretic Government of Massachusetts is Prostrated to the Earth': The Response to Shays' Rebellion Reconsidered," in *In Debt to Shays: The*

Shays' Rebellion was only the most manifest of potentially explosive agrarian unrest elsewhere in New England. Seen as representative of dissent elsewhere, it paralleled what Pencak describes as an attempt "to supplant a social order based on republicanism and a communitarian vision of civic virtue with a minimal state government guaranteeing free pursuit of private and town interests." Such dissent challenged much of the Revolutionary settlement. Even as ratification was being discussed in December 1787, a riot in Carlisle, Pennsylvania, "one of the most widely reported events during ratification," had been settled only by the intervention and mediation of the militia, in an exercise of what its closest student has called "plebeian constitutionalism." A minority, even within the ranks of Antifederalists, who harbored deep reservations about the Constitution, these dissenters were widely feared as threats to the survival of the states and the republic.[86]

While the militia as a means for quelling local unrest had more attraction to Federalists in Philadelphia, Antifederalists still harbored fears of federal suppression or—using the very same term used in the Scottish militia struggle—of being "disarmed" prior to subjugation. Madison understood this fear and had sought to assuage it in Philadelphia. In the August militia debates, Antifederalist Elbridge Gerry of Massachusetts had objected to federal training of the militia. "He had as lief let the Citizens of Massachusetts be disarmed," Gerry asserted, "as to take the command from the States and subject them to the Gen[era]l Legislature. It would be regarded as a system of Despotism." Fear of being "disarmed" along the lines of the Scots after 1745 was never far from the minds of the founding generation, and they used the term repeatedly. The New Hampshire ratifying convention proposed to Congress amendments that there be no standing army, no quartering of troops, and that "Congress shall never disarm any Citizen unless such as or have been in Actual Rebellion."[87]

Seen in its transatlantic context, New Hampshire's mention of rebellion takes on new meaning, for it suggests the experience of the Scots as a model. Such speculation is reinforced by the process of ratification in North Carolina, where ratifiers had good reason to recall the lessons of the '45.

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*Bicentennial of an Agrarian Rebellion,* ed. Robert A. Gross (Charlottesville: University Press of Virginia, 1993), 128–32, 142.

86. Ibid., 124. Saul Cornell, *The Other Founders. Antifederalism and the Dissenting Tradition in America, 1788–1828* (Chapel Hill: University of North Carolina Press, 1999), 109–14. George Washington referred to "combustibles in every State" endangering the republic with threats of violent insurrection. Higginbotham, "Federalized Militia Debate," 43–44.

87. Madison, *Notes,* 513. Akhil Reed Amar recognizes the presence of a general, nonspecific fear of being disarmed: "The Second Amendment was designed to make clear that any such congressional action was off-limits" (*Bill of Rights,* 50). He provides no historical background or support for this claim, however. *Debate on the Constitution,* 2: 552.

After that failed rebellion, thousands of Highanders had fled to Carolina. Though primarily driven by grinding poverty, like other many emigrants from the British Isles they did not forget their past and kept in touch with kin at home. Studying the Highlanders of North Carolina, Bernard Bailyn explains how this cultural continuity was preserved "above all in family correspondences maintained for decades by members of families divided between the two continents. Such transatlantic networks were common in the eighteenth century, and were well known to everyone familiar with the process of emigration."[88]

Settling by the thousands in the southeastern part of the colony, they had been rudely reminded of the cost of being declared rebels in 1771, when many of them joined the "Regulation," an uprising aimed at corrupt and negligent local officials. Using the authority granted by the hastily enacted "Johnston Riot Act"—drafted by the Scots-born Samuel Johnston in the assembly—Governor William Tryon had smashed a Regulator force at the battle of the Alamance. Both sides, writes a recent student of the political culture involved, were engaged in a contest over the "determination of legitimacy" regarding the use of armed force. Attempting to exercise a "careful riot" to press their demands, the Regulators ran up against a legislature whose new riot act offered a contrary definition of legitimate force and expanded the governor's powers and established the sole legitimacy of the organized colonial militia.[89]

Memories of violence and retaliation continued to play a role in North Carolina politics in the Revolutionary era. Many Highlanders, remembering retributions like those after the '45, remained Loyalist in the Revolution and were punished for their choice by victorious Whigs after the Battle of Moore's Creek Bridge in 1776 with punitive raids and confiscation of their property, including weapons. With independence, North Carolina was the only state participating in the Philadelphia Convention to refuse ratification in 1788. "When we consider the great powers of Congress," warned Revolutionary officer William Lenoir at the ratification convention that rejected the Constitution, "there is great cause of alarm. They can disarm the militia." By refusing ratification, the convention defied efforts by

88. Bailyn, *Voyagers,* 502–6, quotation at 503.

89. For an examination of these competing notions of the legitimate use of arms, see Wayne E. Lee, *Crowds and Soldiers in Revolutionary North Carolina: The Culture of Violence in Riot and War* (Gainesville: University Press of Florida, 201), 46–47, 72–73, 94. "An Act for Preventing Tumultuous and Riotous Assemblies" can be found in full in *The Regulators in North Carolina: A Documentary History, 1759–1776,* ed. William S. Powell, James K. Huhta, and Thomas J. Farnham (Raleigh: [North Carolina] State Dept. of Archives and History, 1971), 327–32. Anyone opposing the militia and refusing to lay down his arms was declared a traitor.

its Federalist governor, the same Samuel Johnston who had opposed the unorganized militia of the Regulators, to approve it. After refusing to ratify, its convention articulated demands that imply the cultural and political memories of its Highlander emigrés and descendants. On first glance, its demands were unexceptional: using the same language as its Virginia neighbors, the Carolina convention provided in its Declaration of Rights a provision against standing armies and declared, "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. . . ." But the Carolina convention, meeting in the heart of Highlander country, also went a step farther. Less well known among its proposed amendments to the federal Constitution, after the more common general opposition to a standing army (allowable on a two-thirds vote of Congress, however) and a requirement of state control of the militia, was its mention of rebellion: "That Congress shall not declare any state to be in rebellion, without the consent of at least two thirds of all the members present in both houses." If the federal government wished to use armed force against a state as Parliament had done to Scotland in 1745, it would require a super-majority.[90]

Even before the Philadelphia convention had completed its work, George Mason expressed his suspicions about federal intentions in a letter to Thomas Jefferson, informing his colleague in Paris of a federal authority "whereby, under Colour of regulating, they may disarm or render useless the Militia." At the ratifying convention in Richmond, he remained suspicious: "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them." Pennsylvania had witnessed two brushes with governmental attempts to disarm the populace, and both episodes were raised during the ratification contest. Virginia's George Mason lectured his listeners on Pennsylvania Governor Sir William Keith ("an artful man"), who had tried in the late 1740s "to disarm the people" of Pennsylvania as "the best and most effectual way to enslave them." In December 1787 the new commonwealth's Supreme Executive Council, in a misguided attempt to assure that all weapons be functional, had ordered the collection "of all the

90. Duane Meyer, *The Highland Scots of North Carolina* (Raleigh: [North Carolina] State Department of Archives and History, 1963), 65–68, notes that many Highlanders had come from Argyllshire, home of the Campbells and the Duke of Argyle, who had defeated the Jacobites in 1715. Elliot, *Debates,* 4: 203, 244–45. Compare with Veit et al., *Creating the Bill of Rights,* 12, 19–20. Congress submitted the Bill of Rights to the states in September 1789, and North Carolina ratified the Constitution in November. Louise Irby Trenholme, *The Ratification of the Federal Constitution in North Carolina,* Columbia University Studies in History, Economics and Public Law #363 (New York: Columbia University, 1932), 233.

public arms . . . [and] have them repaired." Pennsylvania Antifederalists made great political capital out of the move, and the next month the Council had to direct all city and county lieutenants, "as soon as the public arms are repaired, to deliver them to the battalions under their command, apportioning them to the number of men in each, take receipts for them, and make report to Council." Not surprisingly, this episode prompted a snide reminder by one convention speaker that "I hear no more of the attempt to execute the order of Council to disarm the militia. . . ."[91]

Jealous of their right to bear arms in local militias, Americans distrusted any efforts to limit enrollment and create a politically contrived select militia. Alexander Hamilton as "Publius" expressed his views with too much candor when he acknowledged the widespread American distrust of a standing army but proposed "the formation of a select corps of moderate size" in *Federalist* #29. Madison leapt into the fray to qualify his collaborator's politically damaging argument. Trying to repair the damage yet not make "Publius" appear contradictory, Madison joined the militia debate in *Federalist* #46 only three weeks later. Not expressly recanting on the select militia, Madison implicitly endorsed a more general militia by discussing a force of "near half a million of citizens with arms in their hands, officered by men chosen from among themselves"—clearly too large to be a very "select" militia. Antifederalist "Federal Farmer" had no patience with the idea of a select militia either and wished to tar it by association with transatlantic reaction and monarchism. "The mind that aims at a select militia," he sneered, "must be influenced by a truly antirepublican principle." Pennsylvanian John Smilie, an Irish emigré who later voted against ratification, warned that "when a select militia is formed, the people in general may be disarmed."[92]

Despite such resistance to a select militia, no consensus emerged on exactly how universal a nonselect militia would be. In Richmond delegate George Nicholas expressed his own dismay that two of the state's leaders, George Mason and William Grayson, were divided over a select militia and unable to clarify the issue for others: "One objects because there will be a select militia—Another objects because there will be no select militia—And yet both oppose it on these contradictory principles." Whatever was intended for the federalized militia, on the state level there existed no reluctance to exclude. The New Hampshire legislature, whose ratifying convention proposed an amendment barring Congress from disarming "any

91. Mason to Jefferson, May 26, 1787, *Documentary History of the Ratification,* 18: 79. Elliot, *Debates,* 3: 378–80; *Documentary History,* 17: 252, 253.

92. Hamilton, *The Federalist* #25, 162; #29, 183–84. Madison, ibid., #46, 321. "Federal Farmer," "An Additional Number of Letters to the Republican," May 2, 1788, *Documentary History,* 17: 363; 2: 509.

Citizen unless such as have been in Actual rebellion," the year before had nevertheless excluded "Quakers, Negroes, Indians, and Mulattoes," among others, from militia service demanded of "all able-bodied male persons within the state, from sixteen years old to forty."[93] "All," therefore, might not truly include "all."

The right to bear arms and to serve in the militia must be seen in its relation to similar civic rights. The right to bear arms in the militia was, like that of serving on juries or voting, an individual right exercised collectively. Madison implied this meaning when he argued at Richmond that a militia was the best way to counter the need or threat of a standing army, "and the certainty of this protection from the whole will be a strong inducement to individual exertion." Few political writers or leaders on either side of the Atlantic, of course, believed that the suffrage should be open to all; common British and American political belief held that voting should be limited to those owning a minimum of property as a stake in society. The right to participate in militia service, therefore, should be understood as similar to that of voting.[94] But suffrage requirements were left to each state; participating in federal elections was dependent on qualifications for state voting. While voting, an individual right to collective participation, could be determined (and guaranteed) by the states, the qualifications for keeping and bearing arms in a state militia were not expressly set out in Article 1, Sections 15 and 16—or at least not clearly enough to satisfy Antifederalist doubters: Congress was empowered to "provide for organizing, arming, and disciplining, the militia."[95] Indeed, there was no express guarantee that the federal government would not exclude—disarm, that is—those whom it wished to prevent from participating in the militia.

This worry must be examined together with concern over the decline of the militia in England and its prohibition in Scotland. Together they provide a context of a resonant shared expression bearing directly on a vital interpretive problem in the historical meaning of "the right of the people to keep and bear arms" and how it relates to the Second Amendment's preamble, "A well regulated militia, being necessary to the security of a free state. . . ."

93. Ibid., 10: 1314. "An Act for Forming and Regulating the Militia Within the State of New Hampshire" [1787].

94. Elliot, *Debates,* 3: 381. *Documentary History,* 17: 142. Some states, in fact, extended the right to vote to propertyless war veterans. Amar notes this fact (*Bill of Rights,* 48–49) but joins war service and voting as cause and effect, the latter being a reward for the former. They are more properly seen as substantively very similar rights deriving from the same principle. In fact, the act disarming the Highlands in 1715 allowed peers and any man possessing £400 "*Scots,* or more, or who is otherwise qualified to vote at elections of parliament-men" to keep weapons. 1 Geo. I, c. 54. It repeated this qualification in the 1746 disarming statute. 19 Geo. II, c. 39.

95. U.S. Constitution, art. 1, sec. 4, clause 1; art. 1, sec. 8, clause 16.

What Congress meant by including this preamble has not been explained since Sanford Levinson in 1989 remarked that the preamble to the Second Amendment "seems to set out its purpose" but leaves us without guidance. "No similar clause," he continues, "is a part of any other amendment." Levinson nevertheless refrains from drawing any definitive meaning from the preamble, noting that it "presents unexpected difficulties in interpretation." More recently, however, Eugene Volokh has responded to Levinson's challenge and has suggested that the preamble should not even be seen as articulating a "purpose," but rather only as a justification for the right: that a preamble is a "justification clause" and not a "purpose clause." To so label it, however, removes the preamble from its understood context; we should look, instead, to the language and understanding of the eighteenth century, where legal writers had their own terms quite adequate to their intentions.[96]

Such an inquiry presents its own problems, of course, for legislative draftsmen in the eighteenth century had numerous sources to rely on in understanding the structure and meaning of the statutes they were to write.[97] Indeed, there existed many different types of statutes that would pose different interpretive problems. Blackstone describes a variety of statutes in his *Commentaries,* and for an enactment such as the Second Amendment he provides explanations that help us see its purpose as commanded by a preamble. He writes, "The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law." Aware of the difficulties of such evidence, he later explains, "If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament."[98]

96. Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 644, 645. Eugene Volokh, "The Commonplace Second Amendment," *New York University Law Review* 73 (1998): 793. Volokh argues that his interpretation of the meaning of the Preamble is "consistent with the general rules of statutory construction used in the late 1700s and 1800s," but does not adduce any eighteenth-century authorities. He cites, instead, three sources from 1848, 1857, and 1882—authorities whose ideas of statutory construction reflected major changes that had taken place since the 1700s. Ibid., 808, and n. 51.

97. For discussions of this variety, as well as of the historical pressures acting on their construction in this period, see William D. Popkin, *Statutes in Court: The History of Statutory Interpretation* (Durham: Duke University Press, 1999), 7–57; and David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989), passim.

98. William Blackstone, *Commentaries on the Laws of England* [1755–69], facsimile, 4 vols. (Chicago: University of Chicago Press, 1979), 1: 59–60.

Once we label the preamble a "justification clause" rather than a "proeme" as used in the eighteenth century, we begin a process of decontextualizing that separates us from its meaning at the time. To recover that meaning, we might turn to Thomas Jefferson's attempt to provide a definitive answer in his writings on the subject, and to the sources he relied on. A staunch believer in legislative supremacy and the danger of broad judicial interpretation, he regarded statutory preambles as reliable and necessary indications of lawmakers' intent and the statute's purpose.[99] In the struggle to draft the Virginia Statute for Religious Freedom in the 1780s, he and others successfully had opposed inserting "Jesus Christ" into its preamble as narrowing the bill's protections. Its rejection "by a great majority," he recalled, preserved their intent and the bill's purpose and was "proof that they meant to comprehend within the mantle of its protection" non-Christians as well.[100] To make statutes as clear as possible (thereby not requiring interpretation), Vice President Jefferson, as president of the Senate, turned to his legal learning to aid in compiling his *Manual of Parliamentary Practice.* When bills were committed to committee for drafting, the preamble was to state its purpose. Citing "7 Grey, 431" in support, Jefferson referred to a Parliamentary debate of 1680 when it was objected that by deleting the words in question from the preamble, "there is no need of this Bill." Because preambles defined the purpose of a statute, he wrote, legislators were even permitted to write and vote on them last, rather than first, despite the general procedural rule that the provisions of a bill were to be considered in their "natural order." Otherwise, the enacting language might diverge from the preamble and render it no longer "consistent" with the bill.[101]

99. David Thomas Konig, "Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication," in *The Many Legalities of Early America,* ed. Christopher L. Tomlins and Bruce H. Mann (Chapel Hill: University of North Carolina Press, 2001), 97–117. As a law student, Jefferson commonplaced a case that turned on the meaning of a preamble. Item #469 in (unpaged) Legal Commonplace Book, manuscript in Library of Congress.

100. "Autobiography," in *The Writings of Thomas Jefferson,* ed. Andrew A. Lipscomb and Albert Ellery Bergh, 20 vols. (Washington, D.C.: Thomas Jefferson Memorial Foundation, 1903–04) 1: 67.

101. Thomas Jefferson, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States,* 2nd ed. (George Town: Milligan and Cooper, 1812), in *Jefferson's Parliamentary Writings,* ed. Wilbur Samuel Howell (Princeton: Princeton University Press, 1988), 383–84. Jefferson's citations were, respectively, Anchitell Grey, *Debates of the House of Commons, from the Year 1667 to the Year 1694* (London, 1769), 431; Henry Scobell, *Memorials of the Method and Manner of Proceedings in Parliament in Passing Bills, Together with Several Rules & Customs, which by Long and Constant Practice Have Obtained the Name of Orders of the House, Gathered by Observation and out of the Journal Books from the Time of Edward 6* (London, 1670), 50.

So important was a preamble that many legislators were criticized for drafting them with patently untrue statements in order to direct the application of the statute. For this reason, Blackstone likened recourse to a preamble to consulting similar laws, because it was the role of the preamble to identify the purpose of the law. "Of the same nature and use [as the preamble] is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point." The preamble, then, was more than merely a "justification" for a statute, but a positive guide for understanding the purpose of the text of the statute in relation to other enactments. In the words of Giles Jacob, whose law dictionary enjoyed wide usage in the eighteenth century, "The *Preamble* of a *Statute* which is the Beginning thereof, going before, is as it were a Key to the Knowledge of it, and to open the Intent of the Makers of the Act; it shall be deemed true, and therefore good Arguments may be drawn from the same."[102] Blackstone's point about the preamble as a referent to other laws may contribute toward explaining why James Madison preferred placing the proposed amendments within the body of the Constitution rather than as a separate addition: placed within the body of the document, adjacent to the provision it was to affect, the purpose of each amendment would become clear. Set apart at the end and removed from the militia clauses of Article 1, Section 8, its purpose was less clear. With a preamble, however, its purpose was clarified by express reference to the militia.

The amendment, therefore, was a militia amendment. Seen as a declaratory statute, its purpose becomes more clear. Such an enactment is made "where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium,* and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been."[103]

What was the common law regarding the keeping of arms? Blackstone, again, provided an answer: it was an "auxiliary right of the subject . . . of having arms for their defence, suitable to their condition and degree, and such as are allowed by law." Citing the Bill of Rights, he described it as "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." It is important to note

102. Lieberman, *Province,* 187. Blackstone, *Commentaries,* 1: 60. Giles Jacob, *A New Law-Dictionary. . . . The Sixth Edition. The Law-Proceedings being done into English, with Great Additions and Improvements, to this time* (London, 1750), s.v. "Statute."

103. Blackstone, *Commentaries,* 1: 86. The Latin translates, "as a lasting testimony of the thing." *A Translation of All the Greek, Latin, Italian, and French Quotations which occur in Blackstone's Commentaries. . . .*, ed. J. W. Jones (Philadelphia: T & J. W. Johnson, 1889), 10.

that this right was classified with "auxiliary" rights, which he also referred to as "subordinate" rights. Though he referred to each of them as a "right appertaining to every individual," and gave as an example "the right of petitioning the king," even that expressly described "individual" right to petition was not an unfettered personal right as understood today, but was limited to institutional channels for its exercise. Orders made in 1689 and 1699 restricted the right to petition by requiring that all petitions be presented to Parliament by a member of the Commons. Only London petitioners were exempted, and no petitions on money bills were to be accepted.[104]

Seen in its proper eighteenth-century context of British law and transatlantic politics, therefore, the preamble to the Second Amendment gains new meaning. Declaratory of the common law and addressed to the practical goal of guaranteeing that there be no repeat of provincial oppression or insurrection owing to the lack of an adequate local militia, the Second Amendment borrowed directly from the preamble of the English Militia Act of 1757. This background clearly informed American consideration of the matter and provided a model for them to follow when Congress drafted the amendment. At the Richmond convention, William Grayson, who would take office as one of Virginia's first two Senators, criticized the inadequacy of the Constitution's militia clauses and suggested protection along the lines of England's law: "He wished to know what attention had been paid to the militia of Scotland and Ireland, since the Union; and what laws had been made to regulate them? There is, says Mr. *Grayson,* an excellent militia law in England; and such as I wish to be established by the General Government. They have 30,000 select militia in England. But the militia in Scotland and Ireland are neglected."[105] Placing the reference to the militia in a preamble replicated the concerns about arms, liberties, and the security of the community as guaranteed by an individual's right to serve in a well-regulated militia.

## III. Conclusion

We may conclude with the text itself, whose alterations as it progressed through the stages of drafting reveal the importance of the preamble and provide powerful evidence for the influence of the transatlantic context and the Scottish militia debates in Britain. As presented to the House on 8 June

104. Blackstone, *Commentaries,* 1: 138–39. Cecil S. Emden, *The People and the Constitution: Being a History of the Development of the People's Influence in British Government,* 2nd ed. (Oxford: Clarendon, 1956), 75–76.

105. *Documentary History,* 10: 1306.

1789, the amendment was to read, "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." By 28 July, the House Committee of Eleven drafting amendments reported that it had made two significant changes. One was to rearrange the clauses within the text to create a preamble where none had existed before: "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms." This version also now added the term "composed of the body of the people" to describe the militia. These changes survived two months of debate in the House, but two weeks of Senate debate led to the removal of references to "the body of the people" and to exemption on religious grounds.[106] When Congress sent the Second Amendment to the states for ratification, therefore, the amendment retained its form with a preamble. Beginning, as did the Militia Act of 1757 with a declared purpose, it read, "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."

Why the Senate preferred Madison's original wording and deleted wording about "the body of the people" has been debated vigorously, but the context presented in this essay suggests agreement with Jack Rakove's contention that the changes constituted a rejection of "the option of engrafting a more expansive definition of the militia onto the Constitution" and sought to allow Congress the authority to determine the nature of future militias. It would also accord with Rakove's account of the debates in Philadelphia in August 1787, where no one debating the militia clauses even implied that the "militia" might be understood as any spontaneously rising group of armed men.[107] As a historically *descriptive* matter, therefore, we must conclude that the right was understood in its peculiarly eighteenth-century meaning, articulated in response to a shared transatlantic legacy of constitutional concern over the past, present, and future effectiveness of local militia in Scotland and the American states. That meaning does not accord well with either of today's polarized *normative* programs of "individual" or "collective" right. As an individual right exercised collectively, it more properly responds to Saul Cornell's call for a new paradigm and corresponds to the construction put on it by Richard Primus; namely, "a

106. The final House version also contained several slight stylistic changes. The progress of textual change can be followed in *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins,* ed. Neil H. Cogan (New York: Oxford University Press, 1997), 169–76.

107. Rakove, "Highest Form of Originalism," 126, 128–29, 159.

popular right to bear arms for the sake of constituting a militia,"[108] As an eighteenth-century right articulated in response to eighteenth-century concerns, it might therefore more properly belong with such rights as the Third Amendment's attention to the quartering of troops or to Article 1's ban on the granting of titles of nobility. Whether this means that the Second Amendment is a "virtual nullity" remains another matter.[109]

That question opens a much larger issue and asks us to ponder, as Rakove has suggested, whether "fears rooted in the historical memories of the eighteenth century should still take priority over the judgments we are entitled to reach after two centuries of constitutional self-government." But that is a normative question, and this article has only attempted to provide a descriptive historical context for the right. In so doing, it has attempted to expand our understanding of the historical context in the hope that context can inform constitutional interpretation. It might, ironically, have the opposite effect. As Neil Richards has demonstrated, "the more sources that are used, the more malleable a tool history can become in the hands of the Court."[110] But at least the dialog called for almost two and a half decades ago can be open and vigorous, supplied with the most sophisticated models and historically sensitive research that historians can provide.

108. Primus, *American Idea,* 102–3.

109. Levinson describes each of these as an "ignored patch of text in our constitutional conversations" ("Embarrassing Second Amendment," 640). See also Yassky, "Second Amendment," 665.

110. Rakove, "Highest Form of Originalism," 164–65. Richards, "Clio," 859.