Conceptions of Rights, Growing Collectives, and the Question of Federalism:

Historical Controversies of the Right to Bear Arms in Early America

Arthur Halliday

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Introduction, or, a Right Defined by Conflict

The right to bear arms in the American colonies and the early United States was a collective right—but that is an oversimplification. Rights can be collective or individual in multiple ways: in purpose and in object—in the group protected by the right and in the group empowered by the right. The right to bear arms in 18th and early-19th century America was explicitly intended to provide for collective security—but it was often given to and secured by both individuals and collectives. Whether individuals or collectives were the object of the right to bear arms, the right was formulated in such a way as to provide for militias, be they conceptualized as a band of arms-bearing individuals or a collective fighting force—which were given the civic responsibility for common defense. The key question to the scope of the right to bear arms was not whether it was for the benefit of the collective or the individual, but rather which, and which sorts of, collectives were intended to benefit from and regulate it. Too often, the collective is assumed to be large and amorphous, encompassing the whole nation of the United States. However, time and again, collectives in early America were conceptualized in a limited and strict fashion. Small communities ran militias, and the binding forces in the communal militia came from ties to intimate collectives. Colonies, and eventually states, were larger collectives that had an unstable and complicated relationship with local militias. The nation, as a collective, was generally subordinated to collective ties to state and, perhaps even more frequently, to locale in the minds of early Americans.

In providing for an armed and regulated militia, the right to bear arms was a tool to secure other rights that early Americans saw, in a Lockean framework, as natural to all men. It is crucial to remember that, while the right to bear arms had value on its own terms as a measure of individual and communal self-reliance, it also had incredible social importance as a means of defending a rights-based social contract. American rights were conceptualized as rights held by

'the people' both as a protection against tyranny of the majority and against regulation of one collective by another collective.[1] In the colonial period and the years shortly thereafter, the locality and the state were seen as the primary guarantors and protectors of rights, and thus those collectives were the most important for individual rights. The federal government, the larger, national collective, was often conceptualized as more of a threat to individual and collective rights than a provider of them. Thus, it makes sense that the right to bear arms resided in small collectives with, common wisdom claimed, less potential for tyranny. It also made sense to consider the right to bear arms as a right to resistance against those who would deny Americans their natural rights. As the decades went by, states began to exercise their authority in ways that provoked resistance from their own local militias. Governors realized that state and local militias could oppose them just as easily as they could oppose the federal government, and the power of the federal level to suppress such uprisings was important to holding together medium and large collectives. Thus, the federal government as both a cohesive protector and a guarantor of rights, took on a greater rights-giving responsibility and could be conceptualized as a collective worth protecting because of these services it provided. During the first decades of the American nation, protecting the federal collective came to mean, more and more, protecting individual rights.

In debates over the right to bear arms in the Constitution and the Bill of Rights, the question of what form the right would take was often less important than the question of who would be allowed to regulate the right. It was taken for granted that all rights, and especially those aimed at collective protection, were subject to regulation—and indeed required it. States fought the federal government for control of the militia, as provided for by a right to bear arms. In short, collectives of different sizes struggled over which collectives would be the object of collective protection, and which would share in collective rights. Through the process of

[1] Wood, Gordon S. 2012. *The Idea of America: Reflections on the Birth of the United States*. New York: Penguin, 304.

consolidating federal power, the right to bear arms came to apply to larger collectives, eventually coming under the authority of the federal government, as the Constitution gave the nation collective power over the militia writ large. This scaling up of the right to bear arms was accompanied, and perhaps brought about, by the deterioration of the right in the small collectives where it had traditionally thrived. In the colonies, civic republican ideals of selflessness and virtue in the community held militias together as strong, collective institutions. Thus, the right to bear arms and the duty of participation in the militia were civic republican rights, with a strong collective objective and an ethos of solidarity. This meant that rights resided emphatically in the community, and were not held for individual interests, but for collective duties that promoted individual gain.

The early history of the right to bear arms in America is thus defined by two struggles: the vertical struggle between collectives in a federalist system, and the ideological struggle between an idealized Lockean individual rights framework and a practical, civic republican conception of community and rights. Both points of conflict had important implications for the status of various collectives in early America and the relationship of the individual to collectives of various sizes. Eventually, the model of Lockean natural rights secured in civic republican, duty-bound communities became insufficient to adequately protect the United States from foreign threats, and the right to bear arms and the militia duty came to be regulated by larger collectives, with the federal government taking a larger role in both the collective defense and the protection of rights. With the decline in civic republican virtue, the Lockean model lacked the strength of interpersonal bonds to knit together communities cohesively enough to sustain small-scale militia control and, thus, to situate and defend rights in small collectives. Lockean rights rely on defending social structures that are clearly rights-securing—this initially meant states and

localities, but it shifted during the first decades of nationhood to include the federal government, while moving away from smaller collectives.

Civic Republicanism and Lockean Rights

Civic Republicanism

Civic republicanism is a reinterpretation of republican tradition. Historically, the republican tradition in America stands for the principle that, as James Madison put it, "The people, not the government, possess absolute sovereignty."[2] Among core values of classical republicanism were wisdom, patriotism, vigilance, and virtue. These values were thought to promote the interest of the whole, in defiance of the primacy of the interests of the many parts, of society.[3] The most common iterations of classical, Roman-inspired, republicanism valued a homogenous population. However, Madison and Thomas Paine, two of the most important republican thinkers in the early United States, attempted to construct a shift away from homogeneity and a reliance on limited, controlled citizenship. Instead, they built their republican ideal on the values of institutionalized religious freedom and natural, individual rights.[4] This brand of republicanism still placed great value on equal citizenship, where all citizens had equal footing in the political process and equal social 'goodness.'[5] In this society of equals, citizens—not the traditionally strong government—were responsible for social cohesion. Individual citizens were asked to sacrifice their private interests in pursuit of the public good. In a significant departure from monarchical beliefs, republicans held that the government did little for social life and cohesion—

[2] James Madison, "Report on the Virginia Resolutions" (1800).
[3] Kalyvas, Andreas and Ira Katznelson. 2003. *Liberal Beginnings: Making a Republic for the Moderns*. Cambridge: Cambridge University Press, 103.
[4] Ibid., 105.
[5] Wood, *The Idea of America,* 207.

this was a product of the people.[6] As part of a strong, and not necessarily governmental, collective, Paine wrote, the anarchy of pre-governmental society is replaced by a collective security. Previously atomized individuals would have a realization: "It would occur to them that their condition would be much improved, if a way could be devised to exchange that quantity of danger into so much protection, so that each individual should possess the strength of the whole number."[7] This is strikingly similar to the Lockean ideal of banding together to escape the state of nature—and it is clear that Paine draws on Locke in envisioning the social nature of men. Classical republicanism, and American Anti-Federalism, goes farther than Locke is willing to go on the social nature of men, asserting that citizens achieve their highest degree of moral fulfillment from engaging in acts of self-governance.[8]

American intellectual historian Gordon S. Wood cautions that, despite common narratives, the republican tradition in the United States was not replaced by a political culture of Lockean liberalism.[9] Instead he emphasizes that in 1776 there were really thirteen republics in the new America—each state being its own homogenous and independent polity.[10] This idea was pervasive, and few during the 1770s envisioned the future of the American colonies as anything more than a confederation.[11] Within each republican state, the governments thought of themselves very much in Madison and Paine's republican framework. They sought to promote a singular public interest that took precedent over the plethora of private interests and individual rights.[12] The New Hampshire Constitution included an understanding of "government being instituted for the common benefit, protection, and security of the whole community, and not for

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[6] Ibid,, 219.
[7] Thomas Paine, "To Thomas Jefferson" (1789).
[8] Wood, Gordon S. 1993. *The Radicalism of the American Revolution*. New York: Vintage, 104.
[9] Kalyvas and Katznelson, 12.
[10] Wood, *The Idea of America*, 232.
[11] Ibid., 234.
[12] Ibid., 301.

the private interest or emolument of any one man, family, or class of men."[13] Thus, early American republicanism separated the public and the private, creating a private sphere outside of most governmental institutions—with the notable exception of the judiciary.[14] The least democratic institution in the new nation was the one called upon to regulate the individual in private. This meant that the people, as a political entity, lacked the democratic authority to directly regulate the private sphere.

Civic republicans, largely 20th and 21st century legal scholars, may be grossly generalized to argue that the American constitution is a framework for "an organic community composed of socially constructed individuals, who join together in government to identify and pursue civic virtue."[15] Civic virtue is all-important to civic republicanism, and yet it is a slightly ambiguous concept. It is the product of collective action—or at least certain types of collective actions—and is motivated by a certain sort of noble sense of communal pride. When a body of self-governing citizens deliberates with a selfless, collective mindset, then the product of the deliberation is civic virtue—at least in the mind of legal scholar Steven Gey.[16] The ideal civic republic is a community of citizens who are selflessly committed to each other and to their common goals—perhaps even at the expense of their own individual interests.[17] In an idea reminiscent of Rousseau's general will, the civic republican citizen is duty-bound to internalize the values of collective determination and to consider the community's values as his or her own—allowing collective values to supersede individual, selfish, values.[18] Of course, this is an extreme point on the continuum of civic republican thought—but it is a useful reference for contrasting the

[13] The New Hampshire Constitution, Bill of Rights, Article 10 (1784).
[14] Wood, *The Idea of America*, 310.
[15] Gey, Stephen. "The Unfortunate Revival of Civic Republicanism" in *University of Pennsylvania Law Review*, 141(3), 806.
[16] Ibid., 810.
[17] Ibid., 818.
[18] Ibid., 825.

collective nature of civic republicanism with the comparatively individualistic and atomized Lockean theory. Detractors of civic republicanism point to this aspect of the philosophy as brainwashing or enforced ideals—but proponents of civic republicanism see this pursuit of collective thinking as necessary to a group polity, wherein individuals cannot always be trusted to do what is right for the political community. Seen more positively, perhaps, the individual can be educated to make decisions that are more in line with the public interest than those that ze would make out of personal interest and ignorance of certain civic virtues.[19] With this skepticism of individual decisions, civic republicanism puts its faith in dialogues between equal members of society, which will determine social values in a discursive setting.[20] In this political philosophy, the government is given power to suppress factional tendencies, which arise naturally, and, in doing so, make sure politics is aimed at a common good.[21]

In criticizing civic republicanism, Steven Gey concludes that, for the civic republican, "individual rights exist only when they coincide with the public values."[22] In this analysis, Gey exposes himself as a proponent of a radical and often unfavorable stance on civic republicanism. A more positive view of the facets of civic republican that Gey overreacts to suggests that the civic republican tradition emphasizes the values of community and civic spirit—and the role that individual rights play in these values. Instead of natural laws and rights that exist before, after, and outside of society, civic republicanism views rights as socially contingent truths born from dialogues between citizens.[23] With this view, the individual rights codified in the Bill of Rights are socially constructed, and thus subject to regulation and truncation in pursuit of the common good in a way that the Lockean, liberal tradition is often unwilling to accept.

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[19] Ibid., 830.
[20] Ibid., 841.
[21] Ibid., 845.
[22] Ibid., 855.
[23] Ibid., 886.

Lockean Liberalism and Individual Rights

In the Lockean understanding of political communities, individuals come to live together in communities to preserve their natural rights, among them a right to self-defense, and in doing so these individuals develop certain limited obligations to each other.[24] Because society defends the individual, the individual has a duty to defend the society. In fulfilling this duty, the individual protects hir own rights, which are secured by the political community. Thus, rights and duties are two sides of the same coin. One implies the other.

This understanding of rights and duties was the dominant one in colonial America. Many British colonists believed, as Locke did, that "freedom is not, as we are told, 'a liberty for every man to do what he lists'…but a liberty to dispose and order as he lists his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own."[25] To many colonists, liberty required regulation—otherwise it was mere anarchy. In the context of the right to bear arms, this meant that the citizenry could not simply be armed; it must be armed and regulated. Without regulation, militias would be mobs, not protective associations.[26]

To glean a Lockean opinion on the individual right to bear arms, one must look to Locke's writings on self-defense. He states, "Men uniting into politick societies, have resigned up to the publick the disposing of all their Force, so that they cannot employ it against any Fellow-Citizen, any farther than the Law of the Country directs."[27] Thus, under the Lockean rights framework, though he affirms that men have an absolute right to self-defense in the state of nature, when they enter into a political community they forfeit their ability to judge situations

[24] Locke, John. 2003. *Second Treatise of Government*, ed. Ian Shapiro. New Haven: Yale University Press, 24.
[25] Ibid., 124.
[26] Cornell, Saul. 2006. *A Well Regulated Militia*. New York: Oxford University Press, 3.
[27] Locke, John. 2000. *An Essay Concerning Human Understanding* eds. Gary Fuller, Robert Stecker, and John P. Wright. New York: Routledge, 116.

where they might employ violence. In a sense, private and unregulated gun ownership was akin to the state of nature, where anarchy ensues from uncontrolled violence.[28] Regardless, the Lockean rights framework obliges the individual to duties that stem from hir rights. Still, these duties are to rights-securing institutions, and the perception of which collectives qualified for this distinction changed, scaling ever upwards (with oscillation and struggle), during the decades after the Revolutionary War. The Lockean model differs from civic republicanism in that it views rights as natural and duties as stemming from rights—instead of connecting rights to social context and limiting them for collective gain. Ultimately, while Locke has a deep appreciation for organized society, his framework of rights has much more potential for atomization into individuals with rights, participating in social duties without a sense of civic duty, than does the collectivist model of civic republicanism.

The Colonial Period

British Rights

The British understanding of the right to bear arms also contained principles for thinking about use of arms against the populace—which American colonists referred to in their resistance to British military actions. British constitutional principles clearly prohibited use of a standing army without the consent of the legislature, in its function as representatives of the citizenry. Thus, Samuel Adams argued, such force without consent was unconstitutional and could be opposed, legitimately, by armed citizens. In asserting this right to oppose tyrannical government through the right to bear arms, Adams situated himself within a history of established English legal principles.[29] Adams understood this historical right to be collective in nature. He wrote, citing

[28] Heyman, Steven. 2000. "Natural Rights and the Second Amendment" in *The Second Amendment in Law and History* ed. Carl T. Bogus. New York: New Press, 181.
[29] Cornell, 10.

William Blackstone, one of the most prominent justices and legal commentators in British history, "*Having arms for their defense* he [Blackstone] tells us is 'a public allowance, under due restrictions, of the *natural right of resistance and self-preservation*, when the sanctions of society and law are found *insufficient* to restrain the *violence of oppression*.'"[30] By invoking the right to bear arms as a "public allowance, under due restrictions," Blackstone clearly situates the right to bear arms as a collective right to citizens acting as a well-regulated militia. Were the right to be conceptualized as individual, the act of resistance would be less meaningful and would lack the force of Lockean theory. As a collective right, the right to bear arms to "restrain the violence of oppression" as exercised by a group of citizens is a refutation of the legitimacy of government action. Individuals cannot act while representing the will of a society, as individuals do not form a society in a Lockean framework. Instead, individuals come together and form a society collectively. Thus, when a government violates the terms of the social contract, it falls to the people as a collective to oppose it, for only the collective can judge when governmental action is inappropriate.[31] Were an individual to claim a right to bear arms against the government in the same way, that individual would be, through hir claim to understand what is or isn't a breach of rights, assuming to dictate rights to the rest of hir society.

Blackstone, and, in turn, Adams, draws a distinction in rights. By citing the right to bear arms as a check on governmental oppression, Blackstone conceptualizes the right to bear arms as a political safeguard—like rights to assembly and speech. Thus, the right to bear arms had an explicitly political scope, with implied duties and the collective nature of politics more broadly.[32] Blackstone elaborated on the duties of rights, writing "the rights of people that are commanded to be observed by the municipal law are of two sorts; first, such as are due *from* every citizen,

[30] Ibid., 14.
[31] Locke, *Second Treatise*, 197.
[32] Cornell, 15.

which are usually called civil *duties*; and, secondly, such as belong *to* him, which is the more popular acceptance of *rights*." He asserted that allegiance and protection were "reciprocally, the rights as well as the duties of each other."[33] Invoking this Lockean framework of rights, Blackstone articulated a duality of codified rights, which imply both right and obligation. So, the right to bear arms conferred upon citizens the right to keep and carry arms for self-defense, both individual and communal, and imposed the obligation to use their arms in a militia for the collective defense of a rights-securing society. Thus, the right to bear arms was highly contextual and meant that arms could only be used properly in certain circumstances.

In articulating their grievances against the British government and explaining their responses to them, colonists invoked their understanding of the rights they held as British citizens. The *Boston Evening Post*, reflecting on British anger over colonists keeping and bearing arms for the common defense, published an article citing the English Bill of Rights, writing "It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression."[34] With such evidence of Americans thinking about their rights as derivative of their status as British citizens, and thus in a British, Blackstonian framework, it is tempting to assume that the American right was taken from the British right. However, the British right, as codified in the English Declaration of Rights in 1689, was not meant to speak to whether or not the government was empowered to regulate the possession of arms. British subjects widely accepted this paradigm. Rather, the statute established who in the government could regulate the right. The phrase "as allowed by law" confirms that Parliament, not the King, had the power to regulate the right to

[33] Cornell, 17.
[34] Malcolm, Joyce. 1996. *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Cambridge: Harvard University Press, 145.

bear arms.[35] Thus, the idea that the colonists simply adapted the British right to bear arms must be premised on an understanding that that right was subject to regulation by the state and was by no means absolute or inalienable.[36] However, the right to resistance that Anti-Federalists claimed the Second Amendment codified may be plausibly supported in British legal history. The context of the English Declaration of Rights and Blackstone's writings originated, and that the right was explicitly made to be regulated by Parliament and not by the monarch, is important. Seen as an attempt to ensure that the right to bear arms can only be infringed upon by a (theoretically) democratic institution, the British right can easily be formulated as a right to resistance and self-defense against monarchical tyranny.[37] Indeed, English rights were, historically, conceptualized as rights held against the power of the monarch.[38]

The Militia

The right to bear arms in the American colonies, and the obligations to militia service that it implied, was typified by the minuteman. As enshrined and glorified in American history, the minuteman was legally bound to arm himself at his own expense and to be ready to muster at a moment's notice to defend his community. The ideal of the minuteman was both deeply collectivist and martial.[39] In the tradition of both American and English culture, standing armies were often taken to be tools of tyranny. A militia of citizens was anything but tyrannical. It embodied ideals of community, of the duality of right and obligation, and of the virtue of the citizen.[40] As such, the militia was central to the lives of many colonists. Living on frontiers and with a reasonable expectation of attack from Native American tribes and nearby French forces,

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[35] Bogus, Carl T. 2000. "The History and Politics of Second Amendment Scholarship" in *The Second Amendment in Law and History* ed. Carl T. Bogus. New York: New Press, 5.
[36] Schwoerer, Lois. 2000. "To Hold and Bear Arms: The English Perspective" in *The Second Amendment in Law and History* ed. Carl T. Bogus. New York: New Press, 227.
[37] Heyman, 191.
[38] Wood, *The Idea of America*, 303.
[39] Cornell, 2.
[40] Ibid., 12.

and often without a centralized police presence, militias maintained order in their communities and provided for defense from outside attack. Militias also became culturally important in their communities. Muster days were special community events, during which localities came together to train and to hold fetes. Militias were also a means of organizing citizens, and, along with the Church, functioned as important indicators of status within local society.[41]

The American colonies modified English militia traditions to meet their needs. The structures and duties of British militias were shaped by existing on an island, without the sort of threats at the borders that the American colonies faced. Every colony legislated to establish the traditionally English institutions of militia, watch, and ward—primarily occupied with defending colonial territory. Their duty was a defensive one, as offensive actions were to be undertaken with volunteer armies. [42] The distinction between defensive and offensive force was made both from the conception of militias as stemming from a right or obligation to communal self-defense and from a knowledge of the disruptive aspects of an offensively minded citizenry. Indeed, Bacon's rebellion against Virginia's colonial government prompted a 1676 prohibition against five or more armed individuals assembling without explicit permission. This act distinguished between the potentially harmful and revolutionary nature of illicit, offensive militias and the dual right and duty of individuals to carry arms in defense of the community—which was not seen as dangerous in the same way.[43]

All men, with exceptions made for the clergy, religious objectors, and black colonists, between sixteen and sixty were duty-bound to serve.[44] Service entailed, under a Massachusetts law that was similar to those of other colonies, keeping and maintaining arms and mustering for

[41] Ibid., 13
[42] Malcolm, 139.
[43] Ibid., 140.
[44] Ibid., 139.

training at least four times per year.[45] Along with expectations for keeping arms and mustering, militiamen, as the primary defense force for their communities, had duties imposed upon them as part of their right to bear arms. The Connecticut Militia Act mandated that all "listed" soldiers in the militia as well as every household "always be provided with and have in continual readiness, a well-fixed firelock…or other good fire-arms…a good sword or cutlass…one pound of good powder, four pounds of bullets fit for his gun, and twelve flints."[46] The right to bear arms, as associated with militias, was thus heavily regulated and carried with it a codified duty. This duty was not only to the individual militia member, as they were engaging in acts of individual self defense, but also to the militia member's immediate community, to their colony, and, eventually, to their nation.

As resentment of British rule built in the American colonies, militias were an outlet for opposition. Suffolk County, Massachusetts serves as an example of this aspect of resistance in the colonial militia. On September 6th, 1774, representatives of the towns in the county issued a statement, advising members of their communities to "use their utmost diligence to acquaint themselves with the art of war as soon as possible, and do for that purpose, appear under arms at least once a week." The purpose of this training, and thus of the increased urgency with which the community needed to call upon its militia, was stated as to:

> . . . Resist that unparalleled usurpation of unconstitutional power, whereby our capital is robbed of the means of life; whereby the streets of Boston are thronged with military executioners; whereby our coasts are lined and our harbors crowded with ships of war; whereby the Charter of the Colony, that sacred barrier against encroachments of tyranny, is mutilated, and, in effect, annihilated.[47]

Of course, this use of arms to resist what was understood to be British tyranny must be understood in the context of the Boston Massacre in 1770, and other similar events, when

[45] Churchill, Robert. 2011. *To Shake their Guns in the Tyrant's Face*. Ann Arbor: University of Michigan Press, 36.
[46] Malcolm, 139.
[47] Churchill, 28.

violence had been used against unarmed colonists in their communities. Thus, militias were designed to muster and respond quickly to violations of rights by standing armies—the greatest and most invasive form of tyranny.

The Right to Bear Arms as a Social Divider

The collective nature of the British and colonial right and duty to bear arms helped to define membership in civil society. As with all societies, those under British and colonial law were defined not only by membership but also by exclusion. Only full members of society could have the dual imposition and boon of duties and rights. The 1689 English Declaration of Rights enumerated a limited right to bear arms, decreeing that "the subjects which are Protestants may have arms for their defense."[48] By limiting the right to Protestants, the English right imparted an understanding of who could and could not be fully English. After the English reformation, the Protestant-majority population viewed Catholics with a deep suspicion. Never was this attitude more present than in the fictitious 'Popish Plot.' In a slew of blatantly baseless allegations, Titus Oates claimed that that conspiratorial British Catholics were planning to assassinate King Charles II. At the base of this conspiracy was a belief that Locke articulated in his *Letter Concerning Toleration*, that Catholics could not be part of a civil society because their ultimate allegiance on Earth was to the Pope—not to the Crown.[49] Thus, the English Declaration of Rights' restriction of the right to bear arms to Protestant subjects conveyed an understanding that the right to bear arms could only be for those who were subjects to the King, who would observe the obligations that came with the right, and who would be concerned, first and foremost, with the common good of the empire.

[48] The English Bill of Rights (1689).
[49] Locke, John. "Letter Concerning Toleration".

American statutes on the right to bear arms also reflected beliefs about who could be part of the collective who shared the right and duties. A 1623 Plymouth law stated: "in regard of our dispersion so far asunder and the inconvenience that may befall, it is further ordered that every freeman or other inhabitant of this colony provide for himselfe and each under him able to beare armes a sufficient musket and other serviceable peece for war…with what speede may be."[50] This legislation was, perhaps, more expansive than the English Declaration of Rights—but this scope may be ascribed to the nature of Plymouth's situation. By citing the dispersion of the people of the colony, the law shows an awareness of the increased importance of broad rights to self-protection in early colonial America. Surrounded by potentially hostile Native American tribes, many of which were provoked by colonists, settler communities had a practical need for self-defense that trumped, to some extent, ideologically driven limitations of the right to bear arms. Expanding the right to "every freeman or other inhabitant of this colony" articulated the collective not necessarily just as a political community, but also as those who were in danger and could band together to provide for the common defense.

Newport, in the colony of Rhode Island but also part of the same general region as Plymouth, also acknowledged the danger of the area. Its 1639 law specified that "noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and none shall come to any public meeting without his weapon."[51] This law illustrates the duality of the collective right to bear arms in the colonies. The first clause dictates individual conduct for bearing arms. On the face of it, a single person leaving town without the means to self-defense is not a collective concern—but rather a clear danger to the individual. However, the collective right to bear arms, and thus to collective self-defense, implicates the individual in such a way that it governs

[50] Malcolm, 139.
[51] Ibid., 139.

individual conduct and individual self-defense. Just as the individual had an obligation to protect the collective, so too did the collective have an obligation to protect the individual. Or, considered another way, the individual had an obligation to protect himself to be able to protect the collective. A man who left town unarmed could be killed, weakening the collective's ability to defend itself. The second clause of the Newport law explicitly implicated the individual in the collective defense. Public meetings were the crux of colonial politics and community, and thus needed to be defended. Furthermore, public meetings were also frequently militia muster days, and these required community members to show up ready to do battle as part of their duty to serve in the community's militia.

In 1640, Virginia law obligated "all masters of families" to outfit themselves and "all those of their families which shall be capable of arms (excepting negroes) with arms both offensive and defensive."[52] While the Plymouth law specified that the right to bear arms belonged to freemen, it is telling that the Virginia law specified that it did not apply to black inhabitants of the colony. This was of special concern to Virginia and other colonies with large slave populations. While slaves were integral to Virginia's economy as the primary source of labor in cotton and tobacco production, they were excluded from the political, social, and cultural community of the colony. In fact, slaves, as well as free blacks who might consort or sympathize with them, were seen as a clear threat to colonial stability. With such a large slave population in many colonies, white colonists were aware of the danger an armed slave revolt could pose. The 1739 Stono Rebellion in South Carolina was the largest slave revolt in the mainland American colonies.[53] Led by a literate Catholic slave named Jemmy, a group that swelled to nearly 80 slaves wreaked havoc on colonial society. They attacked a store, taking weapons and ammunition. With these arms, the

[52] Ibid., 139.
[53] Schuler, Jack. 2009. *Calling out Liberty*. Jackson: University of Mississippi Press, 4.

escaped slaves burned seven plantations and killed 20 white colonists when confronted by an organized militia. Considered outside of the often-convoluted ideologies that justified slavery, the divide between the capacities of black slaves and white colonists to have rights and their corresponding duties was one of stake in society. Colonists profited from their membership in slave-holding communities, while slaves did not. Thus, colonists could have the right to bear arms and could be expected to fulfill the duties that came with it—while slaves could not be given such rights or held to such standards because they did not have a stake in the political system. The same could be said for Native Americans, generally excluded from the right to bear arms, who had many valid reasons to actively oppose colonial society. Thus, we can conclude, exactly who was given the right to bear arms was a reflection of who could be trusted to actually protect society—and thus the right was intended to preserve, not destabilize, social order.

Post-Colonial Codification

The Right to Bear Arms in State Constitutions

The first codifications of the right to bear arms in post-colonial American were made by the states. None of the first state constitutions explicitly protected an individual right to keep arms for individualized self-defense, though such a right was considered in both Virginia and Massachusetts.[54] Instead, Virginia's Declaration of Rights proclaimed:

> That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in times of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, civil power.[55]

This passage introduces some of the important issues at play in the codification of the right to bear arms in the newly independent United States. In stating that the militia should be "well

[54] Cornell, 17-18.
[55] The Virginia Declaration for Rights (1776).

regulated," Virginia acknowledged the need for state power to restrict and modify the right to bear arms for the collective good of the protection provided by militias. Furthermore, the militia is to be "composed of the body of the people," which brings into question what is meant by "the people." Was this an indication of an individual right, where "the people" implicated every individual? Or, was it a reference to the collective, which was duty-bound to serve in protection of a collective safety? By condemning standing armies, the Declaration echoed popular Anglo-American sentiments, and appealed to Anti-Federalist worries that a standing army would replace militias and thus threaten to impose tyranny of the kind that the Revolution had fought against.

Constitutions in Pennsylvania and Massachusetts echoed themes raised in the Virginia Declaration of Rights. The Pennsylvania Constitution read, "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination, to, and governed by, the civil power."[56] Here, Pennsylvania adopts the same critique as Virginia in regards to standing armies, and subordinating them to civil power to prevent violent tyranny. Pennsylvania stipulates that the right to bear arms allows the people to defend themselves. Thus, the right is intended to provide for the defense of the state as an institution, and the people as a collective. By specifying the collective nature of the people, the Pennsylvania Constitution, it makes the purpose of the right clear, and avoids the ambiguity that comes with the choice not to describe the object of the defensive right.

The Massachusetts Constitution specified that "The People have a right to keep and to bear arms for the common defence. And as in times of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power

[56] Constitution of Pennsylvania (1776).

shall always be held in exact subordination to the civil authority, and be governed by it."[57] As in the cases of Virginia and Pennsylvania, Massachusetts affirms the rejection of standing armies and the need to impose civil authority over the federal government's ability to employ violence. Here, "The People" are explicitly given the right to bear arms to provide for collective security. However, it is unclear whether the right, regardless of the purpose of it, is individual or collective. The Massachusetts Constitution, before addressing the specific right to bear arms, makes the grand proclamation that "All men are born free and equal and have certain rights; among which may be reckoned the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."[58] This formulation of rights, which seems Lockean in character, suggests an individual right to self-defense, which would seem to translate to an individual right to bear arms in pursuit of this right to self-defense. However, it is worth remembering here that militias were commonly seen as the primary means through which communities defended their safety and liberties, and thus the seemingly individual right to self-defense and property may be secured through a collective right to bear arms to form a militia.[59] Heyman argues that the Massachusetts Constitution is, in fact, quite explicit in framing the right to bear arms as a collective right. In examining the document, he contends that "the people" is used when the right is collective, while "all men" or other terms implicating individual units, are used when describing individual rights.[60] Thus, the right to bear arms, as codified in early state constitutions, was a collective right which implicated individuals in a duty to protect collective interests under government regulation.

[57] Constitution of Massachusetts (1780).
[58] Ibid.
[59] Cornell, 55.
[60] Heyman, 195.

The Right to Bear Arms as a Federal, Constitutional Right

Eventually, the right to bear arms became the topic of the Second Amendment to the federal Constitution. The process through which the amendment was written provides some insight into how the right was conceived and what it meant to the new nation. At the Constitutional Convention, Anti-Federalists argued that an armed citizenry, in militias controlled by states, could be the last check on federal tyranny by taking up arms against federal overreach.[61] This point was even embraced by some Federalists. In the *Federalist Papers*, Publius wrote that if constitutional checks and balances failed, the last resort would be "that original right of self defense which is paramount to all positive forms of government."[62] However, the way he phrased this made it clear that he thought the scenario in which this would be necessary was highly unlikely under the terms of the Constitution. A more likely use of an armed populace would be to resist rule by a standing army, as the colonists had done in revolting against the British. Federalist Noah Webster spoke to this function of the right to bear arms at the Constitutional Convention, saying,

> Before a standing army can rule the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.[63]

Of course, this comment is as much about the possibility of a standing army as it is about the right to bear arms. One of the points of greatest contention at the Constitutional Convention was the role of a standing army in America and the possibility of rejecting a standing army in favor of strong and well-regulated militias. Regardless of the truth of Webster's assertion, the claim that a spirited militia could overcome any federal army was as much a placation of the fears many had

[61] Cornell, 41.
[62] Federalist no. 28.
[63] Malcolm, 157.

about a standing army as it was an ode to the right to bear arms. His assertion of the power of militias also speaks to the collectives that people were seen as willing to fight for. They were more likely to fight for themselves, and for their locally-secured rights, than against their locale—but in the name of a central authority. This was the general paradigm—rights were secured in small collectives and challenged by larger, centralized, collectives. These collectives would then shift as the civic republican spirit waned and the federal government came to be seen a guarantor of rights during the first decades of the American nation.

The right to bear arms was not codified in the initial Constitution (which put it in good company among a great number of liberties which were not), and thus there was great debate on the issue at state ratifying conventions. Famously, after Pennsylvania ratified the Constitution, a group of Anti-Federalists penned the "Dissent of the Pennsylvania Minority." They claimed that:

> the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law should be passed for disarming the people of any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up, and that the military shall be kept under strict subordination to and be governed by the civil powers.[64]

Here, "the people" is clearly an individual term. Those individuals who committed crimes or posed a public threat could be disarmed. It is interesting, also, that the Minority feels the need to mention defense of the state as separate from defense of the United States. Perhaps this merely reflects the view that defense of the United States implied a different form of command over the militia than specific defense of Pennsylvania from outside threats. However, one can also read this Anti-Federalist statement as one of differentiating defense of the nation from defense of the state—which could need to be defended against the nation itself.

[64] Cornell, 51.

States continued to propose amendments. New Hampshire suggested one that would limit federal authority by denying the national government power to "disarm any citizen unless such as are or have been in rebellion." Such an amendment would solidify the role of the states in administering the right to bear arms. In this era, whether or not the right was individual, it came with demands upon the individual from the states. Using their police power, states made the right to bear arms contingent upon loyalty oaths and other regulations. With this understanding, the proposed amendment was not to ensure that individuals had the greatest possible right to bear arms, but rather to make sure the federal government could not infringe upon the states' claim to regulate the right.[65] Nevertheless, New Hampshire was the stage for the most significant push by radical Anti-Federalists to codify an entirely private, individualized right to keep and bear arms. While such an amendment gained traction in New Hampshire, it was decidedly marginalized in other state debates.[66] More common was an affirmation of the right as collective and a clause or so damning the evil of standing armies. The codification of the right at the federal level, and ultimately in the Bill of Rights, grew out of these debates at state ratifying conventions. Thus, the Second Amendment was, in many ways, inspired by fears states had about centralized military power and the dangers of a strong national government.

Initially, James Madison took it upon himself to draft what would become the Second Amendment. His first attempt was longer than the ultimate product, but the seed was there: "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." Historian Saul Cornell argues that from this first formulation, it is clear that the purpose of the amendment was to

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[65] Cornell, 59.
[66] Uviller, H. Richard and William G. Merkel. 2000. "Muting the Second Amendment: The Disappearance of the Constitutional Militia" in *The Second Amendment in Law and History* ed. Carl T. Bogus. New York: New Press, 148.

protect the militia. Though this conclusion has its share of critics, Cornell makes a persuasive argument that, at the very least, the right to bear arms had more collective than individual components. In the eighteenth century, Cornell explains, lawyers understood preambles of statutes to hold the key to understanding the motive of a law. Thus, the clause which could be removed for brevity's sake, but which is there nonetheless, "a well armed and well regulated militia being the best security of a free country," is vitally important as an assertion of a collective interest to the right to bear arms.[67] However, it is also worth noting here that Madison habitually used "the people" and "the militia" interchangeably when discussing the status of the militia in the new nation.[68] Richard Uviller and William Merkel argue that, regardless of who "the people" implicated, the terms "bear" and "keep" must be understood in their historical context. To "bear" arms meant making militia musters fully outfitted and prepared for duty, while to "keep" arms meant individually maintaining ones weapons and overall readiness to perform militia duties.[69] Furthermore, state legislation only mentioned bearing arms in a militia context—a sign that bearing arms was intimately connected to military service.[70] Thus, the right to keep and bear arms implied heavy regulation, but perhaps an individual right for those who constituted "the people" in question—as individuals comprising a militia and were tasked with maintaining themselves and their weapons for militia service.

On the Senate floor, Madison's amendment was the subject of vigorous debate. The discussion seemed to affirm the view that the amendment's chief purpose would be to protect militias as a check on federal tyranny.[71] A committee proposed a modified version of the amendment: "A well regulated militia composed of the body of the people, being the best

[67] Cornell, 60.
[68] Heyman, 202.
[69] Uviller and Merkel, 149.
[70] Finkelman, Paul "'A Well Regulated Militia': The Second Amendment in Historical Perspective" in *The Second Amendment in Law and History* ed. Carl T. Bogus. New York: New Press, 140.
[71] Cornell, 62.

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 reformulation substituted "state" for "country," so that the militia was understood to be intended to protect both the states, and the state of the United States.[72] Interestingly, the focus of much of the debate was on Madison's religious exemption clause, which many believed could be widened to cripple the militia by disconnecting the civic duty from the right to bear arms.[73] Later, as the militia deteriorated in the decades after independence, such exclusions would again come under scrutiny.

Eventually, the Second Amendment was shortened to its final form in 1791: "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." Interestingly, the militia was no longer the "best security" of a free state, but rather, simply, "necessary"—a difference that historian Joyce Malcolm argues shows an even stronger endorsement of the role of the militia than before.[74] In addition to this change in phrasing, the amendment was shortened. Federalists will argue that the amendment was shortened for brevity, because it was previously too wordy and because the right to bear arms could and should be expressed in a condensed and pure form to minimize interpretive confusion. Anti-Federalists, at least those of a pessimistic disposition, might contest that the amendment was shortened to allow for a select militia—one that was not representative of the collective it served. By taking out the phrase "composed of the body of the people," the amendment made the definition of militia, as connected with the right to bear arms, ambiguous.[75]

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[72] Malcolm, 160.
[73] Finkelman, 139.
[74] Malcolm, 161.
[75] Churchill, 53.

Even after the right to keep and bear arms was codified in the Second Amendment, and the Second Amendment had been ratified, there was still debate and controversy in the early United States over the correct interpretation of the amendment. The most common view was that the right was civic in nature, and tied to a duty to participate in a militia.[76] Still, Anti-Federalists held on to their belief that the Second Amendment was actually a realization of the states' right to resist the federal government through militia force.[77] Thus, the Second Amendment was read by those who shared this perspective as intended to ensure that states had control of their militias, and the right was protected against federal overreach.

Even if one accepts that the Second Amendment was designed to protect the status of state militias, the idea of who constituted the militia, and which collectives the militia was intended to protect, in the new United States was far from fixed. Article 1, Section 8, Clauses 15 and 16 of the Constitution are the so-called 'Militia Clauses'. They grant to the federal government the power to summon the militias of the states to fight invasions, deal with insurrections, and to enforce the laws of the United States. These clauses also mandate Congress to ensure that militias were sufficiently armed, trained, and organized to fulfill their duties. Militias were still under state control, except when summoned by the federal government, and the state appointed all officers. Despite this level of state authority, the Militia Clauses changed the nature of the militia in the United States, giving it a national scope with a new level of national control.[78]

Many Anti-Federalists feared that the militia, for so long a core part of American communities, would become the select militia. This would mean that the militia was no longer a representative institution, as American lore held it to be, but rather a group of people within a

[76] Cornell, 65.
[77] Ibid., 65.
[78] Churchill, 41.

larger community that, because they were no longer a representative body, could be used to coerce and oppress. The "Dissent of the Minority of the Pennsylvania Convention" gave voice to these fears, predicting that the new, select, militia would be used as "instruments of crushing the last efforts of expiring liberty, of riveting the chains of despotism on their fellow citizens."[79] With this level of concern, the select militia and the standing army became a point of contention between Anti-Federalists, who feared a new despot of the ilk of the British monarch, and Federalists, who believed that a true nation needed to be able to protect itself with an organized army and a modern fighting force—not an idealistic militia.

While many people were preoccupied with the possibility of the federal government using control over the militia to oppress the states, the states themselves wanted to be sure that they could use their militias to control their own populations. For example, Virginia expressed concerns that federal control of the militia would prevent them from using their militia to put down slave revolts—a real possibility given the state's large slave population.[80] Thus, while centralized militias were conceptualized as potential weapons of federal tyranny, states planned to use them in similar ways. Though the states feared ceding control of their militias to the larger collective, they had plans to use them against smaller collectives. In light of Shays' Rebellion and other similar citizen uprisings against the states, it was clear that the rosy picture of the states as rights-protecting and the federal government as rights-violating was an over-simplification. It was easy to decry centralized tyranny as a revolutionary people, who had yet to begin governing themselves in medium and large collectives. The realities of government meant that individuals, conditioned to fear distant governments robbing them of their rights, were as likely to turn against their states as they were against their nation. The potentially atomizing nature of Lockean

[79] Ibid., 43.
[80] Cornell, 62.

individual rights had, traditionally, been tempered by the collectivist, civic republican solidarity of communities and sentiments of civic duty. As these dutiful sentiments faded, small collectives lost their ability to field a strong militia and the collective implicated in providing for the common defense grew as the federal government took a greater role in securing individual rights from the outside threats of Native American tribes and the prospect of British invasion.

The Right in the Young United States of America

The Decline of the Militia Myth

For the important part militias played in colonial communities and, eventually, the Revolutionary War, it is difficult not to glorify and overplay their role in early American life. However, the institution of the community militia never again hit the highs of its revolutionary role. In codification of the right to bear arms, and then in debates over legislating militias, the role of the militia in a new, republican nation was quite uncertain. What was certain was the inadequacy of what remained of the revolutionary army. President Washington took office with a force of only 672 regulars. The western frontiers were highly vulnerable to Native American attack and the Great Lakes area was menaced by British forts left manned despite the explicit demands of the Treaty of Paris. It was clear that something needed to be done to drastically enhance the United States' ability to defend itself. However, Congress, tasked with deciding the future of American self-defense, was caught between Washington's demands for a strong standing army and a pervasive fear of the potentially despotic nature of centralized military power.[81] In debates over the Militia Act of 1792, Anti-Federalist congressman James Jackson spoke out against the prospect of only training certain people for the militia, "the people of the United States would never consent to be deprived of the privilege of carrying arms….in a

[81] Uviller and Merkel, 151.

republic, every citizen ought to be a soldier, and prepared to resist tyranny and usurpation, as well as invasion."[82] The Militia Act passed without this provision, and thus without establishing a legislated select militia. The act codified the institution of a universal militia comprised of the majority of the United States' free, white, male citizens aged eighteen to forty-five. It gave legislative body to the norms Federalists envisioned in the Second Amendment—that militiamen kept their arms individually so as to lessen the financial and organizational burden on the federal and state governments, while the purpose of the defensive right remained collective and came under increased federal control.[83]

The legislation also required citizens to provide themselves with a musket and adequate ammunition, a tall order for most Americans.[84] Despite the stature of the minuteman in American folklore, many early Americans did not own firearms. In fact, from the colonial period to 1850, no more than 10 percent of the country owned guns—because guns, difficult and expensive to produce, were quite scarce.[85] Though the Militia Act required much more than 10 percent of Americans to provide their own arms, the law often went unenforced due to its unwieldy logistics and a lack of concerted enforcement effort. Congress had to face the fact that the militia, as the primary means of national defense and the enforcement of police power, was quite inadequate.[86] In his first annual address to Congress in 1790, President Washington reflected on lessons learned during the revolution, saying "A free people ought not only to be armed, but disciplined; …and their safety and interest require that they should promote such manufactories as tend to rend them independent of others for essential, particularly military,

[82] Churchill, 54.
[83] Uviller and Merkel, 175.
[84] Cornell, 123.
[85] Spitzer, Robert J. 2000. "Lost and Found: Researching the Second Amendment" in *The Second Amendment in Law and History* ed. Carl T. Bogus. New York: New Press, 20.
[86] Cornell, 123.

supplies."[87] Washington's comments speak not only to the sorry state of gun ownership by militia members in America, but also to a belief that arming individuals was a tool to provide a good militia—as opposed to arming militiamen through collective institutions. The federal or state governments would not have to bear the costs of outfitting militias if individual militia members armed themselves. Furthermore, individuals arming themselves to serve in militias was in keeping with the community ethos of militias—and avoiding the appearance of having turned them into centralized and centrally dependent organizations. The federal government did, however, become involved in the gun-making industry to increase the number of guns in the United States, lower the cost of guns for individuals, and standardize American firearms. After all, with the diversity of guns in the early United States, gun maintenance had to be an individual responsibility, as cartridges were drastically different and manufacturing imperfections made each gun unique.[88] Until 1860, the United States government was the dominant force in the domestic gun-making industry, thus enabling private gun ownership for militia service.[89]

Fewer and fewer men turned out for muster days as the spirit of civic duty, embodied in the militia ideal, waned. One practical factor behind lower attendance was the freedom with which state legislatures provided exemptions to universal service obligations. By the early nineteenth century, state laws excused clergy, conscientious objectors, school and university teachers, students, jurors, mariners, and ferrymen from militia duty.[90] While the militia had long been a non-universal, non-representative institution, those excluded from militia service had generally previously belonged to socially unimportant or disrespected groups. By removing contributing members of communities from militia duty, these laws eroded the sense of

[87] Bellesiles, Michael A. 2000. "The Second Amendment in Action" in *The Second Amendment in Law and History* ed. Carl T. Bogus. New York: New Press, 61.
[88] Uviller and Merkel, 176.
[89] Bellesiles, 63.
[90] Uviller and Merkel, 157.

community and civic responsibility in militias. Thus, the collective implied in the militia right was no longer strong or local. Militias drew their decentralized strength from the strength of the bonds within their communities and the sense of service to their locality. Without this, militias at the local level were shadows of their former selves.

These disheartening realities of the militia in the early United States lent credence to the Federalist view that, while militias were well suited to defending communities during the colonial period, an army—or at least a select militia—was necessary to protect a nation. Federalists pushed for federal control over the militia and rejected the idea that there was a constitutional right, within the Second Amendment or elsewhere, to armed resistance of federal power by the states or smaller communities. This was in response to Anti-Federalist, Republican beliefs that state militias could assert a sort of passive check on federal tyranny—which was more prevalent than the extreme idea of states fighting the federal government through militias.[91] However, the danger of militias was on full display in the early years of the republic.

In 1790, Senator Rufus King drew on the distinction between the usefulness of militias in the colonial period and the problem of militias for a new nation. In the colonies, militias were useful for the public defense because the British could not and would not provide for the defense of settlers in frontier areas and because, given the attitudes of many colonists towards British soldiers, few people welcomed the possibility of an increased British military presence. However, once the interests of the revolutionaries shifted from insurrection to stable government, militias, at least universal ones, posed a threat to the fledgling nation. King argued that "it was dangerous to put Arms in the hands of the Frontier People for their defense, lest they should Use them

[91] Cornell, 105.

against the United States."[92] While King may have been speaking out of prejudice against the "Frontier People," he was also informed by the events of Shays' Rebellion.

In late 1786, thousands of poor western-Massachusetts farmers, led by Revolutionary War veteran Daniel Shays, forcibly closed state courts to prevent them from foreclosing on their farms. Massachusetts' legislature deemed their actions "open, unnatural, unprovoked, and wicked rebellion."[93] The farmers argued that they were merely acting in the spirit of the revolution, rebelling against tyranny imposed from afar—in this case, Boston. To pay off debts from the Revolutionary War, the states had to raise funds. Massachusetts did this through a series of taxes, many of which hurt the farmers, among them revolutionary veterans.[94] These men invoked a natural right of resistance and took great pains to display themselves not as a mob, but rather as an unsanctioned, but nevertheless legitimate, militia. They assembled with drum and fife, and marched about in a military fashion.[95] Multiple attempts by Governor James Bowdoin to suppress the rebels with state militias failed, and some militia members even joined Shays. In disgust, the Constitutional Congress, working with the Massachusetts government and the Boston business community, raised an army and routed the rebels.[96] Shays' rebels distressed George Washington, and lent impetus to the Constitutional Convention's attempts to reform the Articles of Confederation and change the system of militias in the United States—codified in the militia clauses.[97] This incident also showcased the danger of decentralized militias to the very states that supported the decentralization of militias. While aggression at overreach was often directed at the federal government, it could just as easily be directed at states. This was a shift in thinking about the relationship of different collectives to rights. As states came under suspicion as potentially

[92] Bellesiles, 49.
[93] Churchill, 41.
[94] Cornell, 31.
[95] Ibid., 32.
[96] Ibid., 35.
[97] Ibid., 36.

tyrannical forces, they were more willing to accept a model of centralized control over militias and the right to bear arms in order to maintain the peace.

Of course, the universal militia ideal that the Anti-Federalists fought for was deeply contextual, and never totally true. 'Universal' came to exclude blacks—even free blacks in many places—and, among other groups who didn't serve in militias, the wealthy were able to pay their way out of service. The right to bear arms was also never a right for all people—or even all Americans. As fears over slave rebellions in the south and militia uprisings in the north demonstrated, the right to bear arms was controlled so as to provide for state stability. Thus, the idea that the militia, or the right to bear arms more broadly, had to be universal was contestable.[98] States frequently took steps to control who could serve in militias or bear arms. Pennsylvania disarmed British loyalists and the Test Acts denied the right to bear arms to those who refused to swear an oath of allegiance to the government. Here, as in the rest of the United States, gun ownership was contingent upon the use of firearms to defend the state.[99] The right to bear arms wasn't merely a passive right for all citizens, or a right given because of its natural virtues. Rather, it was premised upon an understanding of the civil duties implied by citizenship.[100] In this theory of the right to bear arms, advanced by Saul Cornell, Michael Bellesiles, and Robert Spitzer, "revolt or revolution is by constitutional definition an act of treason against the United States. The militias are thus to be used to *suppress*, not *cause*, revolution or insurrection."[101] Acceptance of this idea entailed acceptance of the federal government as capable and active in securing and providing individual rights. With this view of centralized

[98] Spitzer, 21.
[99] Bellesiles, 53.
[100] Cornell, 28.
[101] Spitzer, 22.

power, importance of small collectives in public defense was lessened to levels commensurate with the increasingly poor capabilities of common militias.

The War of 1812 was a perfect showcase for the ineptitude and inadequacies of the common militia. In one incident, militia serving in a joint federal and state command refused to cross an international border at Lake Champlain, citing a limitation to defensive warfare, and thus forced American forces to abandon a whole offensive campaign to take the war to Montreal. The militia also played an ignominious role in the 1814 sack of Washington. British forces marched right through a scattered group of seamen, the occasional organized militia, and bunches of common militia on the Bladensburg Road and arrived in the capital, as the folk lore tells, in time to eat the dinner intended for the President and his wife.[102] Military officials quickly realized that while American tradition, and politicians who appealed to this tradition for votes, put citizen-soldiers on a pedestal, the common militia was simply inadequate to replace a regular army in war.[103] In civic republican terms, the civic virtue that had once empowered the militias of the early Americas was now sorely lacking—and the sorry state of militia performance reflected the dangers of a decentralized militia without local civic virtue.

The War of 1812 also sparked federalist tensions over the right to bear arms. The governor of Massachusetts resisted the Madison administration's claim to be able to muster his state's militia. He consulted the Massachusetts Supreme Court, which held that the authority to call out the militia properly rested with the governor of the state. The President could ask that the militia be called out, but he could only do so with the governor's permission. The state court invoked the limited constitutional grant of federal authority over the militia and the idea that militias were a means for states to resist the federal government. They could do this passively, by

[102] Uviller and Merkel, 158.
[103] Spitzer, 17.

refusing to heed the President's request to muster.[104] This opinion was alarming to federal officials, who saw this seemingly legitimized resistance as a threat to national security. They emphasized Madison's belief that there was no real right to resistance against the constitutional authority of the federal government, a statement directed at other states who were less than enthusiastically supportive of the unpopular war.[105]

Regulating the Personal Right

When William Rawle, President Washington's nominee for attorney general, characterized the scope of the federal government's power to regulate the right to bear arms in light of the Second Amendment, he asserted, "The prohibition is general….No clause in the constitution could by any rule of construction be conceived to give congress a power to disarm the people."[106] However, disarmament and regulation—or even the denial of arms in the first place—were separate issues. In response to fears about the threats that handguns and small knives posed to the new nation, the Tennessee legislature passed a law in 1801 making it illegal to "publicly ride or to go armed to the terror of the people, or privately carry any dirk, large knife, pistol, or any other dangerous weapon, to the fear or terror of any person."[107] This regulation of public arms says nothing about the right of any individual to keep and even to bear arms in private. However, it does suggest that the right to keep and bear arms as stated in the Second Amendment was immediately seen as subject to regulation for public safety. One way to consider this Tennessee law, which was merely one of many passed by state legislatures in the early nineteenth century,[108] is to connect the public safety concern that motivated this regulation of the right to bear arms to the very nature of the Second Amendment. In this line of thinking, the whole point of the Second

[104] Cornell, 131.
[105] Cornell, 132.
[106] Malcolm, 164.
[107] Bellesiles, 72.
[108] Cornell, 4.

Amendment is to provide for a militia that would protect public safety—so obviously the Second Amendment right to bear arms, whether individual or collective, could be regulated by concerns for public safety. However, this law may also simply be a regulation on the right of the individual to have hir concerns for protection override concerns of public safety. Thus, the individual has a right to bear arms, but not to bear them in a way that threatens others.

Originally, Anti-Federalists were less concerned with the possibility of an individual right than with the Second Amendment as a revolutionary right to resistance. They claimed that the right gave state militias the power to use force to resist federal overreach.[109] Virginia judge St. George Tucker characterized the Second Amendment as a necessary addition to placate Anti-Federalist fears that the federal government would disarm state militias. Tucker argued that, through the Tenth Amendment, which reserves powers not given to the federal government for the states, the Second Amendment gave states the right to use their militias for the means of "resisting the Laws of the Federal Government, or of shaking off the Union."[110] Of course, this interpretation was terrifying to many people. Pennsylvania judge Alexander Addison predicted a slippery slope if laws could be rejected by force: "if one law is repealed, at the call of armed men, government is destroyed: no law will have any force."[111] This was yet another point of conflict over which collective held the right to regulate and control the right to bear arms and the duty of participating in the militia. Federalism in early America was defined by such collective struggles, and the nature of individual disputes over the right to bear arms shows just how collective most people thought the right was—both in purpose and in object.

One of the defining incidents in the early history of the right to bear arms for individual self-defense in the United States was the Selfridge-Austin affair. Charles Austin was a Harvard

[109] Ibid., 5.
[110] Ibid, 74.
[111] Ibid., 75.

student and the son of one of New England's most prominent Jeffersonians. Thomas Selfridge was one of the most respected lawyers in Boston, and a leading Federalist. What started as a feud between the two over a large tavern bill lead to a confrontation between Austin, armed with a "stout hickory cane," and Selfridge, armed with two pistols. Austin attempted to beat Selfridge with his cane, and Selfridge shot him, wounding him fatally.[112] Selfridge was brought to trial for murdering Austin. The state argued that Selfridge was an obvious example of the limited scope of the right to bear arms for individual self-defense: "All men are bound to surrender their natural rights upon entering into civil society and the law become the guardians of the equal rights of all men." In the eyes of the prosecution, Selfridge had other means of saving himself from an attack with a cane, and he was bound by his obligation to society, having forfeited his right to dispense his own justice by virtue of belonging to a society, to exhaust these other means before shooting.[113] This case presented a new question about the right to bear arms, because it was explicitly the use of a non-military weapon for an entirely individual version of self-defense. The court settled on a doctrine that expanded Blackstonian theory: one did not need to be in actual danger, one need only have a reasonable cause to fear for one's life, to employ deadly force for self-defense.[114] This framing of the issue, and the press from both Jeffersonians and Federalists, showed that people, at the time, saw the case as an issue of common law, not constitutional rights.[115] The Constitution was concerned with larger issues within the right to bear arms—primarily the issues within federalism with who could regulate what about the right.

In 1809, courts were called to consider the question of state resistance via militia. Pennsylvania called out its militia to prevent a federal marshal from executing a writ from the

[112] Ibid., 110-112.
[113] Ibid., 113.
[114] Ibid., 114.
[115] Ibid., 115.

United States Supreme Court, seen to be overstepping its authority.[116] The Madison administration brought charges against the militia commander, General Bright. The US Attorney reminded the jury of the position Bright's militia put the nation in: "The whole power of the confederation, if necessary in arms, against the whole power of one of its members …. [was a] momentous crisis." He went on to compare Pennsylvania's resistance to the actions of the Whiskey Rebels. Bright's attorney argued that the states had a constitutional right of resistance, but the US Attorney responded that this position would lead to anarchy and civil war. Resistance was even worse than secession, as Pennsylvania, in its iteration as a state, was "bound to the authority of the union, expressed through the regular acts of government."[117] Thus, using violence was, categorically, an act of rebellion—and there was, the federal government held, not constitutional right, in the Second Amendment or elsewhere, to armed resistance.[118]

Of course, it was possible to extend this right, centered on individual participation in militias, to broader purposes of self-defense. In 1793, Samuel Latham Mitchell, a professor at Columbia College, argued that the right to bear arms for militias could have a generally positive effect on collective and individual safety. Weapons intended for militia use could also "serve for the defense of life and property of the individual against violent or burglarious attacks of thieves."[119] However, for Mitchell, this effect was merely an externality of the civic right to bear arms in a militia. His thinking shows the possible benefits of conceptualizing the militia right as an individual right. Still, it is clear that the dominant conception of the right to bear arms was still as a provision for the collective defense—even if achieved through a somewhat individualized right to bear arms, as connected to civic duties. As the militia declined, the right to bear arms did

[116] Ibid., 117.
[117] Ibid., 121.
[118] Ibid., 122.
[119] Ibid., 70.

not suddenly transform into a Lockean individual right. Rather, it became centralized and under greater legislative control—while losing importance with the rise of a standing army. The individual rights interpretation of the Second Amendment was still on the margins.

Conclusion, or, How the Right Grew

The reputation of the militia in America fell apart with astonishing speed and totality in the decades following the Revolutionary War. After serving as cornerstones of civic duty and a rousing community spirit in the colonies, militias declined as their civic republican spirit did. Of course, it did not help that militias were no longer simply community organizations. They came to be associated with states, the federal government, and thus larger and larger conflicts and greater and greater outside control. Once, militias thrived in a civic republican environment, protecting Lockean natural rights. As the civic republican ideals of public duties and collective solidarity regressed, albeit not as startlingly or completely as to create a neat and total break, the right to bear arms changed. After the War of 1812, militias were not nearly as important as they had been federally, at the state level, to communities, to legislators, and to the right to bear arms. With the rise of the American standing army, the right to bear arms for the public defense was no longer of paramount importance to defending a rights-securing society. Attempts to individualize the constitutional right garnered support, but not nearly the support that the collective right interpretation continued to receive. Because militias still existed, in a lessened role, the possible interpretation of the right to bear arms as a collective right, invested in the individual, designed to provide for a collective defense, lived on. Still, it lacked the luster of the glorious, civic republican militias of the colonial and revolutionary period's right.

The right existed in a strange state of limbo after the precipitous decline of the militia. It was, as codified in the Second Amendment, clearly still a collective right. However, this collective

right no longer served the same collectives as before. With the standing army controlled by the federal government, the right to bear arms was solidly centralized, and the collective governing it was larger than it had ever been. Under the Lockean rights framework, individuals protect society because it protects them and their rights. They enter into a social contract with each other to accomplish this. One can see the American social contract expand during the early decades of the United States. At first, any large political collective was assumed to be a threat to individual and collective rights. However, as the years wore on in the early American nation, and the practical implications of the right to bear arms in small collectives became clear, it was increasingly palatable to consider the federal government as a guarantor of rights. Thus, the Lockean rights framework didn't suddenly appear to overtake the civic republican model. Rather, the Lockean framework expanded to encompass the largest possible collective in the United States in the project of protecting rights. As civic republican spirits dipped, small-scale, community rights became untenable. By necessity, the rights framework in America expanded.

Of course, this process did not occur in a vacuum. The federalism struggle was incredibly important to the changing right to bear arms. The codification of the right paved the way for increased federal control over state and local militias, and thus state and local rights to bear arms. As the common, decentralized militia proved inept at defending the nation, the federal standing army took its place. In the conflict between states and the federal government over the right to bear arms, the federal government won—gaining ground on a previously localized, collective right. The early history of the right to bear arms in America follows this pattern. Its scope and the scope of what it was meant to protect, and by whom it could be regulated, expanded as the dominant American understanding of rights became more expansive.

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