Notre Dame Law Review

Volume 95 | Issue 1 Article 8

12-2019

Glorious Revolution to American Revolution: The English Origin of the Right to Keep and Bear Arms

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LECTURE

GLORIOUS REVOLUTION TO AMERICAN REVOLUTION: THE ENGLISH ORIGIN OF THE RIGHT TO KEEP AND BEAR ARMS

*Diarmuid F. O'Scannlain**

INTRODUCTION

Good evening. It is a great honor and a high privilege to be delivering the Clynes Lecture and to be a part of the University of Notre Dame's London Law at 50 Speaker Series. I want specially to thank Professor Michael Addo, the director of this wonderful Law Centre, for his extraordinary hospitality to Maura and me, and to thank Dean Nell Newton and Professor A.J. Bellia—I am proud to say a former law clerk of mine—for extending the invitation to speak here tonight.[1]

I

A

One provision of the U.S. Constitution has been much in the news lately: the Second Amendment, which protects the right to keep and to bear arms. Due to several recent tragic school shootings, most recently in Parkland, Florida, a debate has been raging in the United States about the proper regulation of firearms. Proposals abound for wider background checks,

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1 The views expressed herein are my own, and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. I wish to acknowledge, with thanks, the assistance of Benjamin Field, my law clerk, in preparing these remarks.

registration and permitting requirements, and limitations on the types of weapons that can be privately owned or sold. Meanwhile, courts across the country have been routinely asked in the past several years to evaluate whether existing legal restrictions are consistent with the constitutional right. The tension between the Constitution and the budding restrictionist zeitgeist has even led one distinguished jurist—retired Supreme Court Justice John Paul Stevens—to urge just three weeks ago, in the pages of the *New York Times*, that gun control proponents "should demand a repeal of the Second Amendment."[2] The call to amend the American Constitution was sufficiently significant that it received considerable news coverage from major outlets throughout the United Kingdom.[3]

It is definitively not my intention today to wade into such debates about the wisdom of the Second Amendment or to deal with pending or recent court interpretations. Rather, I want to explore *how* it came to be and what role British history had in its genesis. For Americans like myself, such history helps us to understand the meaning of our own Constitution. For the Britons here, it is a powerful example of how your own constitutional principles[4] shaped the legal landscape of far-flung countries once within the Brit-

2 John Paul Stevens, Opinion, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html.

The Second Amendment is not alone in Justice Stevens' crosshairs. He has also suggested curtailing the First Amendment to permit greater regulation of spending on political speech. *See* Adam Liptak, *Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction,'* N.Y. TIMES (Apr. 21, 2014), https://www.nytimes.com/2014/04/22/us/politics/justice-stevenss-prescription-for-giant-step-in-wrong-direction.html. The First Amendment has also been threatened by violence on state university campuses to shut down unpopular speech, *see, e.g.*, Katharine Q. Seelye, *Protestors Disrupt Speech by 'Bell Curve' Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html?_r=0&module=inline, and the religious liberties guaranteed by that Amendment have been the subject of extensive litigation in the last several years, *see, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019). All that is just to say that the Second Amendment is not the only constitutional rights provision under challenge today.

3 For examples across the political spectrum, see Harriet Alexander, *Retired Supreme Court Judge Calls for Repeal of Second Amendment*, TELEGRAPH (Mar. 27, 2018), https://www.telegraph.co.uk/news/2018/03/27/retired-supreme-court-judge-calls-repeal-second-amendment/; Boer Deng, *Judge John Paul Stevens Calls for an End to Americans' Right to Bear Arms*, TIMES (London) (Mar. 28, 2018), https://www.thetimes.co.uk/article/judge-john-paul-stevens-calls-for-an-end-to-americans-right-to-bear-arms-cvkzz809z; and Tom McCarthy, *Gun Safety Groups Not Convinced by Retired Justice's Call to Repeal Second Amendment*, GUARDIAN (Mar. 27, 2018), https://www.theguardian.com/law/2018/mar/27/john-paul-stevens-former-supreme-court-justice-repeal-second-amendment.

4 As the United Kingdom famously does not have a codified Constitution, when I refer to the British or English Constitution, I mean that set of fundamental laws and norms that are generally understood to be the foundation of British government. *See* Robert Blackburn, *Britain's Unwritten Constitution*, BRIT. LIBR. (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution ("Britain does not have a codified constitution but an unwritten one formed of Acts of Parliament, court judgments and con-

ish Empire. And for those simply interested in law as a discipline, irrespective of geography, I hope this lecture serves as a useful case study of how distant history can help contemporary lawyers interpret the meaning of a legal text adopted over 225 years ago.

B

As I have suggested, the precise contours of the Second Amendment right are unsettled, and many cases seeking to define it either are before my court now or are likely to come before it and other federal courts. So, everything I say should be taken simply as a description of history by an American judge, not as an opinion on, or prediction of, the future evolution of American law in this area. The only definitive legal conclusions I will offer are those already settled by the Supreme Court of the United States.

II

Before getting into the history, one might ask: Does medieval and early modern English history really matter? In my role as a federal appellate court judge, I can safely say that, for me, the answer is yes, because our Supreme Court has said so. In the landmark 2008 case *District of Columbia v. Heller*, the Supreme Court was asked to decide for the first time whether the Second Amendment conferred an individual right to keep and to bear arms, as opposed to a right to use arms as part of an organized militia. Invoking both "text and history," the Court said that it did.[5] The Court explained that such meaning was "strongly confirmed by the historical background of the Second Amendment,"[6] and a key part of the "historical background" surveyed by the Court was indeed English history.[7]

A

The necessity of turning to history flows from a tension between two foundational Anglo-American principles: on the one hand, unalienable rights; and on the other, democratic self-governance. Like all constitutional

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ventions."). Because it is informal, the British Constitution lacks the kind of supermajoritarian force of the U.S. Constitution, a concern that motivated the ratification of the American Bill of Rights. *See* David B. Kopel, *The Natural Right of Self-Defense:* Heller *'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 244 (2008) (James Madison "described the arms rights amendment as remedying two crucial defects in the English Declaration of Right: that the right included only the Protestant population, and that the right was, as a statutory enactment, efficacious against the King, but not against the actions of later Parliaments.").

5 District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

6 *Id.* at 592.

7 *Id.* at 592–95. Justice Thomas's concurrence in *McDonald v. City of Chicago* also considered the English history of the right in justifying applying it against the States. McDonald v. City of Chicago, 561 U.S. 742, 815–16 (2010) (Thomas, J., concurring in part and concurring in the judgment).

rights, the Second Amendment protects an individual's liberty at the expense of limiting the range of policy choices available to the polity. If the Second Amendment right is arbitrarily confined, individual liberty is lost; if the right is capriciously expanded, democratic self-governance on questions of public safety is nullified. To know the correct balance, we judges must apply neutral principles of legal interpretation to give fixed meaning to the democratically enacted constitutional provision, based on the popular understanding of those who adopted it.

B

Which begs an obvious question: What *did* the ratifying popular majorities in the year 1791 mean when they adopted the Second Amendment to limit the powers of the newly established government?

One thing we do know is that they chose a somewhat inscrutable text. It reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[8] The meaning of the unique prefatory clause discussing the militia has famously been the subject of much debate, but tonight we focus on the first ten words of the operative clause. What did the ratifying public understand to be the meaning of "the right of the people to keep and bear Arms"?

It is in answering this question that the English historical experience really does matter because the newly independent Americans understood their rights against the backdrop of the English legal tradition.[9] As the Supreme Court put it a century later, "the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors."[10]

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8 U.S. CONST. amend. II.

9 As Alexis de Tocqueville observed in his review of America, the country was deeply influenced by its roots across the Atlantic. As he explained it, "there is not an opinion, not a habit, not a law, I could say not an event, that the point of departure does not easily explain." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 49 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (1835), http://oll.libertyfund.org/titles/tocqueville-democracy-in-america-historical-critical-edition-vol-1.

Indeed, at the time of the Declaration of Independence, most of the newly independent states adopted the English common law, as modified by future legislative enactments. *See* GORDON S. WOOD, EMPIRE OF LIBERTY 404 (2009); *see also* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658–59 (1834) ("It is insisted, that our ancestors, when they migrated to this country, brought with them the English common law, as a part of their heritage. That this was the case, to a limited extent, is admitted. No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted, so far only as its principles were suited to the condition of the colonies . . . .").

10 Robertson v. Baldwin, 165 U.S. 275, 281 (1897). A generation after that, the Supreme Court elaborated that "[t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte* Grossman, 267 U.S. 87, 108–09 (1925).

So, let us turn to the relevant English history to explore what light it sheds on the American right to keep and to bear arms.[11]

III

To begin, it is worth noting that a right to have arms is not among the most ancient in the English tradition.[12] For instance, Magna Carta enshrines the principle of due process of law before a person can be deprived of liberty or property, but nowhere does it mention a right to have arms.[13]

Rather, the story of the rise of the English right to have arms begins in earnest during the English Civil War of the 1640s between King Charles I and Parliament. The immediate spark for the war was a clash over who would control the militia, leading both sides to scramble for possession of as many arms as possible.[14] Once the parliamentary forces had triumphed, the Interregnum government moved to reorganize and to repurpose the militia.[15] A new Militia Act transformed the militia from its traditional role of keeping the peace and suppressing insurrection into a politicized force to disarm Catholics, Cavaliers (the royalist supporters of Charles I), and other dissenters.[16]

When fortunes changed again and Charles II became king, the Restoration government passed yet another Militia Act, which made clear that the king had sole command of the militia, and which formalized broad discretion for officers to search for and to seize weapons from any person "dangerous to the Peace of the Kingdom."[17] At the same time, a series of proclamations declared that, at least formally, all who had fought for Parliament in the English Civil War were prohibited from carrying firearms.[18]

So, between the reigns of Charles I and Charles II, the use of the militia and selective arming and disarming of English subjects had become a key part of the factional disputes that roiled Britain in the middle of the seventeenth century.

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11 For linguistic consistency, I will refer to the American right to "keep and to bear" arms and the English right to "have" arms, with the verbs drawn from the relevant provisions of the American and English Bills of Rights, respectively.

12 For a review of the way the novel right to have arms came to be treated as ancient in the English Bill of Rights, see JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 121–34 (1994).

13 *See English Translation of Magna Carta*, BRIT. LIBR. ¶ 39 (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation ("No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.").

14 *See* MALCOLM, *supra* note 12, at 19–20.

15 *See id.* at 24.

16 *See id.* at 23–24.

17 Militia Act of 1662, 13 & 14 Car. 2, c. 3, § 13 (1662); *see* MALCOLM, *supra* note 12, at 50.

18 *See* MALCOLM, *supra* note 12, at 49–50.

IV

The stage was set, then, for weapons holding to be a central component of the final great clash between the Crown and Parliament, which ultimately led to a codified English right to have arms.

A

1

The next major step in this process after the Restoration-era Militia Act was the Game Act of 1671. In many respects, it mirrored prior game acts that prohibited the use of certain weapons for hunting in order to reserve hunting as a sport for the nobility and gentry.[19] But for the first time, guns were included in the list of per se prohibited devices.[20] And a gamekeeper could unilaterally search suspects' premises for prohibited arms, as could any other person authorized by a warrant from a single justice of the peace.[21] Moreover, the property and wealth requirements for hunting were raised to be fifty times the level required to vote.[22]

At least on paper, then, for the first time, the vast majority of Englishmen were formally prohibited from having guns.[23] Yet, despite the Game Act's sweeping provisions, it was unevenly enforced,[24] and it may not have become a cause for concern but for a series of political crises that beset England in the 1670s and 1680s and saw both it and the Militia Act used for ulterior purposes.

2

Those crises began in earnest in 1678 with a widespread anti-Catholic hysteria inspired by a supposed conspiracy known as the Popish Plot.[25] In response, Charles II issued a proclamation temporarily disarming all English Catholics.[26]

That episode was followed quickly by the Exclusion Crisis between the Crown and Parliament, centered around Charles's brother James. James's conversion to Catholicism had been exposed in 1673, having refused to affirm his allegiance to the Church of England when Parliament passed the

19 *See id.* at 69–70.

20 *See id.* at 72.

21 *See id.* at 71.

22 *See id.*

23 *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 136 (1999) ("In 1671 Parliament for the first time enacted a statute that deprived almost all Englishmen of the right to have arms. The new measure was a game act that so steeply raised the property qualifications on the right to hunt that possession of firearms became illegal except for the wealthy few.").

24 *See* MALCOLM, *supra* note 12, at 86–91.

25 *See id.* at 92.

26 *See id.*

Test Act requiring such an oath for all public officials.[27] In the wake of the Popish Plot scare, Parliament sought to exclude James from the throne, leading Charles II to dissolve three successive parliaments between 1679 and 1681.[28] As part of the exclusion debate, some Members of Parliament (MPs) sought to arm Protestants as protection against royally backed Catholicism.[29]

Two years later, in 1683, a plot among Protestant conspirators to murder the king was exposed and came to be known as the Rye House Plot.[30] In response, the Crown disarmed notable opposition Protestants, and Charles jumped at the opportunity to use the Rye House Plot as a basis to prosecute many of the supporters of exclusion and to purge them from the militia.[31]

3

The sectarian tensions under Charles II paled, however, in comparison to what followed when he died in 1685 without a legitimate heir, thereby leaving the throne to the Catholic James.[32]

The new King James II went even further than his late brother to favor Catholics and to disarm Protestants.[33] He started in Ireland, where he disarmed the heavily Protestant militia in northern Ireland and replaced Protestant officers and soldiers in the Irish army with Catholics.[34] In England, James quashed a revolt intended to place on the throne a Presbyterian illegitimate son of Charles II, and James then replaced large numbers of officers in the militia and army with Catholics, in open violation of the Test Act.[35] At the same time, James attempted to make expansive use of the Game Act and a medieval statute to disarm political dissidents.[36]

Tensions came to a head in 1687 when James suspended the Test Act without approval of Parliament and used his lords lieutenant to pressure subordinate officers to support repeal of the Test Act in Parliament.[37] When James announced the birth of a son—thereby assuring a Catholic heir—it was the last straw for his Protestant opponents, who began entreating the Protestant Prince William of Orange—husband to James's Protestant daughter Mary—to cross the sea and to overthrow James.[38] William landed in

27 *See id.* at 94–95.

28 *See id.*

29 *See* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 36 (2000).

30 *See* MALCOLM, *supra* note 12, at 92.

31 *See id.* at 95.

32 *See id.* at 93.

33 *See* District of Columbia v. Heller, 554 U.S. 570, 592–93 (2008) ("Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.").

34 *See* MALCOLM, *supra* note 12, at 96–98.

35 *See id.* at 98–102.

36 *See id.* at 102–06.

37 *See id.* at 107–09.

38 *See id.* at 110.

England in November 1688, and just a month later, James had fled to France.[39] This rapid and nearly bloodless coup set off what would become known as the Glorious Revolution.[40] James did lead a subsequent invasion of Ireland, but he was defeated for good by William at the Battle of the Boyne in July 1690.[41]

B

Since only a reigning monarch could convene a regular Parliament, William called a Convention Parliament to recognize James's removal and, presumably, to invite William and Mary to become the new king and queen.[42] But mindful of the Stuart pretensions to absolutism that had sparked the Glorious Revolution, the Convention formed committees to draft a Declaration of Rights that a new king must respect—committees that were dominated by Whigs, the political faction favoring parliamentary supremacy and who had sought to exclude James from the throne.[43]

After several amendments from within the House of Commons and further amendments from the Tory-dominated Lords,[44] the Convention Parliament agreed to a declaration, which both listed a series of grievances against James II and enumerated thirteen "ancient rights and liberties" that William was expected to honor.[45] On the grievances side, James II was alleged to have "endeavour[ed] to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom" by "causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law."[46] The Convention articulated a corresponding right: "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law . . . ."[47]

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39 *See id.* at 111–12.

40 *See id.* at 112.

41 James invaded Ireland in March 1689 with a French army—supported by a simultaneous revolt by Scottish Highlanders—but the Jacobite armies were defeated by William's forces at the Battle of the Boyne in Ireland and the Battle of Dunkeld in Scotland. *See Civil War and Revolution*, BBC, http://www.bbc.co.uk/history/british/timeline/civilwars_timeline_noflash.shtml (last visited Sep. 1, 2019). Jacobite revolts in favor of the Stuarts continued into the middle of the eighteenth century but were never successful. *See Empire and Sea Power*, BBC, http://www.bbc.co.uk/history/british/timeline/empireseapower_timeline_noflash.shtml (last visited Sep. 1, 2019).

42 *See* MALCOLM, *supra* note 12, at 113–14.

43 *See id.* at 114–15.

44 For two detailed descriptions of the drafting history—which come to different conclusions about that history's influence on contemporary interpretations of the Second Amendment—see MALCOLM, *supra* note 12, at 115–21; and Schwoerer, *supra* note 29, at 37–43.

45 *See An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, AVALON PROJECT, http://avalon.law.yale.edu/17th_century/england.asp (last visited Sept. 1, 2019).

46 *Id.*

47 *Id.*

William accepted the declaration, and, when a properly convened Parliament was seated in 1689, it was codified in what we now know as the English Bill of Rights.[48]

C

I should pause here to make clear to the audience that I well recognize the irony of giving a speech on a right created in no small part to allow Protestant Englishmen to oppress their Catholic countrymen, here at a Catholic university a short walk from Whitehall, Westminster, and Buckingham Palace. Hopefully, since no agents of the Queen's lord lieutenant appear to be breaking down the doors, we can be confident that whatever force the arms provision of the Bill of Rights still has, its sectarian motivation is no longer British government policy.

V

Returning to the historical narrative, as of 1689, the right to have arms was declared one of the core rights of Englishmen, although it was a version with limitations based on creed, social condition, and the laws of Parliament. Let us now consider how that right evolved in England between 1689 and 1776, when the colonies declared their independence and the American Revolution was underway.

A

In the immediate aftermath of the Glorious Revolution, a broad right to have arms did not seem to be in the offing, as William and his Tory supporters in Parliament blocked efforts to liberalize the Militia and Game Acts.

Although Parliament attempted several times to pass a new militia act, those efforts foundered against the king's opposition to relinquishing royal control of the militia, and the Restoration-era, Crown-friendly Militia Act of 1662 remained in force.[49] In fact, during debate on a new militia act, some MPs who had been vociferous opponents of the king's use of the militia to search for and to seize weapons from Protestants supported the use of that power by Protestant officials to disarm Catholics.[50] Use of the Militia Act to disarm dangerous and disaffected persons continued unabated.[51] In fact, in 1701, William offered monetary rewards for such disarming, and Parliament thanked him for "order[ing] the seizing of all horses and arms of Papists, and

48 *See* District of Columbia v. Heller, 554 U.S. 570, 593 (2008) (citing 1 W. & M., c. 2, § 7, 3 STAT. AT LARGE 441).

49 *See* MALCOLM, *supra* note 12, at 113–24; Schwoerer, *supra* note 29, at 49.

50 Brief for English/Early American Historians as Amici Curiae in Support of Respondents at 22 & n.59, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521).

51 *Id.* at 22.

other disaffected persons."[52] The Militia Act provisions allowing search and seizure of weapons from disaffected persons remained in effect until 1757.[53]

As for the Game Act, new versions in 1693 and 1706 did omit guns from the list of per se prohibited weapons.[54] But otherwise the game laws were still enforced as they had been against social classes below the gentry, while a Whig-backed proposed amendment to permit every Protestant to keep a musket in his house was defeated in Parliament.[55]

B

Over the century following the Glorious Revolution, however, a Whig-inflected view of the right to have arms gained popular and legal purchase.

As a matter of positive law, courts and officials became reluctant to read statutes governing arms to sweep too broadly.

Courts interpreted the Game Act to be consistent with a right for Protestants to have guns. A 1704 county court decision permitted officials to enforce the Game Act but cautioned them that "none of her Majestie's Protestant subjects were to be . . . 'disturbed in keeping arms for their own preservation.'"[56] A trio of cases before the Courts of Common Pleas and Kings Bench from 1738 to 1752 confirmed that the Game Act was not to be read to disarm the people, for it was "not to be imagined, that it was the Intention of the Legislature . . . to disarm all the People of England."[57]

Meanwhile, other statutes restricting the use of arms fell into desuetude in the decades following the Glorious Revolution.[58] For example, a statute enacted under Henry VIII in 1541 restricting ownership of handguns was not used in a single prosecution after 1693.[59]

By the mid-eighteenth century, a philosophical view had become popular drawn from the Whig position that to have arms was a natural right. In

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52 *Id.* (alteration in original) (quoting 5 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1236 (London, T.C. Hansard 1809)).

53 *See id.* at 22 n.59.

54 *See* Schwoerer, *supra* note 29, at 50–52.

55 *See* MALCOLM, *supra* note 12, at 126–28.

56 MALCOLM, *supra* note 12, at 127 (emphasis omitted) (quoting A.H.A. HAMILTON, QUARTER SESSIONS FROM QUEEN ELIZABETH TO QUEEN ANNE 269 (London, Sampson Low, Marston, Searle & Rivington 1878)).

57 *See id.* at 129 (quoting Wingfield v. Stratford (1752) 96 Eng. Rep. 787, 787–88 (K.B.), *reprinted in* JOSEPH SAYER, REPORTS OF CASES ADJUDGED IN THE COURT OF KING'S BENCH BEGINNING MICHAELMAS TERM, 25 GEO. 2, ENDING TRINITY TERM, 29 & 30 GEO. 2, at 15, 15–17 (London, W. Strahan & M. Woodfall 1775)); Brief of the Cato Inst. & History Professor Joyce Lee Malcolm as *Amici Curiae* in Support of Respondent at 7, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) [hereinafter Cato *Heller* Brief]. The other two cases referred to are King v. Gardiner (1738), 93 Eng. Rep. 1056 (K.B.), and Mallock v. Eastly (1744), 87 Eng. Rep. 1370 (C.P.). Cato *Heller* Brief, *supra*, at 7.

58 *See* Cato *Heller* Brief, *supra* note 57, at 7–8.

59 *See id.* at 8 (citing 33 Hen. VIII, c. 6, §§ 1–2 (1541)).

his canonical *Commentaries on the Laws of England*, William Blackstone[60] described a set of "absolute rights of individuals," which "would belong to their persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it."[61] As he explained it, "the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature."[62] Blackstone's view of the nature of rights and of civil society reflects the social contractarian view of John Locke, who posited that men naturally begin in a "state of perfect freedom . . . within the bounds of the law of nature"[63] and are only "willing to quit [that] condition . . . for the mutual preservation of their lives, liberties and estates."[64]

Blackstone distilled man's natural rights into what he called "three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property."[65] Expanding on the right to personal security, Blackstone explained that it "consists in a person's legal and uninterrupted enjoyment of his life," which was itself "the immediate gift of God, a right inherent by nature in every individual."[66]

Blackstone, writing in the 1760s, opined that English law protected more than the core Lockean rights of life, liberty, and property. As he explained, "in vain would these rights be declared . . . if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject . . . ."[67] The people's auxiliary rights, which Blackstone derived from the Bill of Rights, included "that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law."[68] Blackstone explained such right 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."[69]

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60 Blackstone lived from 1723 to 1780. Wilfrid Prest, *Blackstone and Biography*, *in* BLACKSTONE AND HIS COMMENTARIES 1, 45 (Wilfrid Prest ed., 2009). The first edition of the *Commentaries* was published in 1765. *Id.* at 1.

61 1 WILLIAM BLACKSTONE, COMMENTARIES *119 (emphasis omitted).

62 *Id.* at *120.

63 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8 (C.B. Macpherson ed., 1980) (1690) (emphasis omitted).

64 *Id.* at 66 (emphasis omitted).

65 1 BLACKSTONE, *supra* note 61, at *125.

66 *Id.*

67 *Id.* at *136.

68 *Id.* at *139.

69 *Id.* Further evidence suggests Blackstone was not alone in his views. For instance, when anti-Catholic riots broke out in London in 1780, the Recorder of London—the city's legal advisor—issued an opinion confirming the right of individuals and private associations to have arms. *See* MALCOLM, *supra* note 12, at 133–34. As he explained it, "[t]he right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable." *Id.* at 134 (quoting Letter from the Recorder of London (July 24, 1780), *reprinted in* WILLIAM BLIZARD, DESULTORY REFLECTIONS ON POLICE 59–60 (London, Baker & Galabin 1785); Cato *Heller* Brief, *supra* note 57, at 10

VI

It should not be surprising that Blackstone's view of the right crossed the Atlantic to the American colonies, since, as our Supreme Court recently observed, his "works constituted the preeminent authority on English law for the founding generation."[70] Whether by transmission of the common law or Whig political philosophy, the right to have arms was important to Americans on the brink of the Revolutionary War. The immediate spark for war was British attempts in April 1775 to seize American arms and munitions stores in Lexington, Massachusetts, and Williamsburg, Virginia.[71] That July, the Continental Congress adopted a Declaration of Causes and Necessity of Taking Up Arms, which listed among its complaints the British army's dispossession of Boston citizens' arms.[72]

A year later, the Declaration of Independence famously followed the natural-rights principles of Locke and Blackstone by declaring that "all men . . . are endowed by their Creator with certain unalienable Rights" and asserting a popular right to revolt against a despotic government that failed to safeguard those rights.[73] Many of the wartime state legislatures adopted provisions protecting the rights of citizens and militiamen to have arms, such as the 1776 Pennsylvania Declaration of Rights, which stated that "the people have a right to bear arms for the defence of themselves and the state."[74]

After the war, when the U.S. Constitution was being ratified, James Madison sought to allay fears of a despotic federal government by pointing out that such a government "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands," recognizing that citizens had "the advantage of being armed, which the Americans possess over the people of almost every other nation."[75] And thus, the Second Amendment to the U.S. Constitution was adopted as part of our Bill of Rights in 1791.

VII

So how has the right to have arms, or to keep and to bear arms, evolved ever since?

(same). For a view that the Recorder's opinion ultimately did not prevail, see Schwoerer, *supra* note 29, at 53–55. For additional English authorities asserting a broad right to have arms around the time of the American Revolution, see LEVY, *supra* note 23, at 137–39.

70 Alden v. Maine, 527 U.S. 706, 715 (1999).

71 *See* LEVY, *supra* note 23, at 141.

72 *See* Stephen P. Halbrook, *The Original Understanding of the Second Amendment*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 117, 120 (Eugene W. Hickok, Jr. ed., 1991).

73 *Declaration of Independence: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/declaration-transcript (last updated July 26, 2019).

74 Halbrook, *supra* note 72, at 120–21 (quoting PA. CONST. of 1776, art. XIII); *see also* MALCOLM, *supra* note 12, at 146–50.

75 THE FEDERALIST NO. 46, at 233 (James Madison) (Jim Miller ed., 2014).

A

In the United Kingdom, the answer is that the right has been dramatically diminished. With the exception of a brief period of confiscation in response to social tensions in the early nineteenth century, the British right to have arms remained intact until the twentieth century.[76] But after World War I, Parliament enacted a sweeping gun control law imposing a licensure regime with significant discretion given to government officials to deny licenses.[77]

Over time, the restrictions became tighter and license fees more onerous, so that gun possession fell substantially.[78] After a mass shooting in Hungerford, England, in 1987, Parliament banned most semiautomatic rifles; and then following a shooting at an elementary school in Dunblane, Scotland, in 1996, Parliament effectively prohibited private ownership of handguns.[79]

Although firearms are tightly regulated and certain sorts are banned from private ownership, guns in Britain are not completely prohibited: there are still 1.3 million licensed shotguns in the United Kingdom and over 500,000 other legally licensed firearms.[80] Despite that vestigial interest in guns among some Britons, there is seemingly little popular support for loosening gun laws. After the only post-Dunblane mass shooting in the United Kingdom—in Cumbria, England, in 2010[81]—polling revealed that a third of Britons supported a complete ban on civilian gun ownership, with another third supporting tightening existing restrictions, and only four percent supporting a relaxation of the gun laws.[82]

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76 *See* MALCOLM, *supra* note 12, at 165–70.

77 *See id.* at 170–75.

78 *See id.* at 175. For a description of contemporary British gun control regulation, see Dominic Casciani, *Gun Control and Ownership Laws in the UK*, BBC (Nov. 2, 2010), http://www.bbc.com/news/10220974.

79 *See* Casciani, *supra* note 78; *Firearms-Control Legislation and Policy: Great Britain*, LIBR. OF CONGRESS, https://www.loc.gov/law/help/firearms-control/greatbritain.php (last updated July 30, 2015).

80 *There Are More Licensed Gun Owners in the UK than You Might Think*, ECON. (Oct. 19, 2017), https://www.ecnmy.org/engage/the-uk-has-more-licensed-gun-owners-than-you-might-think/.

81 *Firearms-Control Legislation and Policy: Great Britain*, *supra* note 79. The Cumbria shooting resulted in no major change to British gun laws. *Id.*

82 *Ban on Guns?*, YOUGOV (June 7, 2010), https://yougov.co.uk/news/2010/06/07/Ban-on-guns/. Those results are generally consistent with a Gallup poll from 2005, which showed that seventy-nine percent of British adults wanted stricter gun laws compared to only five percent who wanted laxer laws. *See* Shelley Mika, *Britons Aim for Tougher Gun Laws*, GALLUP (June 21, 2005), http://news.gallup.com/poll/16990/britons-aim-tougher-gun-laws.aspx. While Britons seem content with severe restrictions on civilian gun possession, a poll from last year indicated that seventy-two percent support routinely arming police officers with guns. *See* Harry Carr, *Sky Poll: Most Britons Want Police to be Armed*, SKY NEWS (June 5, 2017), https://news.sky.com/story/sky-poll-three-in-four-support-arming-uk-police-after-terror-attacks-10905554.

B

But as the English right to "have" arms declined in the face of increasing Parliamentary restrictions in Britain, the right simultaneously inspired a robust understanding of the American right to "keep and bear" arms. As Justice Scalia explained for the Supreme Court in the *Heller* decision, the meaning of the Second Amendment must be informed by its "historical background . . . because it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right."[83] As the Court's opinion explained, "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'"[84] The *Heller* Court also quoted favorably an 1876 Supreme Court opinion that observed that the Second Amendment right "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[85]

Although the Second Amendment may have formally bound the new American government as a matter of positive law, those passages in *Heller* reflect the view of Enlightenment liberal thinkers like Locke and Blackstone that natural rights preexist government. Based on those passages and the Court's quotation of subsequent American judicial opinions speaking of a "natural right" of self-defense, one scholar has observed that "[o]ne of the most important elements of the . . . *Heller* decision is the natural law."[86] Professor Hadley Arkes, a constitutional theorist who advocates using natural law to inform constitutional interpretation, has even suggested that the *Heller* opinion reflects Justice Scalia's flirtation with a natural law perspective, even though the Justice was, in general, "famously dubious"—as Arkes puts it—about natural law theory as a mode of constitutional interpretation.[87]

In any event, whether influenced solely by the positive law theory of originalism, or also inspired by a natural law view, our Supreme Court—after reviewing the English history I have laid out in this lecture[88]—concluded that "the right secured in 1689 as a result of the Stuarts' abuses was by the

83 District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

84 *Id.*

85 *Id.* (quoting United States v. Cruikshank, 92 U.S. 542, 553 (1875)).

86 Kopel, *supra* note 4, at 235–39. For a pre-*Heller* view on the importance of natural-rights considerations on the Second Amendment, which reaches a contrary conclusion to *Heller*, see Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 283 (2000).

87 *See* Hadley Arkes, *Scalia and the Lure of the Natural Law*, FIRST THINGS (July 1, 2008), https://www.firstthings.com/web-exclusives/2008/07/scalia-and-the-lure-of-the-nat; *see also* Hadley Arkes, *A Natural Law Manifesto*, JAMES WILSON INST. ON NAT. RTS. & AM. FOUNDING, https://jameswilsoninstitute.org/about/a-natural-law-manifesto (criticizing Justice Scalia's tentative positive law view that history only informed the Second Amendment based on original public understanding and the fact that "Blackstone and James Wilson invoked that right of self-preservation, and that many people read them at the time").

88 *Heller*, 554 U.S. at 592–95.

time of the founding understood to be an individual right protecting against both public and private violence."[89]

C

But although *Heller* answered that question and determined that a total prohibition on having handguns in the home violated the Second Amendment, it left open many other questions about the scope of the Second Amendment right.[90] Many of those issues have since been confronted by the courts of appeals, such as whether and to what extent does the right to keep and to bear arms extend beyond the home,[91] what types of criminal convictions justify subsequent disarming,[92] and whether special locations justify heightened gun regulation.[93]

The influence of English history on the Second Amendment's ratifying generation may inform the answers to these and other questions. For example, our courts have divided on the question of whether the Second Amendment protects a right to carry arms publicly, with judges on the one hand citing Blackstone and seventeenth-century English caselaw to hold that the English right included a right to carry publicly,[94] and on the other hand invoking the fourteenth-century Statute of Northampton restricting the carrying of arms to hold that English law recognized significant limitations on the public carry of firearms.[95] Pre-1791 history may also provide insights into whom the Second Amendment's ratifiers would have considered sufficiently dangerous to disarm, or what types of weapons they would have thought received protection.

The value of history in American courts will depend on the question being asked. To the extent an issue about the parameters of the Second Amendment is one that colonial-era Anglo-American law confronted, such historical experience will help judges discern the understanding of the American public of 1791. But not all questions will have such an ancient pedigree, and we will have to apply modes of analysis beyond historical analogy to answer them.

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89 *Id.* at 594.

90 *See id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment . . . .").

91 *E.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017); Peruta v. City of San Diego, 824 F.3d 919, 924 (9th Cir. 2016) (en banc).

92 *E.g.*, Binderup v. Att'y Gen. U.S., 836 F.3d 336, 356–57 (3d Cir. 2016) (en banc).

93 *E.g.*, United States v. Masciandaro, 638 F.3d 458, 473 (4th Cir. 2011).

94 *See, e.g.*, *Wrenn*, 864 F.3d at 659–61.

95 *See, e.g.*, *Peruta*, 824 F.3d at 929–32.

VIII

To conclude, the English history of the right to have arms has proved critical to the contemporary Supreme Court in interpreting the Second Amendment to the U.S. Constitution. There are of course differences—for instance, the Second Amendment shed the English right's limitations based on social class and creed—but the core right is indeed a transplant from across the Atlantic. So, for good or ill, depending on your point of view, Americans have the Englishmen who won the Glorious Revolution and the Whigs who later championed a muscular Bill of Rights to thank (or to blame) for the American right to keep and bear arms.

Thank you.