

THE ENGLISH LEGACY OF THE SECOND AMENDMENT—HISTORY AND MYTH

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*He said, “that he was the greatest Tyrant to the Neighbours in every other Instance, and would not suffer a Farmer to keep a Gun”*¹

I. THE PROBLEM—*HELLER* AND ENGLISH HISTORY

According to the majority opinion of Justice Scalia in *District of Columbia v. Heller*,² pre-Second Amendment adoption English history informs the Amendment’s meaning. The majority opinion discusses the historical background after analyzing the language of the Amendment:

Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.”³

A moment’s reflection would tell us that the Bill of Rights did not codify English practice. There was no right to the “free exercise of religion” in England, there was an established religion, and freedom of the press was limited to there being no prior restraint.⁴ *Heller* itself

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1. HENRY FIELDING, *JOSEPH ANDREWS* 98 (Martin C. Battestin ed. 1967) (1742).
2. 554 U.S. 570 (2008).
3. *Id.* at 592 (quoting U.S. CONST. amend. II).
4. See Gordon Lloyd, *Bill of Rights: The English and Colonial Roots of the U.S. Bill of Rights*, TEACHING AM. HIST., <http://teachingamericanhistory.org/bor/roots-chart> (last visited Feb. 15, 2018).

contradicts the pre-existing rights approach. Justice Scalia noted, “William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to ‘keep arms in their houses.’”⁵ The majority opinion here recognizes that there was no free exercise of religion in England.⁶

Justice Scalia states that the purpose of the Amendment was to assure a “citizen’s militia”:

[P]etitioners’ interpretation does not even achieve the narrower purpose that prompted codification of the right. If, as they believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia, if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a “citizens’ militia” as a safeguard against tyranny.⁷

But as we will see, there never was a universal militia in England.

Toward the end of his opinion, Justice Scalia turns to the limitations on Second Amendment rights.⁸ Once again, history is dispositive.

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. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.⁹

He then relies on Blackstone:

We also recognize another important limitation on the right to keep and carry arms. [*United States v.*] *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the

5. *Heller*, 554 U.S. at 582 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 55 (1769)).

6. *See id.*

7. *Id.* at 599-600 (citation omitted).

8. *Id.* at 626-28.

9. *Id.* at 626 (citations omitted).

historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”¹⁰

Thus, the *Heller* majority purports to be based on pre-Amendment historical practice. We will see that its description of that practice is more mythical than real.

II. THE ENGLISH RIGHT TO KEEP ARMS—A PREVIEW AND THE SOCIAL BACKGROUND

A. *The Whig Supremacy*

Before plunging into the histories of England in the eighteenth century, one should note that none of the histories of England examined for this Article mention the issue of gun rights per se. Gun ownership was an issue under the Game Laws and there were controversies over how inclusive the militia should be, but gun rights in themselves were simply not an issue. There was no National Rifle Association (“NRA”), no chronic incidents of mass shootings (because even a trained infantryman could shoot only three musket rounds per minute), no Brady organization, nor any legislation permitting open carry. There was no party split on gun issues because there was only the Whig Party. No one with any power wanted to arm the populace as a defense against the government, because those in power were happy with things as they were and did *not* want to rock the boat. As a member of Parliament perhaps expressed, “Reform, sir! Don’t talk to one of reform—things are bad enough as they are.” (Probably apocryphal.)

The eighteenth century was known as the era of Whig Supremacy, in which a ruling oligarchy, a society of connections, controlled Parliament, the judiciary, local government, the established church, hunting, and the militia.¹¹ The Whigs purged the opposition, the Tories, both at national and local office.¹² For our study, it is important that the Justices of the Peace (key to the enforcement of the Game Laws) and the Militia officers were all Whigs.¹³

10. *Id.* at 627 (citation omitted) (first quoting *United States v. Miller*, 307 U.S. 174, 179 (1939); and then quoting 4 BLACKSTONE, *supra* note 5, at 148-49).

11. To view the titles of two histories consulted by this Article, see GEOFFREY HOLMES & DANIEL SZECHI, *THE AGE OF OLIGARCHY: PRE-INDUSTRIAL BRITAIN 1722-1783* (1993); and BASIL WILLIAMS, *THE WHIG SUPREMACY 1714-1760* (2d ed. 1962); and see also ROY PORTER, *ENGLISH SOCIETY IN THE EIGHTEENTH CENTURY* 48-56 (Revised ed. 1990).

12. HOLMES & SZECHI, *supra* note 11, at 27, 46, 48.

13. *See id.* at 27.

The Whigs were fundamentally comprised of Protestant and Parliamentary Supremacists:

Loyalty to the Protestant Succession, for example, was not just a convenient passport to office for Whigs; it was total and instinctive. . . . Every Whig stood firm on the fundamentals of the Revolution constitution, as it had evolved between 1689 and 1716 – its centrepiece a sovereign Parliament within the framework of a mixed monarchy.¹⁴

The principles of the Revolution were “erected into a political system by Locke, the evangelist of whig doctrine.”¹⁵ Locke’s emphasis was on property rights: “The great end of Mens entering into Society being the enjoyment of their Properties in Peace and Safety.”¹⁶ Thus, Locke’s “teaching encouraged a whig oligarchy to regard one of the chief objects of government to be the protection of their own rights of property and to adopt an attitude of neglect or indifference to social evils affecting the lower classes of society.”¹⁷

The ruling class was a small, but expanding circle, including “the old aristocracy and county families, but also the *novos homines* . . . who had acquired wealth and gained influence through commerce, adventure, eminence in the professions, or speculation.”¹⁸ The ruling class was extremely small and they all knew each other and almost all had no money cares.¹⁹ Religion was not immune from this system. “The established religion was indeed regarded by most politicians, and many churchmen too, of the eighteenth century, first as a safeguard for the whig system of government, and especially as a valuable form of police control over the lower classes.”²⁰ Church offices were used to provide for the offspring of the great Whig families.

Being part of the establishment required land. Wealth in personal property did not count. One had to have a landed estate to be a voter, a magistrate, or to hunt.²¹ “Peerage-ogling plutocrats had to play a waiting game. First they had to buy rolling acres . . . establish a county family and establish political pull, and finally assiduously cultivate friends in

14. *Id.* at 48-49.

15. WILLIAMS, *supra* note 11, at 3.

16. *Id.* at 5 (quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 134 (J.W. Gough ed., Basil Blackwell Oxford 1946)).

17. *Id.*

18. *Id.* at 145-46.

19. *Id.*

20. *Id.* at 76.

21. PORTER, *supra* note 11, at 50.

high places.”²² During the eighteenth century, landed wealth became more “concentrated in the hands of an upper crust of great proprietors, whose numbers could be counted in hundreds rather than in thousands.”²³ Locally, there was a government of the local oligarchies.²⁴ For our purposes, this makes it hard to make generalizations that are true for all of England. The enforcement of the Game Laws and the organization of the militia varied widely from place to place.²⁵

The Whig elite knew that they were at the top of the social order by the will of God and that only they had the ability and duty to rule.²⁶ We may see this in Blackstone’s introduction to his *Commentaries* where he describes the need for legal knowledge on the part of the elite in fulfilling their high social role.²⁷ He starts by characterizing that class as “our gentlemen of independent estates and fortune, the most [useful] as well as [considerable] body of men in the nation.”²⁸ Such gentlemen may be called upon to serve on a jury, more importantly they serve as Justices of the Peace: “And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by [punishing] the [dissolute] and idle; by protecting the peaceable and [industrious]; and, above all, by healing petty differences and preventing vexatious [prosecutions].”²⁹

Those in Parliament have a greater responsibility:

They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighted improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation.³⁰

The elite have both the ability and the duty:

Yet vast as this trust is, it can no where be so properly reposed as in the noble hands where our excellent constitution has placed it: and therefore placed it, because, from the independence of their fortune and

22. *Id.* at 52.

23. HOLMES & SZECHI, *supra* note 11, at 136.

24. *See id.* at 51.

25. *See id.* at 183-86.

26. *Id.* at 53 (“[W]hile many Whigs . . . wanted to change the ministers, very few indeed wanted fundamentally to change the system.”).

27. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 7 (1765).

28. *Id.*

29. *Id.* at 8.

30. *Id.* at 9.

the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank: and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth; which, as on the one hand it will prevent either interest or affection from interfering in questions of right, so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide.³¹

The Whig attitude is best exemplified today in the television series *Downton Abbey*, especially by Violet Crawley, the Dowager Countess of Grantham, and Lady Mary Crawley. A sense of the era can be gained by the modern reader by dialing back three hundred years, imagining the Crawleys of *Downton Abbey* in an era where their estates were prosperous and there were no serious challenges to their status. In all, Professor Porter writes: “For those safely above the poverty trap, the Georgian age was an exhilarating time to be alive.”³²

B. *The English Right and its Limitations—A Preview*

The history of the English right to bear arms could be traced back at least as far as the English Bill of Rights of 1689, which stated that “the subjects which are Protestants may have arms for their defense suitable to their conditions, and as allowed by law.”³³ To put this in perspective, it's hard to conceive of a right of free speech that is only “allowed by law.” So there are two stories of the right, one expansive and the other restrictive. In any case, Parliament was sovereign so it always had the power to limit a right. “[W]e may venture to affirm, that the power of parliament is [absolute] and without control.”³⁴

One major restriction on any right to bear and keep arms was the Game Laws, which limited hunting to the landed elite. These laws are described in a wonderful book, *Gentlemen and Poachers*:

The eighteenth-century English game laws have long been synonymous with petty tyranny. By imposing a property qualification on sportsmen, they effectively denied all but countrymen the right to take game or even to possess a gun. Those who challenged the gentry's monopoly were fined or imprisoned, usually after only a summary

31. *Id.* at 12.

32. PORTER, *supra* note 11, at 249.

33. *Modern History Sourcebook: The Bill of Rights, 1689*, FORDHAM U., <http://www.fordham.edu/halsall/mod/1689billofrights.asp> (last visited Feb. 15, 2018). Note the English Bill of Rights did not grant any rights to Catholics or Jews. *See id.*

34. 1 BLACKSTONE, *supra* note 27, at 157.

hearing by the local justice of the peace. In the early nineteenth century, it was claimed that one out of every four inmates in England's prisons was an offender against the game laws.³⁵

The Prohibition on poaching and on the instruments of poaching (for example, traps, dogs, and guns) is reminiscent of today's war on drugs. Although many were imprisoned, poaching continued, complete with shootouts between poachers and gamekeepers. Professor Munsche lists seventeen pages of anti-poaching laws in an appendix.³⁶ It has been estimated that only about one percent of the population had the land wealth necessary to be allowed to own a gun.³⁷ Note that the wealth had to be in land—a rich merchant who rented did not qualify.³⁸

Gun rights did not exist in a large geographic area, the Scottish Highlands.³⁹ The threats posed to the English throne from Scottish Highlander attempts to restore the Stuart Dynasty resulted in prohibiting Highlanders from bearing arms.⁴⁰ In the wake of the first Jacobite Rebellion, the English realized that the Scottish clans and Highlanders were a threat to the throne.⁴¹ In response to this realization, they imposed the Disarming Act of 1716, also known as “The Act for the More Effectually Securing the Peace of the Highlands in Scotland.”⁴² At the Battle of Culloden, the final battle in the second Jacobite Rebellion, Bonnie Prince Charlie and his Scottish Highlander troops attempted to restore the Stuart Dynasty once more, but their sparse assortment of weapons was not enough to defeat the English.⁴³ The English went on to prohibit the Highlanders even more stringently than before, banning them from having any weapons, even the wee dirk worn on the Scotsman's kilt.⁴⁴

35. P.B. MUNSCHÉ, *GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671–1831* (inner dust jacket) (1981).

36. *Id.* app. at 169-86.

37. *See id.* at 28.

38. *Id.* at 12.

39. MARGARET SANKEY, *JACOBITE PRISONERS OF THE 1715 REBELLION: PREVENTING AND PUNISHING INSURRECTION IN EARLY HANOVERIAN BRITAIN* 115 (2005).

40. *See id.*

41. *Id.* at 17.

42. *Id.* at 115 (internal quotations omitted) (explaining that the The Disarming Act prohibited the carrying of personal weapons in certain places like roads and fields and ordered the “collection and destruction” of arms in addition to fines and/or imprisonment).

43. PLANTAGENET SOMERSET FRY & FIONA SOMERSET FRY, *THE HISTORY OF SCOTLAND 195-96* (1982). The casualty ratio was about seven to one in favor of the English. RICHENDA MIERS, *SCOTLAND* 31-32 (2006).

44. MIERS, *supra* note 43, at 20. I met a kilt wearer in Scotland and remarked on the embroidered representation of a dirk on his kilt. He explained it was meant to represent the banned real dirk.

Neither the majority nor the dissenting opinion in *Heller* mentions the Game Laws or the disarming of the Highlands.⁴⁵ The majority does, however, cite to Blackstone,⁴⁶ who wrote that the English have had a right to bear arms.⁴⁷ But can we rely on Blackstone? He also said that in a democracy there can be no sovereignty without suffrage, which he then goes on to qualify by reasoning that the right to vote should be limited to those who have enough wealth to enable them to make an independent judgment.⁴⁸ Both the right to vote and the right to arms were, in reality, limited to a small percentage of the population. The limitation on the right to vote was justified by the theory of “virtual representation,” that members of parliament would represent the entire realm, even if elected by only a small part of the realm’s subjects. I have been toying with the idea that the right to bear arms was virtual; all had the right, but it was exercised by the few who bore arms for all.

III. THE ENGLISH LEGACY AND AMERICAN SOCIETY

A. *The Indeterminism of the Determinism of Historical Originalism*

Both sides in *Heller* agreed that the Second Amendment had to be understood in historical terms and that the determinative history included the British as well as the American past. Professor Joyce Lee Malcolm entitled her amicus brief for *Heller* as “The Right Inherited from England.”⁴⁹ Professor Malcolm starts her brief by citing *Robertson v. Baldwin*⁵⁰ for her claim that the Bill of Rights was “simply to embody certain guaranties and immunities which we had inherited from our English ancestors.”⁵¹ The Brief’s “Summary Argument” opens as follows: “Over a century ago, this Court declared it ‘perfectly well settled’ that the Bill of Rights was ‘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.’”⁵² On

45. See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

46. *Id.* at 626.

47. 1 BLACKSTONE, *supra* note 27, at 139.

48. “Next, with regard to the elections of knights, citizens, and [burgesses]; we may observe that herein [consists] the [exercise] of the democratical part of our [constitution]: for in a democracy there can be no [exercise] of [sovereignty] but by [suffrage], which is the declaration of the people’s will.” *Id.* at 164.

49. Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent, *Heller*, 554 U.S. 570 (No. 07-290).

50. 165 U.S. 275 (1997).

51. Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent, *supra* note 49, at 2 (quoting *Robertson*, 165 U.S. at 281).

52. *Id.* (quoting *Robertson*, 165 U.S. at 281). “The true [reason] of requiring any qualification,

the other hand, another amici curiae brief, argues the opposite: “Though Anglo-American political tradition did indeed value the idea of an armed populace, it never treated private ownership of firearms as an individual right.”⁵³

Both the majority and minority opinions in *Heller* are based on historical originalism, although they have two views on what the history says.⁵⁴ The assumption that the Constitution’s drafters only enacted established rights in the Bill of Rights is patently false, as shown by the First Amendment, which rejects the establishment and provides for the free exercise of religion.⁵⁵ In England the Episcopal Church was established, while Catholics, dissenting Protestants, and Jews were subject to many disabilities.⁵⁶ But the assumption that historical originalism is the key to understanding the Second Amendment remains.

So both advocates for gun rights and advocates against them insist that the “English Legacy” is crucial—but both also completely disagree as to what that legacy was. It is strange that something that is seen to be so determinative can be so indeterminate. As we shall see, I conclude that the English law of gun rights and control revolved around English issues of social class and politics that were totally different than the issues that preoccupied Americans.⁵⁷ English history cannot control our Constitution.

B. *The American Dichotomy*

1. Stand Your Ground Versus the Arts of Civilization

How should society be maintained—by the independent man wielding righteous force or by the arts of civilization? Professor Stanley Fish sets out these two worldviews in his essay *Stand Your Ground, Be a Man*.⁵⁸ He points out that “stand your ground” is more than a phrase—it

with regard to property, in voters, is to exclude [such persons] as are in [so] mean a [situation] that they are [esteemed] to have no will of their own. If [these] persons had votes, they would be tempted to [dispose] of them under [some] influence or other.” 1 BLACKSTONE, *supra* note 27, at 165.

53. Brief of Amici Curiae Jack N. Rakove et al., In Support of Petitioners at 2, *Heller*, 554 U.S. 570 (No. 07-290).

54. Compare *Heller*, 554 U.S. at 593 (majority opinion), with *id.* at 647 (Stevens, J., dissenting).

55. U.S. CONST. amend. I.

56. See 4 BLACKSTONE, *supra* note 5, at 55.

57. See *infra* Part V.

58. Stanley Fish, *Stand Your Ground, Be a Man*, N.Y. TIMES (July 22, 2013, 9:00 PM), https://opinionator.blogs.nytimes.com/2013/07/22/stand-your-ground-be-a-man/?_r=0.

is an injunction.⁵⁹ This value is revealed in western movies, that a man should stand his ground and face down the bad guys. There is, however, a counter-theme, of valuing civilization and peace. Women in western movies often represent these values, e.g., Grace Kelly in *High Noon*.⁶⁰ Even she, however, has to resort to violence in the end.⁶¹ A female character in *Shane* advocates for gun control: “[W]e’d all be better off if there wasn’t a single gun in this valley.”⁶²

We can see this anti-“stand your ground” stance in former President Barack Obama’s questioning of the stand your ground laws: he believed the laws must be examined to determine if they are “designed in such a way that they encourage . . . altercations and confrontation . . . rather than defuse potential altercations.”⁶³

2. Professor Reva B. Siegel’s Interpretation of *Heller* as a Populist Decision: The Emergence of Stand Your Ground

Professor Reva B. Siegel argues that the *Heller* majority decision is an outgrowth from a social movement that arose in the aftermath of *Brown v. Board of Education*.⁶⁴ She points out that Justice Scalia’s majority opinion rejects the “hundreds of judges” who, he states, have misread *Miller*, while he relies on the authority of the people.⁶⁵ “These [erroneous opinions] cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms.”⁶⁶ The modern gun control movement began in the 1960s.⁶⁷ The assassination of John F. Kennedy and Martin Luther King, Jr., along with urban riots and rising crime rates spurred Congressional legislation regulating firearms.⁶⁸ Even after Richard Nixon’s 1968 victory and the amount of racism that permeated the gun debate, there was still support for gun control.⁶⁹ There was, however, a

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (“Of course if there were no guns, there could be no shootings, no showdowns and no opportunity to stand your ground. Manhood would have to be demonstrated in other ways, by tilling the ground, raising a family, running a general store.”).

63. *Id.* (quoting Barack Obama, Remarks by the President on Trayvon Martin (July 19, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>).

64. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192-94 (2008).

65. *Id.* at 200-01 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 624 n.24 (2008)).

66. *Id.* at 200 (quoting *Heller*, 554 U.S. at 624 n.24).

67. *Id.* at 202.

68. *See id.* at 204.

69. *Id.* at 206-07.

reaction against gun control in the 1970s, and support for handgun bans dropping from sixty percent to forty-one percent by 1975.⁷⁰ The NRA began to oppose all types of gun control.⁷¹ In 1977, certain members of the NRA staged a coup, turning it into an organization that fought all gun regulation.⁷² The NRA's Institute for Legislative Action based its attack on the common law and the Second Amendment.⁷³ The individual rights interpretation of the Amendment became a political argument.⁷⁴ The NRA's lobbying and direct mail politics transformed gun control into a conservative social issue.⁷⁵ The social issue of anti-gun control merged with the call to construe the constitution according to its original intent. In 1989, Professor Sanford Levinson published *The Embarrassing Second Amendment*, which changed Second Amendment discourse.⁷⁶ He thus started the contemporary emphasis on the right of insurrection, which according to supporters of gun rights was one of the Amendment's purposes.⁷⁷

Thus, the gun rights controversy morphed into a part of the culture wars. In the mid-1990s, the Republican Party, under the leadership of Newt Gingrich, joined in the fight, promising to work for the repeal of the assault weapons ban.⁷⁸ Gingrich distinguished between liberal and conservative views on control: "Generally, liberals neither understand nor believe in the constitutional right to bear arms. . . . For some psychological reason, liberals are antigun but not anti-violent criminal."⁷⁹ Professor Siegel characterizes the NRA and political right view of the Second Amendment as one that "unmistakably" imagines society as divided into "law-abiding citizens" and the "criminal," the "deserving" and "undeserving," and resents governmental "identification with the undeserving other."⁸⁰

In 1996, Wayne LaPierre recruited Charlton Heston to replace the then-current NRA president.⁸¹ Heston traced the Amendment back to the American Revolution, adding a component of racial inheritance: "And no amount of oppression, no FBI, no IRS, no big government, no social

70. *Id.* at 207-12. The District of Columbia's absolute ban on handguns dates from this era.

71. *See id.* at 208, 210.

72. *Id.* at 210.

73. *Id.* at 211.

74. *Id.* at 207-08.

75. *Id.* at 211.

76. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

77. *Id.* at 646-47.

78. Siegel, *supra* note 64, at 227-28.

79. *Id.* at 228 (quoting NEWT GINGRICH, TO RENEW AMERICA 202-03 (1995)).

80. *Id.* at 235-36.

81. *Id.* at 231.

engineers, no matter what and no matter how, they cannot cleave the genes we share with our Founding Fathers.”⁸² Heston thus placed gun rights firmly in the center of white, male, middle-class Evangelicals who were being attacked in the culture wars.⁸³

American culture thus became polarized between those who saw guns as being a central component of American manhood and those who did not. This American gun culture has, as we will see, nothing to do with the role of guns in England prior to the adoption of the Second Amendment.

IV. THE COMPONENTS OF THE ENGLISH LEGACY

The current American views on a right to bear arms are a recent development in our history, part of the culture wars that inform our contemporary political struggles. The Second Amendment’s meaning, however, is cast as deriving from English law. This Article discusses four components of the English law on guns: the English Declaration of Rights of 1687,⁸⁴ the writings of Blackstone,⁸⁵ the Game Laws,⁸⁶ and the Militia.⁸⁷

A. *The English Declaration of Rights*

The English Declaration of Rights (“Declaration”) was in effect a negotiated agreement between Parliament and the King-to-be William III of the Netherlands, on his taking of the throne of England after the removal of James II.⁸⁸ The Declaration represented the agreed upon division of powers between the new King and Parliament.⁸⁹ The final version of the Declaration’s arms provision read as follows: “That the subjects which are Protestants may have arms for their Defense suitable to their conditions and as allowed by Law.”⁹⁰ Professor Lois G. Schworer points out that the Declaration was drafted in the context of the English Protestant struggle against Catholicism and thus it was the

82. *Id.* at 232-33 (quoting CHARLTON HESTON, *THE COURAGE TO BE FREE* 164, 168 (2000)).

83. *Id.* at 233-36.

84. *See infra* Part IV.A.

85. *See infra* Part IV.B.

86. *See infra* Part IV.C.

87. *See infra* Part IV.D.

88. Patrick J. Charles, “*Arms For Their Defence*”? An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in *McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351, 358 (2009).

89. *Id.*; *see also* *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008) (stating the Declaration “was codified as the English Bill of Rights”).

90. Bill of Rights, 1689, 1 W. & M., c.2, § 7 (Eng.).

Protestants who were to be armed in a collective defense against Catholics.⁹¹ Those in favor and those against individual gun rights have engaged in a furious debate over the meaning of the Declaration's language. Does it give Protestants the individual right to bear arms, or does it give Protestants only a collective right to have a militia? Arguments and counter-arguments are made, based on a micro-analysis of the language of the legislative history, and the historical background, as well as later English cases (though there are not many). *Heller* condenses this extensive, technical, and hyper-analytical debate to a sentence: "It was clearly an individual right, having nothing whatever to do with service in a militia."⁹²

I will set out the conflicting arguments, starting with Patrick Charles's extensive law review article, *Arms for Their Defence?*⁹³ Charles argues that the Declaration's "arms" was in response to the fears that Catholics in control of the militia could disarm all the Protestants on a "massive scale."⁹⁴ Charles argues that the disarming of many "disaffected persons" from 1660 to 1701 shows there was no individual right to bear arms.⁹⁵ The final language of the Declaration allowed only Protestants to have arms subject, however, to their socio-economic status.⁹⁶ *Arms for Their Defence?*, contrary to Malcolm,⁹⁷ only referred to "the philosophical right the 'have arms' provision echoed—the right of the people to take up 'arms for their Defence' when all other means of redress to a tyrannical government are exhausted."⁹⁸ Joyce Lee Malcolm reads the Declaration as creating the right to have arms.⁹⁹ In doing so, she writes not as an objective academic, but as a cheerleader for gun rights: "The new magna carta, unlike the old, was to include a *right* for Englishmen to possess arms."¹⁰⁰ Her chapter dealing with the Declaration is entitled "Arms for Their Defence: The Making of a 'True, Ancient, and Indubitable Right.'"¹⁰¹ From this title, one realizes that

91. Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 36-39 (2000).

92. *Heller*, 554 U.S. at 593.

93. See generally Charles, *supra* note 88. Charles is not an academic, but is a book author. *Id.* at 351 n.*.

94. *Id.* at 360.

95. See *id.*

96. *Heller*, 554 U.S. at 664 (Stevens, J., dissenting).

97. See *infra* notes 99-103 and accompanying text.

98. Charles, *supra* note 88, at 383.

99. Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent, *supra* note 49, at 4, 9.

100. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 114 (1994).

101. *Id.* at 113.

Malcolm *starts* with the assumption that the Declaration created an individual right to bear arms.¹⁰² She characterizes the evolution of the English right of citizens to be armed as “unusual,” because of its inception as a duty.¹⁰³

At the convention debating the Declaration, “[c]onvention members expressed their outrage at the disarmament of law-abiding subjects during the reigns of Charles and James.”¹⁰⁴ We now turn to Professors Charles’s and Malcolm’s opposite interpretations of the debates and proposals in the convention. We start with a speech by Thomas Erle (perhaps never delivered) which proposed that “[b]esides the militia arms it will be convenient that every man that hath £10 and every substantial householder in any town or city should be provided of a good musket in case of an invasion.”¹⁰⁵ Malcolm writes that Erle’s “suggestion, or something very like it” must have been on the convention members’ minds, for it mirrors “the first version of the arms article, which declared that Protestants ‘should provide and keep arms for their common defence.’”¹⁰⁶ Charles reads Erle’s language differently, viewing the change to “may have arms” as “articulating that having arms was an allowance by law—not a right per se.”¹⁰⁷ Despite the continued reference to arms “for ‘their common Defence,’” to Malcolm, the substitution of “may” for “should” signaled a shift away from the “public duty” to be armed and asserted more emphasis on the right to arms as an “individual right.”¹⁰⁸

Charles sees the purpose of Erle’s proposal to be enabling every Protestant’s duty to “protect against invasion.”¹⁰⁹ Moreover, Charles reads Erle’s limitation of the extension of the right to “substantial householders” as having the best interest of the nation in mind by allowing arms for those “that have estates of their own,” providing arms only to those who meet certain hierarchical and socio-economical qualifications.¹¹⁰ He notes “Erle’s proposal . . . did not pass.”¹¹¹

102. *See id.* at 113, 119-20.

103. *Id.* at 1.

104. *Id.* at 115.

105. Charles, *supra* note 88, at 384 (quoting Mark Goldie, *Thomas Erle’s Instructions for the Revolution Parliament, December 1688*, in 14 *PARLIAMENTARY HISTORY* 337, 345 (Clyve Jones ed., 1995)). Malcolm gives a slightly different version. *See* MALCOLM, *supra* note 100, at 116-17.

106. MALCOLM, *supra* note 100, at 117.

107. Charles, *supra* note 88, at 385. It is most obvious here, as in Charles’s and Malcolm’s readings of Erle’s speech, exactly how diametrically opposed their readings of the intentions behind the Declaration really are.

108. MALCOLM, *supra* note 100, at 118.

109. Charles, *supra* note 88, at 385.

110. *Id.*

111. *Id.*

Now we come to the dropping of “common” from “common defence” and the addition of “suitable to their Conditions and as allowed by Law.”¹¹² The revised arms article now read: “That the Subjects which are Protestants may have Arms for their Defense suitable to their Conditions and as allowed by Law.”¹¹³ Note that this language restricts the right to Protestants (*not* Catholics) and makes the right subject to Parliament, not the King.

Professor Malcolm concludes: “[T]he rephrasing shifted the emphasis away from the public duty to be armed and toward the keeping of arms solely as an individual right.”¹¹⁴ Professor Malcolm assumes, without discussion, that this provision granted an individual right to arms.¹¹⁵ In support of this assertion, she cites to the Commons Journal: “The Commons Journal records without explanation a new version of the article on the right of individuals to have arms.”¹¹⁶ She concludes that the convention “finally came down squarely, and exclusively, in favour of an individual right to have arms for self-defence.”¹¹⁷ Further, she notes that “militia” was completely left out of the Declaration as well as any reference to “common, as opposed to individual, defence.”¹¹⁸ Professor Malcolm sees the addition of “as allowed by Law” as a compromise, the product of practical politics.¹¹⁹

She does note that with the Game Act and the Militia Act still in force, this right to bear arms “seems empty rhetoric.”¹²⁰ She then retreats from this obvious conclusion, which would totally obliterate her thesis, stating that the final draft of the Declaration was a compromise: “[T]he arms article declared a right that current law negated, with the understanding that future legislation would eliminate the discrepancy.”¹²¹

Charles, on the other hand, places more emphasis on the change to “may” have arms being conditioned on the addition of “suitable to their condition as allowed by Law.”¹²² He sees the addition as providing “an allowance by law—not a right per se,” finding that “may have arms . . . suitable to their conditions,” does not articulate an individual

112. MALCOLM, *supra* note 100, at 119.

113. *Id.*

114. *Id.* at 118.

115. *See id.*

116. *Id.* at 119 (citing 10 H.C. JOUR. 21-22 (1688-1693)).

117. *Id.* at 120.

118. *Id.*

119. *Id.* at 120-121.

120. *Id.* at 120.

121. *Id.*

122. Charles, *supra* note 88, at 378 (citing 1 W & M 2, c.2 (1688) (Eng.)).

right to arms, but a right for the militia to defend against a tyrannical government.¹²³ The frequent use of “condition” in weapon, game, and militia laws expresses the hierarchical and socio-economic status—the “chain of being,” on which the “right” was based.¹²⁴ Citing to books, pamphlets, and the literature of the time, Charles finds the meanings of “arms for their common defence” and “arms for their defence” were the same, both referring to the rights of the militia.¹²⁵

Professor Schwoerer gives another explanation, that the right granted by the Declaration was medieval in that it “was exclusive—not held by everyone. Such a right was dependent upon property, status, or gift.”¹²⁶ In *Heller*, Justice Scalia concludes without discussion that the Declaration gave individuals a right.¹²⁷ “It was clearly an individual right, having nothing whatever to do with service in a militia.”¹²⁸

B. Blackstone

Both Joyce Lee Malcolm and the *Heller* majority rely on Sir William Blackstone as authority—treating his *Commentaries* as the definitive treatise on the Declaration.¹²⁹ Blackstone wrote:

The fifth and laft auxiliary right of the fubject, that I fhall at prefent mention, is that of having arms for their defense, fuitable to their condition and degree, and fuch as are allowed by law. Which is alfo declared by the fame ftatute and is indeed a public allowance, under due reftrictions, of the natural right of refiftance and felf-prefervation, when the fanctions of fociety and laws are found infufficient to refrain the violence of oppreffion.¹³⁰

Blackstone’s language, however, displays the same ambiguity as does the English Bill of Rights and the Second Amendment. Is the right

123. *Id.* at 385, 387.

124. *Id.* at 378.

125. *Id.* at 387-88.

126. Schwoerer, *supra* note 91, at 43.

127. *See* *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

128. *Id.* As we have seen, resolving this issue is not that simple.

129. *See id.* at 593-94; Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent, *supra* note 49, at 4-5. Blackstone’s *Commentaries* were the first synopsis of English law since Lord Coke’s, and were influential, both in England and the United States. *See Heller*, 554 U.S. at 593-94. It should be noted at the outset that Blackstone did institute three innovations in legal education; innovations that have been sadly neglected. He created the first wine cellar in an Oxford College. WILFRID PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 94 (2008). He installed an in-house bar so that law students did not have to leave the building to get a drink. *Id.* at 94-95. Also, when he wrote his scholarly works, he always had a bottle of port on hand. *Id.* at 210.

130. 1 BLACKSTONE, *supra* note 27, at 139 (citation omitted).

individual or collective? Professor Malcolm argues that it is individual.¹³¹ Others argue the opposite.¹³² In any case, natural rights under Blackstone are subject to limitation: they “may be [restrained] by [positive] laws enacted for [reasons] of [state], or for the [supposed] benefit of the community.”¹³³ We see this in the areas of the right to bear arms, the right to hunt game, the right to a jury, the right of representation, and the right to sit in Parliament.

The *Heller* opinion does not mention it, but Blackstone’s discussion of the Game Laws notes how these laws limit the populace’s right to arms.¹³⁴ Blackstone, as we will see, typically starts by affirming a right and then goes on to state that that right is limited in society.¹³⁵ In any case, as noted by the *Commentaries*, Parliament is sovereign, which prevents any judicial enforcement of any right against parliamentary law.¹³⁶ Blackstone describes the Game Laws in his discussion of the criminal laws of England:

Lastly, there is another offence, fo confituted by a variety of acts of parliament, which are fo numerous and fo confufed, and the crime itfelf of fo queftionable a nature, that I fhall not detain the reader with many obfervations thereupon. And yet it is an offence which the fportfmen of England feem to think of the higheft importance; and a matter, perhaps the only one, of general and national concern: affociations having been formed all over the kingdom to prevent it’s deftructive progrefs. I mean the offence of deftroying fuch beafts and fowls, as are ranked under the denomination of *game* But the laws, called the game laws, have alfo inflicted additional punifhments (chiefly pecuniary) on perfons guilty of this general offence, unlefs they be people of fuch rank or fortune as is therein particularly fppecified. All perfons therefore, of what property or diftinction foever, that kill game out of their own territories, or even upon their own eftates, without the king’s license expreffed by the grant of a franchife, are guilty of the firft original offence, of encroaching on the royal prerogative. And thofe indigent perfons who do fo, without having fuch rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations alfo, created by the ftatutes for preferving the game: which aggravations are fo feverely punished, and thofe punifhments fo implacably inflicted, that the offence againft the king is feldom thought of, provided the miferable

131. Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent, *supra* note 49, at 4.

132. See, e.g., Charles, *supra* note 88, at 387.

133. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 411 (1765).

134. *Id.* at 413.

135. See *id.* at 411.

136. 1 BLACKSTONE, *supra* note 27, at 143.

delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the present head, because the only rational footing upon which we can consider it as a crime, is that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings; which is an offence against the public police and economy of the commonwealth.¹³⁷

These laws exist despite the fact that everyone has the natural right to hunt game:

In the first place then we have already shewn, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody, but liable to be seized by the first occupant.¹³⁸

But in society, the right to take wild animals is limited:

But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. . . . [I]n consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize.¹³⁹

And, in a passage that directly contradicts any right to bear arms, Blackstone writes:

Many reasons have concurred for making these constitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and dissipation in husbandment, artificers, and others of lower rank; which would be the unavoidable consequence of universal license. 4. *For preventing of popular insurrections and resistance to the government, by disarming the bulk of the people: which last is a reason oftener meant, than avowed, by the makers of forest or game laws.*¹⁴⁰

137. 4 BLACKSTONE, *supra* note 5, at 174-75.

138. 2 BLACKSTONE, *supra* note 133, at 411.

139. *Id.*

140. *Id.* at 411-12 (emphasis added) (footnote omitted). This passage hidden in plain sight in

So all Englishmen have a right to keep arms, except when restricted. Professor Duncan Kennedy writes that Blackstone posits natural rights and then blames the Normans and Parliament for limiting these rights.¹⁴¹ Certainly this is how Blackstone deals with the natural right to hunt game as the Norman kings reserved hunting for themselves and then Parliament restricted hunting to the wealthier landed gentry.¹⁴² Kennedy also points out that, to Blackstone, holders of absolute rights become holders of only relative rights as members of society.¹⁴³ This contract between abstract rights and reality shows up again in the right of representation and the right to a jury.

Blackstone's own involvement in voting disputes shows the disconnect between his rhetoric and reality. The issue was whether copyholders by inheritance, rather than holding at the will of the lord of the manor, could vote.¹⁴⁴ To Blackstone, voting could be and was restricted to those with a certain property qualification.¹⁴⁵ This was justified because only those with sufficient wealth could be trusted to vote for the good of the country, rather than out of narrow self-interest.¹⁴⁶

A bill to settle this question was introduced in Parliament and Blackstone prepared what today would be called a position statement against such copyhold voting.¹⁴⁷ Blackstone used a historical approach that would have done Justice Scalia proud. He summarized fifteenth century statutes and described the four main types of feudal terms and concluded that the copyholders by inheritance were not "freeholds" or "free lands."¹⁴⁸ The issue was a complicated one, one which a traditional freehold might refer to lands or to the type of terms by which the lands were held. A tenant for life had a freehold interest, but only those holding lands "in free socage" enjoyed freehold tenure.¹⁴⁹ Blackstone stated that customary freeholds were of such a nature.¹⁵⁰

Blackstone's analysis in his legal brief opens with an affirmation that "'in every free state' each member of 'the community . . .' has a

Book II of the *Commentaries*, and was missed by the *Heller* majority.

141. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205, 236-37 (1979).

142. 2 *BLACKSTONE*, *supra* note 133, at 415.

143. Kennedy, *supra* note 141, at 273-74.

144. *PREST*, *supra* note 129, at 126.

145. *See id.*

146. 1 *BLACKSTONE*, *supra* note 27, at 7.

147. *PREST*, *supra* note 129, at 127.

148. *Id.*

149. *Id.* at 128.

150. *Id.*

voice in choosing “those delegates, to whose charge is committed the disposal of his property, his liberty, and his life.”¹⁵¹ But of course, the poor, having “no will of their own” cannot vote.¹⁵² Even if the rights of members of a free state would argue for enlarging the franchise, the existing laws must be followed.¹⁵³

If you have been following so far, there is a right to vote, except for the justifiable exception for those with not enough property. But Blackstone in real life took part in a scheme to allow the propertyless to vote.¹⁵⁴ His motivation was not to enlarge the franchise, but to help his candidate, the Earl of Abingdon.¹⁵⁵ The local franchise was confined to tenants of sixty-one town properties, called “burgage tenements.”¹⁵⁶ Blackstone came up with and implemented a plan to acquire seven burgage tenements and thirty-eight leases; “trusty Friends” of Abingdon’s would be granted leases before the election, enabling them to vote, and then the leaseholds would be returned afterwards.¹⁵⁷ Thus, Blackstone laid down the rule (everyone has a right to vote), along with its exception (actually only those with property qualifications), and then subverted the rule(s) of his *Commentaries* with a successful scheme to subvert the exception.¹⁵⁸ Wilfred Prest notes that he never showed any unease in his position and his taking benefits for the corruption of the election.¹⁵⁹ In other words, regardless of what Blackstone wrote, as a practicing lawyer, he came up with a scheme to get around it and elect his patron.

Blackstone’s own election to Parliament was both convoluted and corrupt. Lord Fitzmaurice, acting as Blackstone’s aristocratic patron, arranged to have Lord Bute, (who had the disposal of the borough of Hindon—“a thoroughly corrupt ‘potwalloper’ constituency”) agree to come up with the money to pay off the Hindon electors.¹⁶⁰ There was a problem, however—Blackstone did not meet the qualification to be a borough member of Parliament because his property was personal, not real.¹⁶¹ He solved the problem by buying an annuity on landed security

151. *Id.* (quoting WILLIAM BLACKSTONE, CONSIDERATIONS ON COPYHOLDERS (1755)).

152. *Id.* (quoting BLACKSTONE, CONSIDERATIONS ON COPYHOLDERS, *supra* note 151).

153. *Id.* 128-29.

154. *Id.* at 224-25.

155. *Id.* at 224.

156. *Id.*

157. *Id.* These votes and leases were called “faggot-votes” and papers. *Id.*

158. *See id.* at 224-25.

159. *Id.*

160. *Id.* at 180 (quoting L.B. NAMIER & J. BROOKE, THE HOUSE OF COMMONS 1754-90, at 415 (1964)).

161. *Id.* at 180.

and settling an equivalent annuity out of his personal estate.¹⁶² The two proprietors of Hindon borough were paid £2000.¹⁶³ Today, this would be illegal, but it must be remembered that Blackstone's society was hierarchical and everyone had to have a sponsor. Like today's Chicago Machine, the eighteenth century establishment "don't want nobody that nobody sent."¹⁶⁴

One more obstacle remained—the King intended to make him a silk, in which "an MP who took silk must resign and stand again."¹⁶⁵ That problem was solved by granting him a royal patent of precedence rather than making him a silk.¹⁶⁶ Blackstone maintained his independence—his parliamentary seat was "conferred unsought, and accepted unconditionally,"¹⁶⁷ but he did prepare a bill about enclosures on property belonging to his patron, the Earl of Suffolk.¹⁶⁸ These actual machinations and bribery were a long way from what was described in the *Commentaries*; but Blackstone was not a neutral academic, he used politics and preferment to become a judge and a member of Parliament.¹⁶⁹

Another instance of Blackstone's actions contradicting his writing was his support for the House of Commons's refusal to seat John Wilkes.¹⁷⁰ Wilkes had been elected three times, but the House wanted to ban him.¹⁷¹ Blackstone argued "that Wilkes was guilty of 'an impious libel, with intent to blaspheme the Almighty God.'"¹⁷² Prest writes, "But the notion that by its mere resolution the House could effectively deprive free-born Englishmen of the right to choose their parliamentary

162. *Id.* at 181.

163. *Id.*

164. See Geoffrey R. Stone, *Remembering Abner J. Mikva, One of America's Most Dedicated and Inspiring Public Servants*, HUFFINGTON POST (July 9, 2016, 2:51 PM), https://www.huffingtonpost.com/geoffrey-r-stone/remembering-abner-j-mikva_b_10906342.html. For someone like me who has lived in Chicago for most of his life, the Whig oligarchy seems all too familiar, although the members of the Cook County Democratic Organization (a.k.a. the Chicago Machine) are not the landed gentry and the Mayor of Chicago has much more power than the King of the United Kingdom did. The rules of "[d]on't make no waves," "[d]on't back no losers" and "you need a sponsor" apply to both. See MILTON L. RAKOVE, DON'T MAKE NO WAVES DON'T BACK NO LOSERS 11, 108 (1975).

165. PREST, *supra* note 129, at 181.

166. *Id.*

167. *Id.* at 182 (quoting THE LETTERS OF SIR WILLIAM BLACKSTONE 1744–1780 (W.R. Prest ed. 2006)).

168. *Id.* at 227.

169. *Id.* at 182, 255.

170. *Id.* at 237.

171. *Id.* at 239.

172. *Id.* at 237 (quoting J. WRIGHT, SIR HENRY CAVENDISH'S DEBATES OF THE HOUSE OF COMMONS, 129 (1841)).

representatives was undeniably disturbing.”¹⁷³ A contemporary pointed out that Blackstone’s *Commentaries* made no mention of expulsion.¹⁷⁴ Thus, Blackstone operated on two levels, in his *Commentaries* he wrote of natural rights and their limitations, and in real life he ignored his writings.

In an essay, *Blackstone on Judging*, Professor John H. Langbein argues that Blackstone knew his conclusions as to limitations on judicial power were false:

Blackstone’s sensitivity to the adaptability of the common law protects Blackstone from “[t]he claim that Blackstone regarded the law as fixed for all time.” If so, however, it convicts Blackstone of the inconsistency, indeed, the plain dishonesty, of resting his defence of judicial power on the supposed binding force of legal rules whose plasticity he knew well.¹⁷⁵

Langbein further states,

There was, however, a much deeper flaw in Blackstone’s account of the allocation of power between judge and jury. As so often in the *Commentaries*, Blackstone’s account was formalistic, in the sense of describing the nominal power relationships, while failing to acknowledge what he and other lawyers of his day knew to be the actual division of power and influence.¹⁷⁶

Langbein concludes: “[D]espite all the strengths of Blackstone’s *Commentaries*, the work is simply too unreliable to merit the deference it tends to be accorded.”¹⁷⁷ Professor Michael Hoeflich explores the reception of Blackstone into American law in his *American Blackstones*.¹⁷⁸ He explains that there were many versions, not just one, of the *Commentaries* in America.¹⁷⁹ These were of two types, the first being the reissue of the English editions without change (and without royalty payments).¹⁸⁰ The second was the publication of the

173. *Id.* at 240.

174. *Id.* at 240-41.

175. John H. Langbein, *Blackstone on Judging*, in BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY 65, 68 (William Prest ed., 2009) (alteration in original) (footnote omitted) (quoting Albert W. Alschuler, *Rediscovering Blackstone*, 145 PENN. L. REV. 1, 43 (1996)).

176. *Id.* at 70.

177. *Id.* at 77.

178. Michael Hoeflich, *American Blackstones*, in BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY, *supra* note 175, at 171-84.

179. *Id.* at 171.

180. *Id.* at 172, 177.

Commentaries with notes specifically applicable to general American law and a particular state's law.¹⁸¹ American lawyers realized that Blackstone could only serve as an introduction to law and was not, by any means, automatically applicable to American practice.¹⁸² Publication of the original *Commentaries* continued for several reasons: they functioned as an introductory text, were a source of quotable phrases, and looked impressive on the law office shelves. Also, since then the American copyright law did not protect foreign authors, no royalties need be paid.

It could be argued that whatever the English reality, the drafters of our Bill of Rights accepted the *Commentaries* at face value. But the drafters of the Bill of Rights had to know of the real conditions in England. There was correspondence and travel between the United Kingdom and America. They knew that Blackstone could not be applied automatically in the United States.

Saint George Tucker, the only man who signed both the Declaration of Independence and the Constitution, edited the first Blackstone that was adapted "to the Constitution and laws of the federal government of the United States and of the Commonwealth of Virginia."¹⁸³ Tucker explained that "the revolution which separated the present United States of America from Great Britain . . . produced a corresponding revolution not only in the principles of our government, but in the laws."¹⁸⁴ He continued, "Many parts of the laws of England are also either obsolete, or have been deemed inapplicable to our local circumstances and policy."¹⁸⁵

The bare quotations of Blackstone in the NRA brief by Malcolm and the *Heller* opinion both totally miss the fact that interpreting Blackstone's exposition of the English law is complicated and his theory and practice were not identical. The *Heller* majority opinion evidences a complete misunderstanding of Blackstone's *Commentaries* and his society.

181. *Id.* at 172.

182. *Id.* at 174.

183. *Id.* at 172.

184. *Id.* at 173 (quoting ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND THE COMMONWEALTH OF VIRGINIA, at iv-v (1803)).

185. *Id.* at 174 (quoting TUCKER, *supra* note 184, at xi).

C. *The Game Laws*

1. The Social Context

Professor Munsche in his history of the English Game Laws, *Gentlemen and Poachers*, explains that there were a multitude of laws that governed “the pursuit of animals for sport in this period,” and regulated the use of guns in that pursuit.¹⁸⁶ He lists one and a half pages of “Principal statutes, 1275-1831” in small print, and a fourteen page “guide to the laws” relating to deer, rabbits and game for 1660-1831, broken down by offenses committed by any persons and those committed by an unqualified person, the law applicable to gamekeepers, and the applicable enforcement procedure.¹⁸⁷

The purpose of all these laws was to grant the landed upper class a monopoly on hunting.¹⁸⁸ They made hunting and the possession of the means to hunt into crimes.¹⁸⁹ As such, they conflicted with any right to keep and bear arms that might have existed. Professor Munsche points out that the militia was to protect against arbitrary government by making a standing army unnecessary and thus preventing the king from governing without Parliament.¹⁹⁰ The militia did not supplant the regular army, “but the conviction persisted in many quarters that English liberty was dependent on the existence of an armed and vigilant yeomanry. This obviously ran counter to the spirit of the Game Act.”¹⁹¹

Gentlemen and Poachers studies those who “defended and enforced” the Game Laws and those who broke them.¹⁹² From the work we are able to gain a deeper insight into the state of the world in of eighteenth century England—clearly showing how different that world is from ours and what made it so different from our own. Professor Munsche points out that the Game Laws were not just hunting regulations, but had an all-important social dimension, in creating an identity for the gentry.¹⁹³ The Game Laws were the creation of the gentry—“[t]hey wrote the game laws, benefited from them, defended them, enforced them – and they led the fight for their repeal.”¹⁹⁴ Remember that the English Bill of Rights limited gun rights according to

186. MUNSCHÉ, *supra* note 35, at 3.

187. *Id.* at 170-86.

188. *Id.* at 21.

189. *Id.*

190. *Id.* at 79.

191. *Id.* at 79-80.

192. *Id.* at 7.

193. *See id.* at 8.

194. *Id.* at 6.

social condition and legislation and that those permitted to hunt were also the minority permitted to vote, be members of Parliament, and be officers in the militia. For the ruling class it was simply the natural order.

The gentry and the majority of the English population, however, had completely different view of the Game Laws' legitimacy: "Indeed, the vast majority of the population had never really accepted the gentry's right to a monopoly on game; they continued to believe that hares, partridges and pheasants 'were ordained from the beginning free for anyone who could overtake them.'"¹⁹⁵ The country gentlemen, however, believed that society was benefitted because the poor were prevented from developing habits of idleness, while at the same time rewarding "men who gave freely of their time and fortunes in the service of their community. In other words, the Game Laws were measures designed to preserve a stable society, one which was rural-based, hierarchical and paternalist."¹⁹⁶

With both sides—the gentry and the rural common folk—believing that they had a God-given right to either have the game for themselves or to hunt freely, the problem of poaching was endemic and intractable. In many ways, the "war on poaching" resembled our own "war on drugs." It was an unwinnable and ever-escalating conflict, a problem with no solution.

We may have the idea that poachers captured game to feed their families, but many sold their catch. It was the selling that distinguished the poacher from the sportsman. Selling game violated "one of the cardinal rules of sportsmanship in the eighteenth century."¹⁹⁷ Not only was selling game not sporting, it was also a "threat to social order."¹⁹⁸ To most country gentlemen, it seemed that the necessity of working for a living was the only thing that kept the poor from idleness. "Without the discipline of constant labour . . . the lower classes would . . . sink into lives of crime and debauchery" leading inevitably to society's decay.¹⁹⁹

Poaching was more than an activity of poor rustics trying to feed their families, it had the characteristics of modern day organized crime. Armed gangs made regular raids and once caught and sold, the game was transported from the country to cities using a distribution system that took the hares and pheasants from the country estates to the urban

195. *Id.* at 107 (quoting ROBERT FULFORD, SAMUEL WHITBREAD, 1764–1815: A STUDY IN OPPOSITION 224-25 (1967) (statement of a farmer)).

196. *Id.* at 7.

197. *Id.* at 53.

198. *Id.*

199. *Id.* at 53-54.

centers. In the last half of the eighteenth century, road improvements and the creation of stage and mail coaches brought most towns within a day of London.²⁰⁰ The coachmen operated outside of regulation and bought game to market without much risk to themselves.²⁰¹ So underneath the multiple cloaks of the coachman, a popular image from Regency romance novels, there often were rabbits and pheasants.²⁰² The financial incentive for the distribution system was a significant markup—“[i]n the 1820s . . . poulterers sold game for two or two-and-a-half times the amount paid to the poacher.”²⁰³

The trade became so vital to poulterers that they joined together to pay for the defense of their members who were charged with the sale of game.²⁰⁴ The actions of the middlemen were made illegal in 1707, when “any higgler, chapman, carrier, innkeeper, victualler or alehousekeeper” was forbidden “to buy, sell or possess game under pain of a £5 fine (per head of game) or three months in prison.”²⁰⁵ This Act, however, like many of our drug laws, was ineffective.

The illegal, but profitable trade attracted informants and blackmailers. These groups, of course, supported the Game Laws. Those in the trade, like the drug dealers today or the bootleggers during prohibition, enjoyed the higher profits that the Game Acts made possible.²⁰⁶ Many poachers worked as individuals or in families, but in the later part of the eighteenth century, there was a rise in poaching gangs who were armed and sometimes killed informants.²⁰⁷ There were even pitched gunfights between poachers and gamekeepers.²⁰⁸ Like our drug laws, the Act of 1755 banning the game trade gave poachers a monopoly on the supply end.²⁰⁹ Poaching went “from a craft, it was turning into a business – one which occupied large numbers of men and was capable of yielding large rewards.”²¹⁰ Professor Munsche concludes by stressing the Game Laws’ social importance:

200. *Id.* at 60.

201. *Id.* at 60-61.

202. *See id.* at 61; Jeffrey Nigro, *Mystery Meets Muslin: Regency Gothic Dress in Art, Fashion, and the Theater*, PERSUASIONS ON-LINE 10-11 (2010), <http://www.jasna.org/persuasions/on-line/vol31no1/nigro.html> (discussing the significance of coachmen’s cloaks in Regency literature).

203. MUNSCHÉ, *supra* note 35, at 61.

204. *Id.* at 56-58.

205. *Id.* at 55 (quoting 5 Anne, c. 14 (1707) (Eng.)).

206. *Id.* at 62.

207. *See id.* at 65-66, 68, 71.

208. *Id.* at 68-72.

209. *Id.* at 66.

210. *Id.*

The game laws were born out of a desire to enhance the status of country gentlemen in the bitter aftermath of the Civil War. Their message was that land was superior to money, a blunt assertion of privilege which for a long time accepted, or at least was not openly contradicted.²¹¹

For the ruling class it was simply the natural order.

2. The Enforcement of the Game Laws

a. Fines and Imprisonment

Legal process was divided between those conducted in informal sessions before Justices of the Peace and the trials before the Quarter-Sessions.²¹² Both were presided over, of course, by the landowning gentry (the same people who could vote, command the militia, and serve in Parliament), who wanted to preserve their monopoly on game.²¹³ Both proceedings were limited in the power to punish; the poacher could be fined and if the fine were not paid, he could be whipped and confined to jail for up to a few months.²¹⁴ The judges in the Quarter-Sessions were also drawn from the gentry, but the indictment and findings of guilty and innocence were in the hands of a grand and petty jury.²¹⁵ Another alternative was for plaintiffs (often game associations) to bring a civil suit against poachers.²¹⁶ The expense of these suits could be ruinous for the plaintiff or the defendant, and thus were usually settled.²¹⁷

b. Seizure

Instruments for catching game, such as snares, nets, dogs, and guns were subject to seizure under the Game Laws.²¹⁸ It is here that we come to the conflict between the Game Laws and the right (if there were such a right) to keep and bear arms. The details of that conflict will be discussed below.²¹⁹ Authorities could, and did, seize guns.²²⁰ A warrant was required for the search and seizure of guns.²²¹ To circumvent the

211. *Id.* at 164.

212. *Id.* at 77.

213. *See id.* at 76.

214. *Id.* at 78.

215. *Id.* at 76, 78, 90.

216. *Id.* at 89-90.

217. *Id.* at 90, 92.

218. *Id.* at 78-79.

219. *See infra* Part IV.C.3.

220. MUNSCHÉ, *supra* note 35, at 79-80.

221. *Id.* at 80-81.

process of obtaining a specific warrant, some counties issued general warrants.²²² These warrants provided “for the seizure of any gun, dog, net or ‘engine’ kept by an unqualified person.”²²³

Professor Munsche doubts the effectiveness of these attempts to disarm the English.²²⁴ The prevalence of news articles involving shooting and the openness of gun possession by the unqualified argues against wholesale disarmament.²²⁵ Dogs, however, as instruments of hunting, were subject to seizure and destruction, ordered by the gentry and the nobles.²²⁶ The steward of the Duke of Devonshire gave notice to the Duke’s tenants “if any of them keep any Dogs that destroy game, unless they dispose of them immediately, I have ordered the Keeper . . . to shoot them.”²²⁷ This summary of the seizure and killing of dogs illuminates the difference between eighteenth century England and American society today. Imagine what would happen today if hunting dogs were taken and shot?

c. Impressment

Another enforcement mechanism was the impressment of poachers into the Navy.²²⁸ Impressments were not a formal punishment until 1800, but some poachers were singled out.²²⁹ Professor Munsche concludes that it was difficult to say how many poachers were pressed, but it did happen.²³⁰ One poet wrote:

For his Majesty’s Service, we’ll press
The Felon who steals but a Hare;
For his Brats, the whole Parish assess:
All poachers and Anglers, *beware*.²³¹

The story of the Game Laws up to the time of the adoption of our Bill of Rights is an interesting one. But, one could ask what is its relevance to the English legacy of the Second Amendment? The difference between that society and ours is stark. I’ve done an informal poll of people familiar with rural areas asking them what would happen

222. *Id.* at 81.

223. *Id.* Yorkshire, for example, had a county gamekeeper who was authorized to seize guns from the unqualified. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 82.

227. *Id.* (citing JOAN WAKE, *THE BRUDENELLS OF DEENE* 218-19 (1953)).

228. *Id.* at 87-88.

229. *Id.* at 88.

230. *Id.*

231. *Id.*

if hunting rifles and dogs were taken away and hunting outlawed. Their universal answer is that the enforcers would be shot.

3. The Game Laws and the English Bill of Rights

The Game Laws were not mentioned explicitly in the Bill of Rights, but these laws did conflict—if one assumes an individual right to bear arms had been created—with the Bill of Rights. The purpose of the militia and the Game Laws were in conflict. Professor Munsche writes:

The purpose of [the formation of a militia] was to make the establishment of a “standing army” unnecessary, and thus prevent the Crown from acquiring the means to govern without Parliament. In practice, the militia failed to supplant the regular army, but the conviction persisted in many quarters that English liberty was dependent on the existence of an armed and vigilant yeomanry. This obviously ran counter to the spirit of the game act.²³²

Professor Malcolm states: “If the Game Act was still in force despite the Declaration of Rights,” the “have arms” provision would be a right that “merely . . . [protected] the wealthy.”²³³ We have seen that Professor Malcolm deals with this problem by stating that the Bill of Rights created the right to bear arms, with the conflict with the Game Laws to be dealt with later.²³⁴ Parliament did not resolve the conflict. Was parliamentary action necessary? Patrick Charles disagrees once again with Malcolm’s interpretation. “[T]here is nothing in the drafting history of the Declaration of Rights that extended the right to ‘have arms’ to hunting or game. None of the grievances or debates even mentioned it in passing.”²³⁵ We should start with the Game Law of 1671, which authorized the following:

[O]ne or more Game-keeper or Game-keepers within their respective Mannours or Royalties, who being thereunto soe authorized may take and seize all such Gunns, Bowes, Grayhounds, Setting-dogs, Lurchers or other Dogs to kill Hares or Conies, Ferretts, Tramells, Lowbells, Hayes or other Netts, Harepipes, Snares or other Engines for the taking and killing of Conyes, Hares, Pheasants Partridges or other Game as within the precincts of such respective Mannours shall be

232. *Id.* at 79.

233. MALCOLM, *supra* note 100, at 120.

234. *Id.* at 121-22. Charles here comments, “Malcolm is showing her twentieth-century bias. The Declaration of Rights’ ‘have arms’ provision and the Game Acts were in fact adopted to protect the interests of the wealthy. The 1690’s Parliamentarians were primarily concerned with the landed gentry’s interests.” Charles, *supra* note 88, at 386.

235. Charles, *supra* note 88, at 386.

used by any person or persons, who by this Act are prohibited to keepe or use the same.²³⁶

The 1692 Act omitted any explicit reference to guns, but did ban “any other Instruments for the destruction of Fish Fowle or other Game.” . . . One may argue that ‘guns’ could be grouped in with the 1692 Act’s mention of “other Instruments.”²³⁷ In 1693, there was a proposal that would have resolved any conflict between any right to arms and the game acts by allowing “every Protestant to keep a musket in his House for his defence.”²³⁸ The proposal also would have made it clear that there was an individual right to keep arms.²³⁹ It did not pass.²⁴⁰ One of its opponents protested that it would “arm the mob.”²⁴¹

Similar to the 1692 Act, guns were also omitted from the 1706 Act.²⁴² Professor Munsche states that the law was unclear.²⁴³ Guns could “be seized by the lord of the manor, but subsequent statutes did not say whether an unqualified person could be prosecuted simply for having a flintlock or a pistol in his possession.”²⁴⁴ Did the omission of “guns” mean that possession of them was permitted, or were guns included in the term “engines”? Professor Malcolm argues that “guns” were not covered at all by the new Act.²⁴⁵ She assumes that “engines” did not include guns and explains any conflicting evidence as confusion.²⁴⁶ She supports this assertion by pointing out that the conservatives who controlled Parliament were willing to concede to the right to have weapons and to do away with the prohibition against firearms from the new act.²⁴⁷ “Although subsequent legislation brought statute law into conformity with the right to have arms enshrined in the Bill of Rights, there was still confusion in the counties.”²⁴⁸ Some seizure of guns and prosecution did take place.²⁴⁹

236. *Charles II, 1670 & 1671: An Act for the Better Preservation of the Game, and for Securing Warrens Not Inclosed, and the Severall Fishings of this Realme*, BRITISH HISTORY ONLINE, <http://www.british-history.ac.uk/statutes-realm/vol5/pp745-746> (last visited Feb. 15, 2018).

237. Charles, *supra* note 88, at 393 (referencing 4 W. & M., c. 23 (1692) (Eng.)).

238. *Id.* at 403.

239. *See id.*

240. *Id.*

241. *Id.*

242. MALCOLM, *supra* note 100, at 128.

243. MUNSCHE, *supra* note 35, at 79.

244. *Id.*

245. *See* MALCOLM, *supra* note 100, at 128.

246. *Id.* at 128-29.

247. *See id.* at 128.

248. *Id.* at 127.

249. *Id.*

Professor Malcolm does state that “[i]t was during the eighteenth century . . . that Englishmen came to accept the Whig view of the utility of an armed citizenry.”²⁵⁰ She cites two cases (decided in 1739²⁵¹ and 1752²⁵²) that held it was not illegal to possess a gun per se for the proposition that there came “repeated pronouncements of the right for Protestant subjects of all ranks to have firearms.”²⁵³ Charles’s analysis of these cases is that they only banned guns if used for hunting game, but did not rule that there was any individual right to have a gun. “At no time did it stipulate that having arms was a right.”²⁵⁴ My earlier point about the lack of controversy and debate about any conflict between the Game Laws and the Declaration bears repeating. The negative evidence tells us that supposed conflict did not exist in the minds of Englishmen. It took till 1739—fifty years after the Declaration—to get a definitive ruling on whether or not the Game Laws banned gun possession per se.²⁵⁵

4. The Game Laws—Conclusion

The Post-Restoration Game Laws lasted from the Game Act of 1671 to the Game Reform Act of 1831.²⁵⁶ The purpose of these laws was to enhance and preserve the status of country gentlemen and maintain their superiority to the moneyed interests.²⁵⁷ “Their message was that land was superior to money.”²⁵⁸ As such, these acts were more than sport regulation, they were social legislation—to preserve and protect a way of life. To allow the lower classes to hunt would take from the yeoman “respectful submission and manly dependence.”²⁵⁹ If game were saleable, it was thought by the gentry that country gentlemen would be degraded into “men who were not mindful of ‘gentlemanlike and liberal feelings’ but interested only in ‘poultry profit.’”²⁶⁰ The Game Reform Act of 1831, which radically changed the Game Laws, then, represented not just a change in the law, but a change in society.²⁶¹ “In a world

250. *Id.* at 128.

251. *Rex v. Gardner* (1739) 93 Eng. Rep. 1056 (K.B.).

252. *Wingfield v. Stratford and Osman* (1752) 96 Eng. Rep. 787 (K.B.).

253. MALCOLM, *supra* note 100, at 128-29.

254. Charles, *supra* note 88, at 397; *see Wingfield*, 96 Eng. Rep. at 787.

255. *See* MALCOLM, *supra* note 100, at 129.

256. MUNSCHÉ, *supra* note 35, at 8, 156, 167-68.

257. *See id.* at 164.

258. *Id.*

259. *Id.* at 165.

260. *Id.* at 166 (quoting 5 THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME, at col. 41 (T.C. Hansard ed., 1812)).

261. *Id.* at 166-68.

where everything had its price, there was little room for tradition, loyalty, or deference.”²⁶²

It is hard, if not impossible, to figure out exactly how the Game Laws affected any right to keep and bear arms, but one thing is clear—one could not use a gun (or a dog) to hunt game. *Heller* states that there is a right to hunt in the Second Amendment,²⁶³ but there is no basis for that right in English history. Looking at the social purpose of the Game Laws, we realize that the basic flaw with studying “The English Legacy” in order to interpret the Second Amendment is that English society from the Declaration to 1792 (the date of the Second Amendment) was a totally different social system than ours, then or now. Focusing on particular individual aspects of English laws, such as the Declaration or the amendment of the Game Act just misses the point. It is trying to figure out how one system works by studying another system. A jet engine works the same way as steam engine on a high level of abstraction—but they are different systems. “The English Legacy” is useless as an interpretative tool for the meaning of the Second Amendment.

D. *The English Militia*

Since the Second Amendment begins with an assertion of the necessity of a well-regulated militia,²⁶⁴ a study of the English militia should inform the Amendment’s meaning, but it does not. After reviewing the hapless history of the English militia, it is hard to see how a militia is necessary for the security of a free state. In England and America, diligent practice and drill were essential for the infantryman to execute orders effectively.²⁶⁵ A militia could not stand up to a regular army.²⁶⁶ The English militia in the period from the Glorious Revolution until 1792 (and after) was bound up with the Whig Supremacy.²⁶⁷ The officers had to meet a landed property qualification and formed part of the local magistracy that was a central component to the Whig

262. *Id.* at 168.

263. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

264. *Id.* at 592-95.

265. William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 17 (1992).

266. *See id.* at 37.

267. *See id.* at 17 & n.54.

dominance.²⁶⁸ Unlike the army, the militia was not subject to the king.²⁶⁹ It was never a universal militia, nor was it a substitute for the army.²⁷⁰

The militia of the eighteenth century represents two related military tendencies: it was an attempt both to create a reserve formation for home defence and to use an obligation of military service on the citizen the basis for recruiting. Political factors made it impossible to introduce true conscription and necessary to keep the militia distinct from the army, which led to various inconveniences. . . . It may fairly be claimed that the militia was an expedient proportioned to the extent of the danger to be met. It is not true that the danger was imaginary and the militia superfluous; at the same time there were good reasons for avoiding revolutionary measures like full conscription.²⁷¹

As in the prior sections, there will be a counterpoint between history as told by Professor Malcolm and *Heller* on one hand, and historical sources on the other. Malcolm and *Heller* both speak of a universal militia, but there never was an actual universal militia in England, nor did the dominant governing establishment want one.

Justice Scalia in *Heller* states:

Besides ignoring the historical reality that the Second Amendment was not intended to lay down a “novel principl[e]” but rather codified a right “inherited from our English ancestors,” petitioners’ interpretation does not even achieve the narrower purpose that prompted codification of the right. If, as they believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia, the *organized* militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a “citizens’ militia” as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force. . . . Thus, if petitioners are correct, the Second Amendment protects citizens’ right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not the people’s militia that was the concern of the founding generation.²⁷²

268. J R WESTERN, *THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY: THE STORY OF A POLITICAL ISSUE* 304 (1965).

269. *Id.* at 436.

270. *Id.* at 438.

271. *Id.* at 443-44.

272. *District of Columbia v. Heller*, 554 U.S. 570, 599-600 (2008) (first alteration in original) (footnote omitted) (citation omitted) (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

Professor Western directly contradicts the idea of a universal militia in England: “The Shelburne plan [a plan to arm to general populace] was attacked in the commons as putting arms into the hands of people not fit to be trusted with them.”²⁷³ This statement also contradicts any idea that the militia could be used for a legitimate revolution.

Not only did the upper classes not want the general population armed, the lower class’s hostility to serving would have prevented any universal militia. The riots of 1757 and 1796 were the most extreme reaction to militia call-ups for militia service.²⁷⁴ Mobs ensued in every region, threatening officials to prevent them from enforcing a new militia act.²⁷⁵ The new system of recruitment of 1757 was viewed as an “upper-class plot.”²⁷⁶ The Militia was not drawn from all of the British population.²⁷⁷ Scotland was considered too poor to have a militia and, as was stated in Parliament, “the people of Scotland were ‘tinctured with the notion of despotism’ and might, if armed, be ‘fit instruments in the hands of a treacherous, tyrannic and unprincipled administration.’”²⁷⁸

There was a proposal in 1775 to create a Scottish militia, to allow the militia to serve abroad, and to augment its ranks, in response to the beginnings of the American Revolution and the growth of radicalism, but nothing came of it.²⁷⁹ *The English Militia* devotes fourteen pages analyzing the complex political alignments of the time; all proposals for changes in the militia were defeated.²⁸⁰

The gun rights literature speaks glowingly of the militia as a community organization whose members enthusiastically trained as a military force.²⁸¹ On the contrary, the reaction of those liable to the called up reminds one of the attitudes towards the draft in the Vietnam War. The call-ups yield at best was not great, and it was constantly threatening to fall short of the statutory target.²⁸²

273. WESTERN, *supra* note 268, at 217.

274. *See id.* at 290-302.

275. *See id.* at 290-91.

276. *Id.* at 299.

277. *Id.* at 209, 258-59.

278. *Id.* at 209 (quoting 8 WILLIAM COBBETT, COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, at 1236-37 (1813)).

279. *Id.* at 206-08.

280. *Id.* at 205-19.

281. Regiments were often stationed away from home because being in the home county was bad for discipline and it was feared that in case of riot, the militias would not fire on their neighbors. *Id.* at 401-02.

282. *See id.* at 283. In the Borough subdivision of Surrey only 300 out of 1000 appeared. *Id.* Many candidates were exempt from call up. *See id.* at 249. One statistic is from Sussex in 1803, “there were 9630 men of the right age who were exempt and 14,102 who remained liable.” *Id.*

The militia draft was always limited—there was never a universal arming of the people. Recruits were chosen by lot; and, if chosen, one could buy himself out by paying a fine of £10 or finding a substitute.²⁸³ One could even buy militia insurance, which would indemnify those who were “unlucky in the ballot.”²⁸⁴ In 1762, insurance against being called up was forbidden, except where confined to one parish.²⁸⁵ This law was repealed in 1786, after which commercial insurance was again available.²⁸⁶ From 1762 on, public funds gave poor men £5 to find substitutes or pay the fine.²⁸⁷

[P]opular hostility to military service was not got rid of. Attempts to move towards it were felt as a grievance and were apt unseasonably to remind the people that they had other grievances as well. The arming of the manhood of the nation at large by a regime which was fairly liberal and yet not democratic was bound to be a delicate operation. The aversion of the people to being armed gave their rulers a salutary early warning of this, and only under extreme pressure from Napoleon did they make a half-hearted attempt. Thus for political no less for economic and administrative reasons it was not possible to advance to a true system of national military training from the quaint simulacrum of it that was the militia.²⁸⁸

Once called, the militia was chronically insubordinate—“[o]fficers seem to have felt themselves to be on the edge of a volcano.”²⁸⁹ Officers, not surprisingly were in short supply. Officers were to be men of property: “The authors of the earlier militia acts had intended that the militia should be commanded by men of property, and that as far as possible all men of property should take their turn,” but few men of property could neglect their private affairs for long and either resigned or did not serve.²⁹⁰ Thus, there was “a permanent shortage of officers.”²⁹¹ “[A] natural source of supply was to be found in the sons of noblemen and wealthy gentlemen, who had neither to care for an estate nor earn a living.”²⁹² But “[y]oung men of the better class often proved unfit for responsible posts. They were commonly unused to hard work and to the complicated financial dealings which even the command of a

283. *Id.* at 251.

284. *Id.* at 252-53.

285. *Id.* at 253.

286. *Id.*

287. *Id.* at 253-54.

288. *Id.* at 302 (footnote omitted).

289. *Id.* at 419.

290. *Id.* at 304.

291. *Id.* at 306.

292. *Id.* at 309.

company then entailed.”²⁹³ The militia resembled the Church of England in providing employment for the sons of the oligarchy.²⁹⁴ As such, the militia’s martial fervor was similar to the religious fever of the Anglican Church of that time.²⁹⁵

The officers were the achilles heel of the militia. The men were satisfactory material, and in wartime at least they were not too badly trained. But they were so badly led that it is doubtful if they could have faced seasoned troops with any hope of success. . . . [T]he bulk of the offices were likely to be raw or disreputable or too old or absent²⁹⁶

The militia’s main virtue was that it was cheap; but even so it was underfunded.²⁹⁷ *The English Militia in the Eighteenth Century* is replete with instances of undersupply.²⁹⁸ Arms wore out before their scheduled replacement, and the replacements were tardy.²⁹⁹ Ammunition became unusable.³⁰⁰ The quality of arms was such that they were frequently unable to fire.³⁰¹ Militia members were given supplies, such as clothing, and were at least supposed to be paid, but all too frequently supplies were short and material, including arms and ammunition, wore out and were not replaced.³⁰²

The militia did have a social and political function. The militia guarded prisoners of war, chased smugglers, watched against possible invasions (which never took place), and suppressed riots.³⁰³ The militia, however, itself caused riots when lists were promulgated of men liable for militia duty.³⁰⁴ Far from being a community force, militias were stationed outside their own counties “so that they would never be called on to fight their friends and relations.”³⁰⁵ It provided positions for the wealthier landed gentry who comprised a substantial portion of the officer class.³⁰⁶ It fit in with the period of Whig Ascendancy; the Whigs wanting political power in their hands, and not in the King’s.³⁰⁷ Since

293. *Id.* at 311.

294. *See id.* at 309.

295. *Id.* at 309-10.

296. *Id.* at 339 (footnote omitted).

297. *See id.* at 345.

298. *See id.* at 342.

299. *Id.* at 342-43.

300. *Id.* at 343 & n.7.

301. *Id.* at 343.

302. *Id.* at 343-57.

303. *Id.* at 429-34.

304. *See id.* at 290-302.

305. *See id.* at 433.

306. *See id.* at 304, 309.

307. *See MALCOLM, supra* note 100, at 112, 116.

the King commanded the regular Army, the militia served as a counterweight and provided the high-landed gentry with power, position, and patronage.³⁰⁸ Thus the Militia Acts were similar to Game Laws, which limited hunting to the higher gentry and the ability to vote which the required landed wealth.

In conclusion, the English Militia vacillated between two extremes. At one extreme, it would have abolished the national forces:

The national government would have ceased to control the armed forces of the state: neither the king nor any other central authority would have had the means to enforce obedience to their commands in the county. It is not surprising that Charles II vetoed the militia bill of 1678, modest though it was.³⁰⁹

The opposite extreme was that the militia would be adjunct of the regular army, being in the same position as our National Guard for the Armed Forces. The resistance to any general call-up and the desire of the local oligarchs prevented this from happening.³¹⁰ But “popular hostility to military service was not got rid of. . . . The aversion of the people to bring armed” prevented “a true system of national military training from the quaint simulacrum of it that was the militia.”³¹¹ The militia burdened the poorer subjects by their being liable to call-ups and paying taxes to support it.³¹² Since someone called up could buy his way out or pay a substitute, the militia draft was actually a randomly imposed tax. The militia riots were the most compelling symptom of their resentment. Professor Western describes the fundamental economic and social change that made the militia obsolete:

There was a deeper reason why the quarrels over the militia died down—the palpable obsolescence of the backward-looking radical ideals which had inspired the militia’s revival. Rapid social change made it hard for even the most resolute backwoodsman to go on taking them seriously. As opponents of the militia agitation had never tired of pointing out, the ideal of a citizen army, with men of property filling the ranks, had been made incapable of realisation by the development

308. See WESTERN, *supra* note 268, at 436.

309. *Id.* One extreme lives on today in the “insurrectionist” interpretation of the Second Amendment—the hope that an armed populace will “take back their government.” *Heller* gives this as one of the militia’s functions: “[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.” *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008). The insurrectionists ignore the provision in the Constitution that makes the President Commander-in-Chief of the militia, Article II, Section 2. See generally Carl Bogus, *Heller and Insurrectionism*, 59 SYRACUSE L. REV. 253 (2008).

310. See WESTERN, *supra* note 268, at 444.

311. *Id.* at 302.

312. See *id.* at 22 & n.3.

of a capitalist economy. The middle class of businessmen and farmers-for-profit needed to devote their entire attention to business and could not take time off for fighting. That was possible only in a community of poor subsistence-farmers. The upper class, likewise, no longer regarded war as its profession, and was not eager to sacrifice time and money to military pursuits. Even the skilled artisan could not be spared from his trade (he might forget it). Save for privileged body of sportsmen, the people had ceased to have arms.³¹³

V. CONCLUSION

As we have seen, the English society of the eighteenth century differed too much from the American society of that era to serve as an interpretive guide to the Second Amendment. This poses the question—where does *Heller* go wrong? Of course, *Heller* is not alone in misunderstanding legal history: “constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers.”³¹⁴ *Heller* starts with many assumptions that are wrong. First, it starts with the assumption that our Bill of Rights simply embodies English rights.³¹⁵ This is obviously not so, as seen in the First, Ninth, and Tenth Amendments. Article I limits the powers of Congress; in England, Parliament’s power was unlimited. There were no rights in England that were immune from Parliamentary legislation and the right to keep arms in the English Bill of Rights was expressly subject to parliamentary action.

Another problem is that Professor Malcolm and Justice Scalia assume England was in a constant armed state in the eighteenth century. This leaves Professor Malcolm with the problem of explaining the diminution of gun rights in the following years. Professor Western, however, states that although England was beset with armed violence from the Puritan Revolution to the reign of William III, internal armed conflict disappeared during the following century.³¹⁶

The militia established under the Restoration Acts belonged to a world of bitter political and religious animosities, where any party quarrel was an incipient civil war and those in power always tried—though not always very systematically—to suppress their opponents by force. The decline of the old militia was a sign that things were changing. Men

313. *Id.* at 440 (footnote omitted).

314. Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995).

315. See *District of Columbia v. Heller*, 554 U.S. 570, 582-83 (2008).

316. WESTERN, *supra* note 268, at 436.

were not only ceasing to possess weapons but also trying more and more to live amicably with those with whom they differed in politics or religion.³¹⁷

The assumption that our Bill of Rights just copies English rights stems from an assumption that English society was the same as ours, one made by Professor Malcolm certainly makes this assumption.³¹⁸ The subtitle of her book, “The Origins of an Anglo-American Right,” conflates two societies. The most illuminating passage in her book is where she points out the “inequitable” attitude of the British upper class in keeping hunting for themselves and then proceeds to psychoanalyze that attitude: “Justification for such a blatantly inequitable standard involved a carefully nurtured double standard [I]n 1671, in the guise of an act to protect wildlife, Parliament passed the first law in English history that took from the majority of Englishmen the privilege of having firearms.”³¹⁹

Her views assume that there is an underlying right to bear arms for the majority and that any legislation to the contrary is fundamentally wrong. This, however, is projecting on historical England the views of the NRA onto the views of the Whig oligarchs. There were no such views as shown by the Declaration’s limitations, Blackstone, the Game Laws, and the rejection of any sort of universal militia. The elite were sure they owed their position to God and it was their duty to rule England, from the nation as a whole to their county.³²⁰ Today, their sense of their position is exemplified by the aristocrats of *Downton Abbey*, who are merely a remnant of a once all-powerful elite. None of the show’s characters evidence any ambivalence about their position.

Another fundamental error is trying to understand eighteenth century English society by taking a few quotes from here and a few facts from there. It was a system and has to be understood as a whole. I can use an example from a talk I had with my auto mechanic. I was asking him about the problems of repairing modern cars. He said that today’s cars are better built, but that the problem now is with customers who try to find solutions to their car problems on the Internet. Because they have no idea how a car works as a whole, they think they know the answer, but do not. An example would be a customer who is sure that the radiator thermostat is the problem, but does not see that something else is causing the thermostat problem. Systems, whether

317. *Id.* at 441.

318. MALCOLM, *supra* note 100, at 135.

319. *Id.* at 12.

320. *Id.* at 12-13.

cars or societies, have to be understood as a whole. As Professor Flaherty emphasizes:

More importantly, the legal community notoriously ignores the principle that the individual historical questions that its members seek to answer cannot be understood except as “part[] of a larger historical . . . whole.” . . . Another procedural corollary requires viewing, or at least attempting to view, events, ideas, and controversies in a larger context. Here legal scholars, in what in its worst form is dubbed “law office history,” notoriously pick and choose facts and incidents ripped out of context that serve their purposes.³²¹

Professor Ellen Katz, in an article describing how the Roberts Court uses precedent gives a description that also applies to *Heller*:

It leaves precedent denatured and relegated to a kind of cameo appearance in a willful construction of decisional history. As such, this use of precedent is not unlike the abuse of legislative history, wherein the record of the past becomes little more than a narrative filled with data points that are mined for supporting arguments. The weight given to a particular statement or textual provision becomes purely a matter of perspective and desired outcome, as holdings become contingent explanations and dicta is transformed into binding rules.³²²

Professor Mark Tushnet argues that historical interpretivism is internally flawed:

The first step is an argument that interpretivism must rest on an account of historical knowledge more subtle than the naive presumption that past attitudes and intentions are directly accessible to present understanding. The second step identifies the most plausible such account, the view — sometimes called hermeneutics — that historical understanding requires an imaginative transposition of former world views into the categories of our own. The third step is an argument that such an imaginative transposition implies an ambiguity that is inconsistent with the project of liberal constitutional theory (and interpretivism). The project of imaginative transposition can be carried through in a number of different ways, with a number of different results, none of which is more “correct” than the others.³²³

321. Flaherty, *supra* note 314, at 553-54 (first two alterations in original) (quoting H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 674 (1987)).

322. Ellen Katz, *Hobby Lobby and the Pathology of Citizens United*, 9 DUKE J. CONST. L. & PUB. POL’Y, 2014, at 29.

323. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983).

Heller performed the second step of imaginative transposition, but the imagination stemmed from the Hollywood West of “stand your ground,” rather than the Georgian Age. *Heller* just does not work as an exercise in historical interpretation, but instead functions as an example of how not to apply history to the Constitution.