Chicago-Kent Law Review

Volume 76
Issue 1 *Symposium on the Second Amendment: Fresh Looks*
Article 3

October 2000

To Hold and Bear Arms: The English Perspective

Lois G. Schwoerer

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LOIS G. SCHWOERER*

INTRODUCTION

For the last quarter of the twentieth century, the Second Amendment to our Constitution has attracted increasing attention from the general public, legal commentators, and historians of colonial and early national American history. As incidents of gun violence have multiplied, and the public has become polarized into groups that favor gun control versus those who believe in a constitutional right of the individual to own guns, academics have enlarged their efforts to discover exactly what the intentions of our forefathers were in writing the Second Amendment and precisely what that awkwardly worded amendment meant. Interest in the English background to the Second Amendment was only marginal for a time, but it has grown as the debate hardened. In the 1970s and 1980s several historians and legal commentators wrote about the English origins of the Second Amendment, but their essays met largely with indifference or criticism.[1]

Then, in 1994, Joyce Lee Malcolm, an American professor specializing in English history who teaches at Bentley College in

* Elmer Louis Kayser Professor Emeritus of History at George Washington University. I owe thanks to many people. Charlene Bangs Bickford, Kenneth Bowling, Catherine A. Cline, Robert J. Frankle, Eliga Gould, Howard Nenner, John G.A. Pocock, Barbara Taft, and Melinda Zook offered advice and comment, not all of which I followed. Michael Bellesiles, Carl Bogus, Mark Goldie, Janelle Greenberg, and Linda Levy Peck also talked with me about the English perspective on guns. I am also indebted (as always) to the staff at the Folger Shakespeare Library in Washington, D.C., especially to Georgiana Spiegal, and to the staff at the Library of Congress, especially Bruce Martin, and the librarians in the Rare Book Room and the Law Library there. I cheerfully declare that errors that remain are my own.

1. *See, e.g.*, STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 22-42 (1984); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 599-614 (1982); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 961-1001 (1975). These essays varied in merit. For a measured but critical review, see Joyce Lee Malcolm, Book Review, 54 GEO. WASH. L. REV. 452 (1986) (reviewing STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)).

Massachusetts, recast and enlarged her early work into a book entitled *To Keep and Bear Arms: The Origins of an Anglo-American Right*, which Harvard University Press published.[2] In this book Malcolm presented three major ideas: First, that the old medieval English duty of service in the militia and in the *posse comitatus*, imposed theoretically on all males between the age of sixteen and sixty, was transformed at the time of England's Glorious Revolution in 1688–89 into an individual right to keep and bear arms. She maintained that Article VII of the Declaration of Rights, 1689 (better known as the Bill of Rights, its statutory form) secured that right, writing unguardedly that the Convention—that is, the irregularly elected body that drew up the Declaration of Rights—"came down squarely, and exclusively, in favour of an individual right to have arms for self-defence."[3] Second, to explain the undeniable restrictions on the possession of arms in Article VII, Malcolm declared that the restrictions were not really intended and that eighteenth-century legislation, court interpretation, and learned comment clarified the intended meaning of the arms article and that by the end of the century it was generally agreed that all Protestants had the right to arms.[4] Third, turning to colonial America, Malcolm asserted that Article VII was an English legacy that influenced the American drafters of the Second Amendment, who, however, broadened the legacy, sweeping aside "limitations" upon the individual right to possess arms.[5] In brief concluding remarks, Professor Malcolm commented on the fate of Article VII in the next centuries, regretting that although many people wanted to reaffirm it, it was "gently . . . teased from public use" leaving the British people exposed to danger.[6]

This provocative and confidently written book provoked great interest and warm approval. At the present time, *To Keep and Bear Arms* plays an important role in discussions of the meaning of the Second Amendment. My essay, however, contests its thesis, attempts to show why it is unacceptable, and offers a reading of the evidence and of the nature of late-seventeenth-century and eighteenth-century English society and thought that is different from that of Professor Malcolm.

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

3. *Id.* at 119-20.

4. *See id.* at 123, 128, 129, 134, 138.

5. *See id.* at 151, 153, 161, 162, 163.

6. *Id.* at 165, 176.

To dissent from Malcolm's interpretation, some might say, is foolhardy. After all, her book was enthusiastically received by American historians, legal commentators, and the gun community.[7] Lengthy reviews, warmly praising it, poured from American law journals, including those of the highest reputation. Her argument has been described as "irrefutable," her research in political and legal history as "meticulous," her book as a "foundational text" of the so-called "standard modelers."[8] Predictably, the National Rifle Association promoted the book, and the reviews in its journal were especially enthusiastic.[9] Less predictably, indeed rather surprisingly, the book found favor with the Bench: Supreme Court Justice Anthony Scalia described it as "an excellent study," and Judge Samuel Cummings of the Fifth Circuit Court in Texas, famous for his ruling in the *United States v. Emerson* case, cited Malcolm's book in asserting that the right to bear arms was a legacy of the English Bill of Rights.[10] It has been noticed that no scholar has challenged Malcolm in print.[11] That is, strictly speaking, not true, but it is true that of the formal published reviews, only two—one of them by me—expressed reservations about the thesis and the scholarship,[12] and only two other historians have negatively criticized Malcolm's study in print.[13] In short, Malcolm's thesis has been widely accepted; in some circles it enjoys the status of dogma respecting the English origins of the Second Amendment.

Professor Malcolm asserts that she is an historian, not an advocate, and that she is asking only for a "decent respect" for the

7. Of the two printed reviews in English journals, one was an excursus about guns and crime in English society without critical comment on Malcolm's book. *See* David Wootton, *Disarming the English*, LONDON REV. BOOKS, July 21, 1994, at 20. The other, by an American in the "Briefly Noted" section of the journal, was a restatement of Malcolm's thesis, again without critical comment. *See* Eliga Gould, Book Review, 111 ENG. HIST. REV. 1290, 1290 (1996).

8. Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1013 (1995) (book review); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right To Arms*, 93 MICH. L. REV. 1333, 1352 (1995) (book review); Chris Mooney, *Liberal Legal Scholars Are Supporting the Right to Bear Arms. But Will Historians Shoot Them Down?*, LINGUA FRANCA, Feb. 2000, at 27, 28.

9. *See* WAYNE LAPIERRE, GUNS, CRIME AND FREEDOM 14-15 (1994); Book Review, AM. RIFLEMAN, Apr. 1994, at 27. Both the book by LaPierre and the book review were cited in Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 376 n.318 (1998).

10. Mooney, *supra* note 8, at 31.

11. *See* Kopel, *supra* note 8, at 1352.

12. *See* Michael A. Bellesiles, Book Review, 14 L. & HIST. REV. 382, 383-84 (1996); Lois G. Schwoerer, Book Review, 61 J.S. HIST. 570, 570-71 (1995).

13. *See* Bogus, *supra* note 9, at 406 n.502; Garry Wills, *Why We Have No Right to Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62, 66.

past.[14] I, too, lay claim to the high calling of historian and with Malcolm believe that knowledge of history is of great value deserving of "decent respect" and more. I suspect that all historians would agree that it is no simple matter to research some historical problem or other, build one's understanding of it on verifiable sources, and present one's account and interpretation with such clarity, grace, and unambiguous evidence as to convince and delight the reader. Historians understand, as sometimes students and lay persons forget, that evidence does not always say the same thing to everyone; different people of good will may interpret it differently. It does not follow, however, that every interpretation is as accurate as every other one. As Michael Dorf remarks in his essay in this collection, "In the end, a satisfying interpretation is not so much one that earns the highest composite score on the relevant factors, nor even one that prevails in a trumping category, but one that best hangs together."[15] In my view, an issue is more likely to yield its meaning when the words used are dissected in terms of their contemporary signification, when the political, ideological and socioeconomic context is analyzed, the persons playing a role in it are examined, and the evidence is contemporary and verifiable.[16] These steps are especially important when the evidence is not as full as one would wish, as is the case with the passage of the Declaration of Rights. Unchallenged, or in the two negative reviews challenged necessarily only briefly, Malcolm's thesis has become received wisdom through the circularity of positive comment. To challenge that thesis by offering a different interpretation will, I hope, clarify not only the intellectual and constitutional antecedents but also cast some light on the meaning of the much-disputed Second Amendment to our Constitution.

I

Professor Malcolm's statement and practice suggest that she is an originalist; in other words, that she believes in the overriding importance of the original meaning of the English and American Bill of Rights.[17] I will follow her in this by presenting my understanding of

14. MALCOLM, *supra* note 2, at 177.

15. Michael Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI-KENT L. REV. 291, 293 (2000).

16. See, for example, the classic study, H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (AMS Press 1978) (1931), and many articles by Quentin Skinner, among them *Motives, Intentions and the Interpretation of Texts*, 3 NEW LITERARY HIST. 393, 393-408 (1972).

17. *See* MALCOLM, *supra* note 2, at 176, ch. 7.

the drafters' intentions and the resultant meaning of Article VII of the Declaration/Bill of Rights, 1689.[18]

It was a tactical victory for the supporters of a claim of rights that a list of thirteen rights was included in the Declaration of Rights along with the offer of the throne to Prince William and Princess Mary of Orange and the other terms of the Settlement.[19] To underscore its importance, the Declaration of Rights was carried in a magnificent procession on February 13, 1689 from Westminster Hall to the Banqueting Hall and presented to Prince William and Princess Mary in an elaborate ceremony, events later memorialized in prints.[20] In December 1689, the Declaration was transformed into a statute, known to this day as the Bill of Rights, a legal process that endowed all its provisions with statutory authority.[21] The fact that Article VII was a part of the document that presented the terms settling the revolutionary crisis no doubt elevated its political importance, and the fact that the Declaration of Rights was transformed into a statute of course gave all the articles statutory authority.

As one might expect, the Declaration of Rights took some days to draft, and over a two-week period the entire document, including Article VII, underwent significant amendment. The process began on 29 January 1689, when Anthony Cary, Lord Falkland, a Tory, urged the House of Commons not to think about filling the throne until they had decided, "what Power . . . [to] give the King . . . and what not."[22] In ways suggestive of the politics that surrounded the passage of the American Bill of Rights, Falkland's initiative concealed a Tory effort to delay a decision on filling the throne by embarrassing and deflecting the attention of Whigs who might be expected to agree to the idea of a statement of rights.[23] Following a lengthy debate in which objections were aired[24] and grievances canvassed, the Commons concurred with Falkland's proposal and appointed a thirty-

18. A copy of the *Declaration of Rights of 1689* may be conveniently found in LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 295 (1981).

19. *See id.* at 19, 234.

20. There are three undated prints of the presentation ceremony, none of which is contemporary, in the Print Room of the British Museum.

21. *See* SCHWOERER, *supra* note 18, at 267.

22. 9 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 30 (London, 1763).

23. *See* SCHWOERER, *supra* note 18, at 185-90; Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223, 223-51(1988). *See generally* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA 1788–1828 (1999).

24. *See* SCHWOERER, *supra* note 18, at 195-97.

nine-member committee,[25] the "rights committee," dominated by Whig members, to prepare a report.

Prominent among the many grievances mentioned in debate were a standing army in peacetime without parliament's consent and the use of the militia (under the command of the king) to disarm and imprison men without cause. Members of the House of Commons, who for years had harangued against these issues, came forward. For example, Sir Richard Temple declared that it was essential to "provide against a standing army without consent of Parliament" in peacetime.[26] Serjeant John Maynard denounced the Militia Act and bitterly complained that it was "[a]n abominable thing to disarm the nation, to set up a standing army."[27] Amplifying the point, Hugh Boscawen said, "The Militia, under pretence of persons disturbing the government, disarmed and imprisoned men without cause: I myself was so dealt with."[28]

But no one urged in this or any other debate that the individual had a right to bear arms. Professor Malcolm argues to the contrary, basing her view on elliptically reported comments by a Tory, the Honorable Heneage Finch, in the debate on 28 January 1689. According to notes taken by John Somers (used by Malcolm), Finch said, "The constitution being limited there is a good foundation for defensive arms—It has given us right to demand full and ample security."[29] On those grounds Malcolm asserted that Finch "pressed" the "need for the private possession of weapons to restrain the Crown."[30] In my judgment, her reading of these words is unacceptable.

Three separate accounts of this debate have survived: one is by Somers,[31] a second by Anchitell Grey, who recorded parliamentary

25. Two days later the committee was enlarged to forty members.

26. 9 GREY, *supra* note 22, at 31.

27. John Somers, *Notes of Debate, January 28, January 29, reprinted in* 2 MISCELLANEOUS STATE PAPERS: FROM 1501 TO 1726, at 417 (Philip Yorke & Earl of Hardwicke eds., London, 1778); *see also* 9 GREY, *supra* note 22, at 31. They may have heard of the complaints of Sir Robert Atkyns, a judge, whose weapons, including the sword with which Charles II had knighted him, were confiscated in 1683. *See* J.R. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY: THE STORY OF A POLITICAL ISSUE, 1660–1802, at 4, 69 (1965) (citing Public Record Office, "The Remarks of Sir Robert Atkyns," *Cal. S.P. Dom., Reign of Charles II* (July–Sept. 1683) (London, 1934) at 402-03). Professor Malcolm may wish to correct her citation from Western's *Monarchy and Revolution* to Western's *The English Militia in the Eighteenth Century*. MALCOLM, *supra* note 2, at 92 n.68.

28. 9 GREY, *supra* note 22, at 32; *see also* Somers, *supra* note 27, at 416-17.

29. Somers, *supra* note 27, at 410.

30. MALCOLM, *supra* note 2, at 116.

31. *See* Somers, *supra* note 27.

debates from 1667 to 1694,[32] and a third by an anonymous compiler of the debate of 28 January 1689.[33] All three record that Finch, a former solicitor general, was discussing the title to the throne, the subject of the 28 January debate. Focusing on the legal complexities of the vacancy of the throne caused by James II's flight, he was asking members to consider whether the flight was a demise, an abdication, or a desertion.[34] Insisting that he was not excusing James II, Finch declared (in *Debates*) that he looked with horror on the "invasion of our Religion and Properties," and insisted (according to the anonymous compiler) that he "own[ed] that [King James's] violations were very great and that the taking up arms [against him] was necessary."[35] The compiler's account makes clear that the words "defensive arms" in Somers' notes referred to the recent engagements against the army of James II. Finch did not mention, much less press for, an individual right to bear arms. His purpose in the debate, as the three records show, was to urge the case for a regency. It is impermissible, I submit, to interpret Finch's remark as favoring the right of the individual to bear arms. I make the point, for it shows that the right to arms was not regarded as significant enough to be named in the 29 January debate when grievances and rights were discussed.

On 2 February 1689, the committee presented its report, known as the *Heads of Grievances*.[36] The report contained twenty-eight Heads,[37] three of which are pertinent to this discussion. One Head (number 5) declared that "the Acts concerning the Militia are grievous to the Subject." Another (number 6) held that the "raising or keeping a Standing Army within this Kingdom in time of Peace, unless it be with the Consent of Parliament, is against Law." The third (number 7) declared that "it is necessary for the public Safety, that the Subjects, which are Protestants, should provide and keep Arms for their common Defence; and that the arms which have been seized, and taken from them be restored." These military issues—the militia, the standing army, and, mentioned for the first time, provision

32. *See* 9 GREY, *supra* note 22.

33. *See* Lois G. Schwoerer, *A Jornall of the Convention at Westminster Begun the 22 of January 1688/9*, 44 BULL. INST. HIST. RES. 256, 258 (1976).

34. *See* 9 GREY *supra* note 22, at 18.

35. *Id.*; *see also* Schwoerer, *supra* note 33, at 258.

36. A copy of the *Heads of Grievances* is in SCHWOERER, *supra* note 18, app.2.

37. The committee brought in twenty-three Heads; five were added in the debate. *See* Robert J. Frankle, *The Formulation of the Declaration of Rights, 1689*, 17 HIST. J. 265, 268 (1974).

for the common defense—were clearly important to members of the rights committee, for no other single topic was addressed in three separate Heads.

Where did the idea of specifying a right of Protestant subjects to possess arms for the common defense come from? The right was not a component of an intellectual tradition, as was the antiarmy prejudice and the promilitia sentiment. The Renaissance heritage, known to all educated men through the works of Erasmus and Sir Thomas More, satirized and condemned war and professional soldiers and favored a system of citizen defense. Machiavelli argued that the military threatens a people's liberty and that in a free state the citizen militia should serve as the armed force. Citizens should be armed and trained for service in the militia. James Harrington, the English political theorist, wrote in great detail about military affairs in *The Commonwealth of Oceana*, which influenced other writers, like Henry Neville.[38] Harrington worked out a complicated scheme for the militia, based on the wealth of the citizen.[39] An individual right to arms was not considered.

There was no ancient political or legal precedent for the right to arms. The Ancient Constitution[40] did not include it; it was neither in Magna Charta 1215 nor in the Petition of Right 1628. No early English government would have considered giving the individual such a right. Through the old militia laws—Henry II's Assize of Arms (1181) and Edward I's Statute of Winchester (1285)—early governments had imposed a responsibility on subjects, according to their income, to be prepared to use arms against crime and in defense of community and nation. In 1558, a Tudor law[41] gave statutory authority to the new office of lord-lieutenant of the county who was almost always a peer, and, perhaps in 1559, certainly by 1569, the lord-lieutenant was empowered to appoint a deputy-lieutenant, usually a member of the gentry. The command of the militia was placed in the hands of these two officers.[42] Although ultimate

38. *See* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS (J.G.A. Pocock ed., 1992).

39. LOIS G. SCHWOERER, "NO STANDING ARMIES!": THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 15-18, 64-67 (1974).

40. For the classic study, see J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY. A REISSUE WITH A RETROSPECT (1987).

41. *An Acte for the Taking Musters, reprinted in* 4 THE STATUTES OF REALM 320-22 (London, 1817).

42. *See* GLADYS SCOTT THOMSON, LORDS LIEUTENANTS IN THE SIXTEENTH CENTURY 62-63, *passim* (1923).

authority over the militia rested with the king and Privy Council, actual supervision lay with the peerage and landed gentry.

Game Laws[43] also restricted gun possession. The earliest Game Laws, starting in the fourteenth century, limited hunting to persons of a certain wealth, because, it was observed later by King James I, hunting was for gentlemen and "it is not fit that clowns should have these sports."[44] As a twentieth-century historian wittily remarked, the laws "protect[ed] pheasants from peasants."[45] When guns came into use, they were added to the list of prohibited weapons. The Game Laws helped to protect the monarch and upper classes against insurrection while at the same time defending their sport and game. The Game Act of 1671 was the most exacting of all. For several reasons, it contained highly restrictive measures; among them, limiting the right to have a gun to persons with a freehold of at least £100 a year, or a long term leasehold or copyhold of £150 per year, or who were sons and heirs of persons of high degree.[46] One may put this figure in perspective by noting that the annual income of a laborer in the period ranged from £9 to £15; the average income of a temporal lord was estimated at £3,200.[47]

Other laws also restricted the holding of guns. A nagging fear of all early English governments was riot and social upheaval, and, in the sixteenth century, Tudor monarchs took steps to control guns. For example, an act of 1541, passed during the reign of Henry VIII, limited the ownership of pistols less than a certain length and crossbows to persons with an income of at least £100 and restricted their use by such persons.[48] In 1548, a law of Edward VI required people who "shoot guns" to register with their local justice.[49] In the early seventeenth century, in 1616, King James I issued a

43. *See* P.B. MUNSCHE, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671–1831, at 8-27 (1981).

44. EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 23 (1988).

45. *Id.*

46. For the terms, see THE STUART CONSTITUTION, 1603–1688: DOCUMENTS AND COMMENTARY 457-58 (J.P. Kenyon ed., 2d ed. 1989). For the reasons, see MUNSCHE, *supra* note 43, at 15-19.

47. *See* PETER LASLETT, THE WORLD WE HAVE LOST 36-37 (2d ed. 1972) (citing Gregory King's calculations); KEITH WRIGHTSON, ENGLISH SOCIETY 1580–1680, at 34 (Rutgers Univ. Press 1982).

48. *An Acte Concerninge Crosbowes and Handguns, reprinted in* 4 THE STATUTES OF THE REALM, *supra* note 41, at 832-33.

49. *An Acte Against the Shootinge of Hayle: The Act of Shott, reprinted in* 4 THE STATUTES OF THE REALM, *supra* note 41, at 58. Professor Malcolm may wish to correct the date she gives for this act. *See* MALCOLM, *supra* note 2, at 10.

proclamation to ban the sale and the wearing and carrying of "[s]teelets, pocket daggers, picket Dagges and pistols" under pain of imprisonment and censure in the Court of Star Chamber. He described the weapons as "odious and noted Instruments of murther and mischiefe" and declared that he preferred to prevent rather than punish crime.[50] James I and Charles I vigorously enforced the Game Laws.

There were objections and resistance to the Game Laws, but not in terms of a demand for the *right* to possess arms. The right of the individual to bear arms was no part of the Militia Bill debate in 1641.[51] It did not figure in the proposals of the Levellers or Diggers, radicals who might be expected to demand a radical right.[52] Reformers at the time of the Exclusion Crisis (1678–83) did not mention individual arms as a right,[53] nor did radical Whigs.[54] Men who tried to influence members of the 1689 Convention by printing their ideas did not refer to it.[55]

But once, during the frenzy of Exclusion, parliamentary critics of the government called for arming Protestants, not as a right, but to protect the nation against Catholics. In the spring of 1679 an M.P. wanted a law empowering the people to arm against a king who wished to introduce popery.[56] Although no one spoke of a *right* of the individual to arm, members of the Commons did want to arm the people for the practical purpose of preserving the nation from Catholicism. Nothing came of this proposal nor of an address to the king in December 1680 which asked for approval of an association bill.[57] The proposed bill was modeled on the Act of Association of

50. *Proclamation of 1616, reprinted in* 1 STUART ROYAL PROCLAMATIONS 359-60 (James F. Larkin & Paul L. Hughes eds., 1973). A copy of the 1616 Proclamation is at the Folger Shakespeare Library, STC 8539.8.

51. *See* SCHWOERER, *supra* note 39, at 33-50.

52. The Levellers' several *Agreements of the People* make no mention of the right to possess arms. That right is not included in John Lilburne et al., *An Agreement of the Free People of England. Tendered as a Peace-Offering to This Distressed Nation, reprinted in* THE WRITINGS OF WILLIAM WALWYN 344 (Jack R. McMichael & Barbara Taft eds., 1989), described as "the ultimate and full scope of all our desires and intentions." *Id.* at 345.

53. *See* B. Behrens, *The Whig Theory of the Constitution in the Reign of Charles II*, 7 CAMBRIDGE HIST. J. 42, 42-71 (1941); *see also* O.W. Furley, *The Whig Exclusionists: Pamphlet Literature in the Exclusion Campaign, 1679–81*, 13 CAMBRIDGE HIST. J. 19, 19-36 (1957).

54. *See* MELINDA S. ZOOK, RADICAL WHIGS AND CONSPIRATORIAL POLITICS IN LATE STUART ENGLAND (1999).

55. *See* SCHWOERER, *supra* note 18, at 153-68; *see also* Mark Goldie, *The Roots of True Whiggism 1688–94*, 1 HIST. POL. THOUGHT 195, 195-236 (1980).

56. *See* WESTERN, *supra* note 27, at 84.

57. *See id.*

1581, which authorized the upper classes to unite for defense of themselves and the nation were Queen Elizabeth I to be murdered.[58]

The idea, then, of giving individual Protestants the right to provide and keep arms must have been a response to immediate experience. It almost certainly came from members who may have remembered the moves toward arming the populace taken a decade before, and who had received rough treatment at the hands of a zealous militia operating under the command of the king during the two previous reigns. These had already expressed outrage in debate (as we saw), and it is a near certainty that some among them translated their anger into a right of Protestants to provide and keep arms and into the demand that confiscated weapons should be returned. Their actions well illustrate the historicity of interest in specific rights; one historian has put it this way: "A right presupposes a claim; if the claim is not made, the question of a right does not arise."[59] In other words, claims to specific rights emerged out of practical political disputes, not abstract theoretical discussions. At this stage in the drafting process of Article VII, members claimed this right as necessary for the public safety and placed no qualifications on it. This right was drafted, apparently, with hotheaded speed out of deep rage over the treatment that some had endured. It was not a carefully thought-out article, as the ready acceptance several days later of the Lords' significant amendments indicates.

What did the committee mean by the word "Arms" (or "Armes") that Protestants should "provide and keep"? According to the *Oxford English Dictionary*, in the seventeenth century the word meant, among other less pertinent things, "instruments of offence used in war"; "Firearms: those for which gun powder is used, such as guns and pistols as opposed to swords, spears or bows"; "defensive or offensive outfit for war."[60] We may assume that the word was chosen advisedly; obviously, another word could have been employed. If it is objected that the term was hastily selected, even as the article was hastily drafted, and no particular significance should be given it, it may be rejoined that the committee took two weeks to amend that article and during that time made a number of changes, but not to the

58. *See id.*

59. MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 81 (1973); Lois G. Schwoerer, *British Lineages and American Choices*, *in* THE BILL OF RIGHTS GOVERNMENT PROSCRIBED 1, 3 & n.8 (Ronald Hoffman & Peter J. Albert eds., 1997).

60. 1 OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989); *cf.* definitions in Wills, *supra* note 13, at 64-65.

word "Arms."

The committee was heavily dominated by lawyers, men who by training are sensitive to language and who may be expected to use words that say what they mean. Why, then, did they select "Arms"? I suggest that M.P.'s chose "Arms" to signal that they were not providing a right to the individual subject to have a weapon for the protection of himself, his family, or his house. In a predominantly rural society, in a society that had no police force, many persons no doubt had some kind of weapon—a club, an ax, a gun—for those purposes. Malcolm apparently believes that English Protestants were well fitted with guns in the Restoration period.[61] But the number of subjects having a gun or other weapon for personal defense is beside the point that the drafters of Article VII were making; they said that Protestants "should provide and keep Arms for their common defense."[62] These words implied a collective defense and evoked the idea that ran through the seventeenth century that, ideally, a reformed militia composed of Protestant freeholders and officered by the local aristocracy was the "common defense" of the nation. Men of substance, according to their wealth, provided arms for the militia and kept them on hand to use as need arose. The militia was the military instrument that would provide for public safety and serve as a counterweight to a professional army–indeed the militia would make a standing army unnecessary. Article VII was a kind of reminder of the need for a reformed militia and reflected the concern spelled out in Article V that the operation of the Restoration Militia Act was grievous. That act had placed control of the militia in the hands of the king and allowed him to use it to suppress dissidents, including some M.P.'s.

Article V, of course, evoked memory of the use King Charles II and King James II had made of the militia, and, by implication, so too did Article VII. Furthermore, the use of the plural in "Subjects, which are Protestants" and in "their common Defence" also suggests that the drafters of Article VII were thinking of a collective, rather than an individual right.

In sum, these features of the Article indicate that the committee's silent reference point was the militia: first, the words "it is necessary for the public Safety" evoked the arbitrary unreformed militia condemned in debate and in Article V. Second, the words

61. *See* MALCOLM, *supra* note 2, at 79-86.
62. SCHWOERER, *supra* note 18, at 295.

"the Subjects, which are Protestants, should provide and keep Arms for their common Defence" signaled a reformed militia which would protect the Protestant community. Professor Malcolm dismissed this argument that the militia had anything to do with Article VII. She argued that the militia was not mentioned in the Bill of Rights and that in the amendment process the word "common" was dropped, as we will see.[63] But the militia was in the forefront of members' minds as they drew up the list of grievances and rights. It was given first place in the list of grievances that required new law. A reformed militia was the ardent desire of many M.P.'s, and, in my view, the language they chose for this first draft reflects that desire.

As the negotiations over this draft document proceeded, significant changes were introduced. The Prince of Orange objected to any provision that restricted the powers of the Crown, and under pressure from him to "shorten" the list, the House of Commons ordered the committee on 4 February to separate the Heads into two categories—those that required new law and those that were a reaffirmation of old law.[64] Accordingly, on 7 February the committee brought to the House of Commons the second draft of its report in which several changes appeared. The Heads were now grouped into two categories. Head V was about the militia and was given first place in the category of issues requiring new law. There the demand was made for "repealing the Acts concerning the Militia, and settling it anew."[65] Head VI, about condemning standing armies in peacetime without the consent of parliament, although it made new law, was nonetheless kept in the category of reaffirming old law, no doubt to make certain that this venerable grievance would not be lost in future revisions. The language of Head VII was revised (as will be discussed) and, although a new (but muted) law emerged, the article was retained in the category of reaffirming old law.

Placing these two military clauses in the category of reaffirming old law, when, in fact, they made new law (however faint in the case of Article VII), was not a unique move. As I have shown elsewhere,[66] the Houses simply declared old law what they wanted to be old law in a total of eight instances, nine instances if Head VII is added, as Malcolm insists it should be. Malcolm faulted me for not including it

63. *See id.* at 119-20.

64. *See* 10 H.L. JOUR. 19 (1688). Frankle, *supra* note 37, at 265, 268-69 & n.25 stresses the role of the Prince in the amendment process.

65. 10 H.C. JOUR. 22 (1688).

66. *See, e.g.*, SCHWOERER, *supra* note 18, at 100, 283-84.

in 1981 in my list of old laws that were really new.[67] My view then and now is that the only thing "new" in Head VII was that words in the body of the Declaration of Rights (which, of course, commanded all the articles), made the possession of arms by Protestants a right. The Declaration of Rights spoke of "vindicating and asserting [the nation's] ancient Rights and Liberties," and referred to the nation's "undoubted Rights and Liberties." But the restrictive clauses added later (and discussed below) returned this right to the practice of the years prior to 1689—that is, the possession of guns was restricted to upper-class Englishmen (since the Reformation, upper-class English Protestants). In other words, arms possession and property were linked, as they had been for centuries. Furthermore, the restrictive clauses qualified the "right" so severely as to negate the very concept of a "right." For those reasons, Article VII was not in my list. I agree with Malcolm, however, that before 1689 the bearing of arms was not described as a "right," and that making it a "right" was new, however tempered by restrictive clauses.

Several alterations were also made to Article VII in the second draft. First, the form of the verb was changed from "*should* provide and keep arms" to "*may* provide and keep Arms."[68] This change, Malcolm believes, had two consequences: first, it made "having arms a legal right"; and second, it "shifted the emphasis away from the public duty to be armed and toward the keeping of arms solely as an individual right."[69] Citing my work, she buttressed her point by appealing to the idea that lawyers are sensitive to words and use them to convey their precise meaning. I indeed do believe that lawyers are sensitive to words and that they use them to convey a precise meaning. However, in my view, Malcolm partly misinterpreted the implications of the change in the verb form. While she is correct that the form "may" conferred on Protestants legal permission to keep arms if they chose to do so, I do not see that "may" shifted the emphasis towards keeping arms as an *individual* right. There is no change in the noun; "Subjects" remains in the plural. If an individual right had been intended, those lawyers would have changed it to the singular. Had they done so the sentence would have read: "That the Subject, which is Protestant, may provide and keep Arms, for his common Defence," and in that formulation, the notion that an

67. MALCOLM, *supra* note 2, at 121-22.

68. It is interesting to note that Article VII is the only one in which the verb form "may" occurs.

69. *See* MALCOLM, *supra* note 2, at 118.

individual right was intended is arguably true. But members made no such change and in my judgment the plural of the nouns is a ghost of their intention to signal that their reference point remained the militia. Finally, I hypothesize that the change was made to satisfy the Prince of Orange who objected to the idea that Protestants "*should* provide and keep Arms." As we will see, a few days later, William opposed that notion of providing and keeping arms.

The second change to Article VII was to drop two phrases: one, "it is necessary for the publick Safety" for Protestants to have arms; and two, the "arms which have been seized, and taken from them be restored." Although the record is silent about the reasons, and, therefore, we cannot be sure, no doubt the words were removed because the Prince of Orange's camp disapproved. Clearly, it was insulting to his authority to say that it was necessary for the public safety to arm Protestants. More subtly, the language was an implied challenge to that authority. Further, it was palpably unfair to require his government to restore the arms that had been confiscated by previous kings. Finally, William and his friends would have objected to a phrase about returning weapons when the charge of seizing them could be leveled against him. Article VII now read: "That the Subjects, which are Protestants, may provide and keep Arms, for their common Defence."

A further decision was also reported on 7 February, namely, to tidy up the *Heads of Grievances* and shape it into two sections. The first section indicted King James II in thirteen particulars for "endeavouring to extirpate the Protestant Religion, and the Lawes and Liberties of his Kingdome."[70] The second section matched the grievances generally with thirteen alleged "ancient rights." This configuration of the *Heads of Grievances* was retained in the Declaration of Rights. Moreover, in the 7 February debate the question of linking the claim of rights to the offer of the throne was raised for the first time, and during debate the next day, members decided to do just that.[71] Then, on 8 February, following an order of the House, the committee dropped the reforms requiring new law from their draft and with that move, the Article V about militia reform disappeared too.[72] The proposed document was now ready to submit to the House of Lords.

70. 10 H.C. JOUR. 21 (1688).
71. *See* SCHWOERER, *supra* note 18, at 228-30.
72. *See* 10 H.C. JOUR. 23 (1688).

From 9 February through 12 February the House of Lords, assisted by a thirteen-member committee dominated by Williamite peers,[73] amended the draft document that the House of Commons had sent them. They made substantive changes to the language of the military articles. Thus, urged on by an unidentified lord, the peers added the words, "and quartering of soldiers, contrary to Law," to the article about standing armies in the indictment section.[74] They explained that free quarter was "proper to be added" as an aggravation of a standing army and a violation of the petition of Right.[75] The move prompted sharp debate and the entry of a dissent because some lords were reluctant to denounce King James II for an action—quartering soldiers—that might be charged against the Prince of Orange. But the proposer prevailed and the words were accepted by the House of Commons.[76] To another article in the indictment of King James II, this one about disarming Protestants, the Lords added the words "at the same time when Papists were both armed and Employed contrary to Law."[77] This addition was also justified as a "further aggravation" that strengthens the clause.[78]

The Lords also substantially amended Article VII. In the phrase "provide and keep arms for their common defence" they substituted the word "have" for "provide and keep" and deleted the word "common."[79] I follow Malcolm's suggestion that both the House of Lords and the Prince of Orange regarded the word "provide" as "smack[ing] too much of preparation for popular rebellion" to be accepted.[80] But I dissent from her view that, by dropping the word "common," the peers "claimed for the individual a right to be armed."[81] Rather, I think that the word "common" also conveyed the idea of a national preparation for the kingdom's defense—as in a reformed militia—and that the Prince was unwilling to accept. So, it was dropped. Furthermore, their lordships added two phrases that negated the notion of granting an individual right to have arms even as they significantly qualified the idea of all Protestants having the

73. For a discussion of the Lords' rights committee, see SCHWOERER, *supra* note 18, at 237-43.

74. 14 H.L. JOUR. 122 (1685).

75. *Id.*

76. *See* 10 H.C. JOUR. 25 (1688).

77. 14 H.L. JOUR. 125 (1685).

78. 10 H.C. JOUR. 25 (1688).

79. *Id.*

80. MALCOLM, *supra* note 2, at 119.

81. *Id.*

right to possess arms: they were "suitable to their conditions" and "as allowed by law."[82] These changes to Article VII were accepted without recorded debate by the House of Commons on 12 February.

Article VII, as revised, now read: "That the Subjects which are Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law." As is plain to see, the language of Article VII had traveled a long way from its first formulation. The words now qualified the right of the subject to have arms in three respects: *religion*—must be Protestant; *socioeconomic status*—"suitable to their condition"; and *law*—"as allowed by law." One may ask: What kind of "right" is this that is so severely qualified as to negate the very meaning of a "right"? Obviously, it is a far cry from our understanding of a "right," but it would have been familiar to persons in the Middle Ages. Then, and for centuries thereafter, a right meant a power or authority that was exclusive—not held by everyone. Such a right was dependent upon property, status, or gift.[83] We cannot know for sure, but probably that understanding was in the minds of the Lords who proposed the restrictions and, perhaps, of the Commons who readily accepted them. What are we to make of these limitations?

The first restriction on gun possession was religion—subjects must be Protestants. Now, anyone familiar with the history of sixteenth and seventeenth century England would expect that members of the Convention would limit such an extraordinary right as that of subjects to have arms for their defense to Protestants. The limitation reflected the fear and loathing of Roman Catholics that had grown and intensified in English society ever since the sixteenth century Protestant Reformation. By the late seventeenth century, anti-Catholic prejudice was deeply embedded in English culture. In one Convention debate, Henry Pollexfen expressed the feeling of the Assembly when he declared, "Popery is the fear of the nation."[84]

This prejudice had been nourished by a yearly church service of thanksgiving for the timely discovery and foiling of the Gunpowder Plot of 1605 and sharpened by the Popish Plot of 1678–1683, said to be aimed at elevating a Catholic to the English throne. To rescue England from a succession of popish kings, a virtual certainty with the birth of King James II's son in June 1688, was one reason for the

82. *Id.*
83. *See* Schwoerer, *supra* note 59, at 4.
84. 9 GREY, *supra* note 22, at 34; *cf. id.* at 27.

Revolution of 1688–89. English Protestants were outraged that King Charles II and, even more, the Catholic King James II, had tried to disarm the militia in Ireland, Scotland, and to a lesser extent in England at the same time that they had disarmed Protestant gentlemen.[85] James II had also appointed Catholic officers to his army and armed his Catholic subjects.[86] As members of the rights committee testified in debate, several of them had had their arms confiscated and/or their houses searched. Their outrage was palpable, as we saw. Language that evoked memory of these incidents was insisted upon by the lords, who added the words "at the same time when Papists were both armed and Employed contrary to Law." The majority of English people despised and distrusted Catholics. The point is that restricting the right to have arms to Protestants was a reflection of Early Modern English prejudice against Catholics. The second and third qualifiers were "suitable to their [Subjects'] condition," and "as allowed by Law." Malcolm confessed that she found it difficult to explain these amendments, because they made "the assertion of a guaranteed right for Protestants to have arms seems empty rhetoric."[87] She resolved her dilemma by recalling that "legislative reforms proposed by the Convention, such as a modification of the Militia Act, had been left to future parliaments. This meant," she reasoned, "[that] the arms article declared a right that current law negated, with the understanding that future legislation would eliminate the discrepancy."[88] There is no evidence in either the debates of 1689 or the later legislative record that it was agreed in 1689 that "future legislation would eliminate the discrepancy." In my view the qualifiers conveyed precisely what members of the Convention intended.

The restrictions may be explained by a short excursus into English social history. The amendments reflected the social and economic prejudices of upper-class English society, members of which sat in the House of Lords and the House of Commons. The structure of English society was hierarchical and stratified, with a tiny minority at the top exercising enormous political, economic, and

85. *See* JOHN MILLER, JAMES II: A STUDY IN KINGSHIP 211-12 (1977).

86. *See id. See generally* John Miller, *The Militia and the Army in the Reign of James II*, 16 HIST. J. 659, 659-79 (1973).

87. MALCOLM, *supra* note 2, at 120.

88. *Id.*

social authority.[89] It was a society based on inequality, one that recognized social gradations and was sensitive to title, status, role, and wealth.[90] A telling illustration of this point occurred in one of the Convention debates, when a member, in an effort to make a partisan political point, declared that the Convention represented no more than a "4th part of the Nation."[91] He explained that "there are freeholders under 40 shillings a year & all Copyholders, & women & Children & Servants" who have no share in parliamentary elections.[92] This remark met with indignant rejoinders, one fellow member protesting that "we represent the people fully" and speak for those that have a share in government—"or are fit to have a share in it."[93] This response encapsulates the socially conservative view of the Convention.

The social standing of the peers is obvious; perhaps we should remind ourselves that members of the House of Commons enjoyed high economic and social standing too. The rights committee in the Lower House was composed almost entirely of leaders in parliamentary, political and legal circles. Many were lawyers and some had connections with members of the Lords' rights committee either as friends, family, or business associates.[94] The first chairman of the Commons rights committee was Sir George Treby (1634–1700), a lawyer and past Recorder of London. The second chairman, John Somers (1651–1716), also a lawyer, was a writer of influential political tracts, junior counsel (he was thirty-seven years old) for the Seven Bishops at their trial in June 1688, and after the English Revolution, Lord Chancellor. Such people as these were sensitive to the dangers implicit in allowing *all* Protestants to have arms. There was even a recent incident that might have been in the forefront of their minds: that is the rampaging of a Protestant mob in London in December 1688, which had caused property and personal damage.[95]

Equally to the point is that the possession of arms had always

89. *See, e.g.*, WRIGHTSON, *supra* note 47, ch. 1. See also the classic study by LASLETT, *supra* note 47, chs. 1, 2, 8.

90. *See id.*

91. Schwoerer, *supra* note 33, at 252.

92. *Id.* at 253.

93. *Id.* at 254-55.

94. For relationships with peers, see SCHWOERER, *supra* note 18, at 39. Five sons of peers were on the committee. *Id.*

95. *See generally* Tim Harris, *London Crowds and the Revolution of 1688*, *in* BY FORCE OR BY DEFAULT? THE REVOLUTION OF 1688–1699, at 44-64 (Eveline Cruickshanks ed., 1989); Robert Beddard, *Anti-Popery and the London Mob*, 38 HIST. TODAY 36, 36-39 (1988); William Sachse, *The Mob and the Revolution of 1688*, 4 J. BRIT. STUD 23, 23-40 (1964).

been associated with property and/or income. Subjects' military obligations had been equated with their socioeconomic status in the militia laws going back to the twelfth century, as we have seen. The customs and laws governing both the militia and the feudal array reflected hierarchical social values and fear of arming the lower classes. Weapons in the hands of the "people" were closely regulated by law. The Militia Act of 1662 continued the principle set out in earlier militia laws that specified the individual's obligation according to one's estate. It is no wonder that the House of Commons should have accepted without recorded dissent the two qualifiers introduced by the House of Lords.

Further, the attitude of equating weapons and property was reflected in papers of two members of the Convention. Thomas Erle (c. 1650–1720), a member of the House of Commons and an opponent of standing armies, was interested in reforming the militia to prevent an arbitrary monarch from using it for corrupt purposes against his perceived enemies. In a manuscript entitled *Paper of Instructions for the Parliament Meeting after the Revolution* and written probably in early December 1688, Erle spelled out his ideas for protecting the nation.[96] There should be no standing army, and no English monarch should have more guards than did Queen Elizabeth I, King James I, and King Charles I.[97] The militia should be reformed, and only persons of wealth were to serve, for such men had something to lose and could be trusted, Erle believed.[98] In addition to the militia he recommended that men in the counties with an income of £10 and substantial property holders in towns and cities should be provided with a "good musket" to protect the nation against invasion.[99] That idea would have required an amendment to the Game Law of 1671 (discussed below), but Erle argued that other laws protected game, and, sounding like a late-twentieth-century defender of guns, declared that a gun was not to blame for the destruction of game, but the person who misused it. It is not certain that Erle presented his ideas in debate, but since he wrote them out, it is likely.

Philip Wharton, fourth Baron Wharton (1613–1696), a Whiggish member of the House of Lords, also left papers setting out his ideas

96. Mark Goldie, *Thomas Erle's Instructions for the Revolution Parliament, December 1688*, 14 PARLIAMENTARY HIST. 337, 337-47 (1995); *see also* SCHWOERER, *supra* note 18, at 77, 192.

97. *See* Goldie, *supra* note 96, at 337-47.

98. *See id.*

99. *Id.* at 344-45.

on remodeling the government, including the militia. Among the points he made was that only freeholders who had an annual income of at least £20 or held a copyhold for life of £30 were to serve in the militia.[100] Equating arms and property is a basic assumption in Wharton's thought, even as it was in Erle's. In neither case was an unrestricted individual right to arms under consideration. Thus, in debate and in surviving papers, members of the Convention made it clear that two qualifications for Protestants to have a gun was their social status and economic condition.

The other qualification for possessing arms introduced by the House of Lords was "as allowed by law." What did the peers mean by this phrase? There seem to be two overlapping strands comprising the point the peers were making. Foremost in their minds, I think, were the old Militia Laws and Game Laws, especially the Game Act of 1671, both of which restricted the possession of weapons to the wealthy. The lords knew well the provisions of the Game Act of 1671, for three members of their rights committee had served on the committee to which the Game Bill was referred in 1671.[101] So too did members of the rights committee in the House of Commons, for four of them had initiated that Game Bill.[102] Members of both Houses had reason to preserve their hunting privileges and game and to fear the threat to property and person from placing arms in the hands of *all* Protestants. In Article VII, they specified that having guns was to be limited according to law, that is by the laws already on the books that restricted guns to upper-class Englishmen.

At the same time, their lordships were underscoring with this restriction the law-making role of parliament. Professor Carl Bogus has insightfully argued that the words were intended to mean that parliament, as the principal law-making body, had the authority to decide which Protestants might have guns.[103] Bogus reasoned that the phrase "as allowed by law" invited the question: who makes law?[104] Members of the Convention (which was concerned with doing all it could to achieve the sovereignty of parliament) would have certainly answered: parliament. Parliament, of course, had been regulating

100. Philip Wharton, [untitled paper] (n.d.), Bodleian Library, Carte MSS 81, fol. 766. Although untitled and undated, internal evidence establishes that it was written around January of 1689. The terms of the paper are discussed further in SCHWOERER, *supra* note 18, at 238-39.

101. *See generally* MUNSCHE, *supra* note 43, at 15.

102. *See id.*

103. *See* Carl Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 311, 383-85 (1998).

104. *Id.* at 384.

who might have weapons, including guns, for centuries in the Militia Laws and Game Laws. Recently they had done so in the Game Act of 1671. Surely they would do so in the future. In other words, the phrase "as allowed by law" invited recognition of parliament's law-making authority in the past, the present, and the future.

Interestingly, the language does not specify "English men," but rather says "Subjects which are Protestants." Thus, logically, properly qualified English women—that is Protestant women of wealth, who as widows held property of appropriate value would be allowed to have arms also. In this instance, then, the prejudices of religion, status, and economic standing trumped the prejudice against the female.

In sum, I maintain that Article VII was erected on prejudices: religious, social, and economic. Reflecting social and economic snobbery, Article VII preserved the interests of the upper-class Protestant landowner. It was erected on law—class law that protected the interests of the well-to-do. The phrase "as allowed by law" may also have signaled the intention that parliament have the authority to make future law regarding who might possess guns. Article VII is properly regarded not as a gun-rights law, but as a gun-control measure. It gives no right to all Protestants to possess guns; it gives that right to upper-class Protestants. In effect, it armed a small minority—perhaps no more than three percent—of the population. This, I submit, was the original meaning of Article VII.

II

What happened to this restrictive right immediately following the Revolution? If we are to believe Joyce Malcolm, members intended to "eliminate the discrepancy" of restrictions in Article VII, and "by the early eighteenth century legislation and court interpretation had made it clear that an individual right to bear arms belonged to all Protestants."[105] No evidence, presented by Professor Malcolm or otherwise uncovered, convincingly supports this argument. Malcolm offered three examples.

First was the 13 March 1689 debate over disarming Catholics.[106] The Convention had been transformed into the Convention Parliament at the end of February, and the same members were now

105. MALCOLM, *supra* note 2, at 122.
106. *See id.*

sitting to take up the pressing issues that confronted the new government.[107] For some members, nothing was more important than protecting the nation against gun-owning Catholics. In debate on doing so, an M.P. remarked that "a way to convict" persons of Catholicism must be contrived else "you cannot disarm them."[108] Malcolm reasoned that "this statement implies that the House clearly meant the new right to have arms to include all Protestants, whatever their condition."[109] In my view the comment cannot carry that conclusion. The debate was on disarming Catholics; neither Protestants nor an unrestricted right of all of them to have arms was mentioned. If such a right had been intended only a month after crafting Article VII, surely it would have provoked comment. But the bill disarming Catholics passed without any comment. The law gave Catholics permission to keep "necessary Weapons" for personal defense, as the Justice of the Peace would allow. The allowance reinforces my point that the Convention was guaranteeing a right to certain carefully identified persons to keep "arms" suitable for offensive and defensive warfare; it was not giving a constitutional guarantee to have a weapon for personal defense.

Malcolm's second example was reform of the militia.[110] Beginning in July 1689 and continuing in the autumn of 1690, M.P.'s made repeated attempts to draft a Militia Bill.[111] Their efforts to reform the militia met with failure: unsettled conditions and King William's opposition doomed the project.[112] Malcolm saw a connection between militia reform and the right to possess arms in the failure of militia reform. "Insistence on the principle of a right to be armed," she wrote, "must have seemed adequate protection against forcible disarmament by the militia."[113] She explained that Sir William Williams (1634–1700) willingly delayed reform on those grounds.[114] But Malcolm gave no evidence to show the existence of an "insistence" on the principle of an arms right nor of Williams's interest in that principle. By contrast, J.R. Western, the militia

107. *See* Lois G. Schwoerer, *The Transformation of the Convention into a Parliament, February 1689*, 3 PARLIAMENTARY HIST. 57, 57-76 (1984).

108. 5 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 183 (London, 1806).

109. MALCOLM, *supra* note 2, at 123.

110. *See id.*

111. *See* WESTERN, *supra* note 27, at 85-89.

112. *See id.* at 87-88.

113. MALCOLM, *supra* note 2, at 125.

114. *See id.* at 208 n.25.

historian, explained Williams's willingness to delay militia reform due to his sense of urgency that the nation must move against Catholics whatever the condition of the militia.[115] In my view, M.P.'s handling of militia reform does not advance Professor Malcolm's argument.

What the story of attempted militia reform does show is that militia reform—and not allowing all Protestants the right to possess guns—was what seriously engaged the attention of members of the Convention Parliament. If M.P.'s had wanted to modify the restrictions in Article VII, they would have taken the time to do so, just as they took the time to introduce bills about the militia. They had other opportunities, of which they did not avail themselves, when over the next eight months or so the Declaration of Rights was transformed into the Bill of Rights. During that process the Declaration was amended,[116] but Article VII was not touched. It cannot be said that the committee of eleven members elected on 5 March to manage that transformation was unfamiliar with the details of the Declaration. Eight persons who had served on the rights committees for the Declaration, including Somers and Treby, were elected to the Bill of Rights committee.[117] The proper conclusion is that members ignored Article VII deliberately, because it was not part of their intention to remove the restrictions.

The third "proof" that Malcolm offered was the Game Act of 1693.[118] Stressing that guns were not specifically included in the list of prohibited devices, although admitting that they may have been included under "other instruments," Malcolm declared that "the Whigs . . . fought" to assure of the right of gun ownership for all Protestants.[119] The "committee," she continued, introduced a rider at the third reading "to enable every Protestant to keep a musket in his House for his defence, not withstanding this or any other Act."[120] It is true that Whigs played a primary role in promoting the rider, but Whig leaders did not take the initiative and the amendment was not a "committee" measure. Rather, the rider was presented by "Mr.

115. *See* WESTERN, *supra* note 27, at 85.

116. *See* SCHWOERER, *supra* note 18, ch. 16.

117. *See id.* at 268.

118. Malcolm gives the date as 1692, using Old Style dating in this instance. *See* MALCOLM, *supra* note 2, at 126. The bill moved through the House of Commons in February 1693, New Style. *See* 10 H.C. JOUR. 801, 805, 807, 824 (1692).

119. MALCOLM, *supra* note 2, at 126.

120. The quotation is from 10 H.C. JOUR. 824, not from HENRY HORWITZ, THE PARLIAMENTARY DIARY OF NARCISSUS LUTTRELL, 1691–1693, at 444 (1972), as Malcolm's notes show. *See* Malcolm, *supra* note 2, at 209 n.36.

Norris"—no doubt Thomas Norris (1653–1700) who was on the committee, and a Whig to be sure, but "an inactive Member"—no leader.[121] Of the four men who supported Norris, only one was from the committee—Anthony Bowyer (1633–1709)—described as voting "steadily as a court Whig," which was not true in this case.[122] These men argued that the rider promoted the security of the government and that all Protestants should be able to defend themselves.[123] The "majority Tory party," Malcolm said, opposed the rider. True again that Sir Christopher Musgrave and Sir Joseph Tredenham, both Tories, led the debate against the rider. But significantly Sir John Lowther, a *Court* Whig, joined them, and we can be sure that King William and his friends would not have allowed it to pass. These men insisted that the measure was irregular, one saying that it "savours of the politics to arm the mob, which . . . is not very safe for any government."[124] One may reasonably think that such considerations animated Musgrave and Tredenham (who had served on the rights committee) just four years earlier when Article VII was being drafted. In any case, the rider was decisively defeated 169 to 65,[125] leaving no doubt that, while minority sentiment for arming all Protestants existed, a decisive majority opposed both it and the notion of modifying the terms of Article VII. By the early eighteenth century, Article VII and the assumptions underlying it remained intact.

III

Whereas no claim of the right of the subject to have arms was raised before the Revolution of 1688–89, such claims for Protestants were raised during the eighteenth century. They appeared in law cases when a defendant protested being denied a gun, or in tracts at moments of crisis, as, for example, during the run-up to the Militia

121. Horwitz identifies the participants in this exchange. HORWITZ, *supra* note 120, at 444. For comment, see 3 BASIL DUKE HENNING, THE HISTORY OF PARLIAMENT. THE HOUSE OF COMMONS 1660–1690, at 148 (1983). *See also* HENRY HORWITZ, PARLIAMENT, POLICY AND POLITICS IN THE REIGN OF WILLIAM III 338 (1977).

122. 1 HENNING, *supra* note 121, at 696.

123. *See* HORWITZ, *supra* note 120, at 444. The other three were: the Honorable Goodwin Wharton (1653–1704), an eccentric, known as an "influential" Whig at this time (*see* 3 HENNING, *supra* note 121, at 695-96); Mr. Howe, impossible to identify because one of three "Howes" in the Parliament; and Mr. Clarke, probably Sir Gilbert Clarke (c. 1645–1701), a Tory (*see* 2 HENNING, *supra* note 121, at 82).

124. HORWITZ, *supra* note 120, at 444.

125. *See id.*

Bill of 1757, or in parliamentary debate at the time of the Gordon Riots in 1780. As long as there was a threat of foreign invasion from France, Jacobite uprising, or papist coup d'etat, some persons would argue for allowing all Protestants to have guns. But, as the historian of the Game Laws has remarked, "the spirit of the Game Laws . . . was very much alive in the eighteenth century" and grew stronger over the century.[126] In fact, court decisions and claims did not prevent the Game Acts from being enforced, albeit fitfully, depending upon the attitude of the local gentry,[127] nor eliminate further claims to the right to have arms. These facts alone demonstrate that a constitutional right for all Protestants to have arms was not achieved by the end of the eighteenth century.

Changes that occurred were in the Game Laws, not in Article VII of the Bill of Rights. Thus, the Game Act of 1706 omitted guns from the list of prohibited weapons, this time deliberately. According to a later account of the debate, a contemporary member of Parliament who participated in the discussions objected to including guns because "it might be attended with greate inconvenience."[128] A gun, it was said, is "frequently necessary to be kept and used for other purposes, as the killing of noxious vermin and the like."[129] But when used for killing game, then a gun fell under the law.

Decisions in two cases, *Rex v. Gardner* in 1739,[130] and *Wingfield v. Stratford and Osman* in 1752,[131] reinforced the legality of an individual to have a gun.[132] The court ruled for the defendant charged with gun possession. In both instances, the court accepted the defense argument that a gun was needed for personal defense or "for a farmer to shoot crows."[133] These two cases apparently were the only pertinent ones, for Malcolm neither discusses nor cites any others.[134]

These two rulings favoring gun possession, however, did not put the matter to rest. After each case, outrage that guns were being

126. MUNSCHE, *supra* note 43, at 32.

127. *See id.* at 80-82.

128. 1 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER: BY RICHARD BURN, CLERK, ONE OF HIS MAJESTY'S JUSTICES OF THE PEACE FOR THE COUNTY OF WESTMORLAND 442-43 (London, 1755).

129. *Id.*

130. 93 Eng. Rep. 1056 (K.B. 1739).

131. 96 Eng. Rep. 787 (K.B. 1752).

132. *See* MALCOLM, *supra* note 2, at 129.

133. *Id.*

134. Malcolm wrote of a "series of court cases" and of "several law cases" but identified only two. MALCOLM, *supra* note 2, at 128-29.

taken from subjects appeared: The *Craftsman* complained in 1739 that pheasants and partridges were being preserved at "the imminent Hazard of our Liberties."[135] In 1755, John Shebbeare, a Tory polemicist, critical of the government's slowness to proceed with militia reform, wrote a series of letters to and about the English, in which he fumed against the Game Laws for depriving people of Arms to defend themselves, making them "slaves by robbing [them] of the power of resistance."[136] He said it was a "breach" of the Bill of Rights to disarm the populace.[137] He and other Tories (such as William Beckford and John Brown) bitterly attacked the use of standing armies and foreign troops, condemned the denial of arms to the people, and demanded a national militia.[138] They appropriated the anger over that denial and used it as a propaganda ploy, even as the antimilitary ideology had been used during the Restoration. Tories and Patriot Whigs pressed hard for arming the people for service in a militia, which they confidently predicted would remove the need for and rid the country of German mercenaries and also train the nation in civic virtue. Public opinion, thus aroused, propelled William Pitt to power and led to the passage of the Militia Bill. Ironically, the new militia, although driven by popular and libertarian sentiments, proved unpopular in the event, provoked serious riots, and influenced the nature of political alignments.[139] The point is that printed tracts concerning the Militia Bill of 1757 illustrate the polemical uses of claiming a right to arm.

The Gordon Riots of 1780 were another example of occasions that provoked outbursts of vehement support for the principle of the right of the individual to possess arms. The context[140] was this: The government of Lord North had fallen under increasingly sharp criticism because of military reverses in America and serious

135. MUNSCHE, *supra* note 43, at 80.

136. JOHN SHEBBEARE, A FIFTH LETTER TO THE PEOPLE OF ENGLAND, ON THE SUBVERSION OF THE CONSTITUTION: AND THE NECESSITY OF ITS BEING RESTORED 35 (1757); *cf. id.* at 34. The same point was made even more passionately in JOHN SHEBBEARE, A LETTER TO THE PEOPLE OF ENGLAND, ON THE PRESENT SITUATION AND CONDUCT OF NATIONAL AFFAIRS 16 (1755).

137. JOHN SHEBBEARE, A THIRD LETTER TO THE PEOPLE OF ENGLAND 49, 56 (1756).

138. *See* ELIJAH H. GOULD, THE PERSISTENCE OF EMPIRE: BRITISH POLITICAL CULTURE IN THE AGE OF THE AMERICAN REVOLUTION 46, 51, 82 (2000).

139. *See id.* at 75, 79, 81, 84, 86, 89.

140. For brief review, see WILLIAM B. WILLCOX & WALTER L. ARNSTEIN, THE AGE OF ARISTOCRACY 1688 TO 1830, at 182-84 (1966). *See also* T.A. CRITCHLEY, THE CONQUEST OF VIOLENCE: ORDER AND LIBERTY IN BRITAIN 81-90 (1970); CHRISTOPHER HIBBERT, KING MOB: THE STORY OF LORD GEORGE GORDON AND THE LONDON RIOTS OF 1780 (1958).

problems with France, Spain, and neutral nations. The opposition, under the leadership of such men as Charles James Fox, became radical and factious. In 1778, in an effort to motivate Catholics to enlist in the army, North's government promoted the passage of the Catholic Relief Act, which removed several disabilities from Catholics. Tapping into the deep vein of anti-Catholicism, the Protestant Association, led by its president, the erratic Lord George Gordon, young son of a Scottish noble, organized a mass petition said to contain 120,000 signatures for the repeal of the Act. When Parliament refused an immediate hearing, the crowds gathered outside Westminster turned angry. Violence soon spread through the city. From Friday, 2 June to the following Thursday, 8 June, great damage was done to Catholic chapels, houses, and businesses; over 300 people were killed in the melee, and more were injured. Some cities in the counties also erupted in riot and mayhem. Order was not restored until the army was finally ordered to act. An army officer, Jeffrey Lord Amherst, commanded his lieutenant colonel in London to disarm all residents except those in the militia and others specifically designated to defend the city. Charles Lennox, the third Duke of Richmond, responded indignantly to this move. In speeches in the House of Lords later in the month he charged that the Bill of Rights guaranteed that "every Protestant subject shall be permitted to arm himself for his personal security, or for the defence of his property."[141] He moved that the order of the army officer be branded as "unwarrantable" because it had violated the "sacred right" of Protestant subjects "to have arms for their defence, suitable to their conditions, and as allowed by law."[142] Although Malcolm makes much of Richmond's remarks,[143] it is clear that in his confused speech he ultimately claimed nothing different from the restricted right allowed by Article VII. The Earl of Carlisle, Lord Stormont, and the Lord Chancellor defended the army's actions and Richmond's motion was defeated.

Protests favoring the right of Protestant subjects to be armed were heard outside of Parliament. In the summer of 1780, the Yorkshire Association condemned any attempt "to disarm peaceable subjects" who were Protestant.[144] When asked to give his opinion in July 1780, the recorder of London registered his approval of the

141. 21 COBBETT, *supra* note 108, at 727.
142. *Id.* at 728.
143. *See* MALCOLM, *supra* note 2, at 131.
144. For what follows, see GOULD, *supra* note 138, at 173-76.

associations and of the right of Protestants individually to have arms "and to use them for lawful purposes." It was a right, he said, which "may, and in many cases must, be exercised collectively."[145] Malcolm regards his remarks as "perhaps the clearest summation of the right of Englishmen to have arms" at that time.[146] On the other hand, the recorder's use of the words "for lawful purposes" and his reference to "exercising" the right "collectively" may signal that he wanted to guarantee the right of individual Protestants to be armed so that they might serve effectively in the associations. In any case, these remarks did not end the matter. Two years later, an anonymous tract, *Dialogue Between a Scholar and a Peasant*, written by William Jones in 1782, again regretted that Englishmen did not have guns and urged them to be prepared—that is, armed—to defend themselves in associations against the government.[147] The tract was published by the radical Society for Constitutional Information and translated into Welsh.[148] These moves provided powerful propaganda. But the moment passed; people turned away from extralegal activities, disavowed radicalism, and lost interest. The government took charge and the associations in the counties and in London dissolved. Jones was charged with libel and sedition.[149] The fervent expressions of the right of the individual Protestant to be armed came to nothing.

Further to support her thesis, Malcolm called upon two great figures in English history, the jurist, William Blackstone, and the historian, Thomas Lord Macaulay. She declared that in his famous *Commentaries on the Law of England*, Blackstone endorsed the Whig view that "armed citizens [sic] were a necessary check on tyranny" and in doing so transformed the view into "orthodox opinion."[150] It is true that Blackstone identified the right of the subject to have arms as the fifth "auxiliary right" in protecting freedom, but he was not talking about an unrestricted right. He wrote:

> The fifth and last auxiliary right of the subject . . . is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 William and Mary and is indeed a public allowance, under due restraints, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found

145. MALCOLM, *supra* note 2, at 134.
146. *Id.*
147. *See* GOULD, *supra* note 138, at 173-74, 176.
148. *See id.*
149. *See id.* at 176.
150. MALCOLM, *supra* note 2, at 129-30.

insufficient to restrain the violence of oppression.[151]

Clearly, Blackstone not only quoted from Article VII but named the Bill of Rights. He summed up by describing the five auxiliary rights as birthrights, "unless where laws of our country have laid them under necessary restraints."[152] In his view, the right of the subject to have arms existed under "due restraints" as spelled out in the Bill of Rights. That right applies, he added, only "when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[153] Blackstone was not advocating an unrestricted right of the individual to have arms. I agree with Malcolm that Blackstone's remarks are "of the utmost importance" because his *Commentaries* played such a significant role in both England and the colonies.[154] That being the case, it is of utmost importance to understand aright what he wrote.

In a different way, Macaulay's views carry an importance equal to those of Blackstone. Quoting a passage from Macaulay's *Critical and Historical Essays, Contributed to the Edinburgh Review*,[155] Malcolm contended that Macaulay advocated the idea that "the Englishman's ultimate security depended not upon the Magna Carta or Parliament but upon the power of the sword."[156] It is true that in a review of Henry Hallam's *The Constitutional History of England, from the Accession of Henry VII to the Death of George II*, Macaulay had written: "The great security, the security without which every other would have been insufficient, was the power of the sword."[157] But Macaulay was not arguing for the subject's right to have arms in this remark. Rather, he was discussing the mounting conflict in 1640–41 between Charles I and the parliamentary leaders over the power of the sword, a dispute that moved inexorably towards the passage of the Militia Bill/Ordinance[158] and the outbreak of war. His point was that each side understood the importance of the Militia Bill/Ordinance because the result would place command of the armed forces in the hands of Parliament. I know of no place where

151. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (Stanley N. Katz ed., 1979).

152. *Id.* at 140.

153. *Id.* at 139.

154. MALCOLM, *supra* note 2, at 130, 142-43.

155. 1 THOMAS BABINGTON MACAULAY, CRITICAL AND HISTORICAL ESSAYS, CONTRIBUTED TO THE EDINBURGH REVIEW 154, 162 (1850).

156. MALCOLM, *supra* note 2, at x, 169, 176.

157. MACAULAY, *supra* note 155, at 159.

158. *See* SCHWOERER, *supra* note 39, ch. 2.

Macaulay subscribed to an unrestricted right of the subject to have arms. In fact, he does not even mention the restricted right to arms provided by Article VII in his magisterial *History of England.*

IV

The climax of Joyce Malcolm's argument is that an individual right to have arms was a heritage of the Bill of Rights that "Englishmen took with them to the American colonies."[159] It was a legacy that "Americans fought to protect in 1775."[160] This heritage, Malcolm contends, had a defining influence on the Second Amendment. The "public" found reassurance when the First Congress "copied English policies"; it was not satisfied "until passage of the Second Amendment."[161] In the Second Amendment, Americans went beyond the model provided by Article VII; they removed the restrictions, forbidding "any infringement" upon the right to have arms.[162] Malcolm maintains that the account in her book "is the key to the meaning and intent of the much-misunderstood Second Amendment."[163]

There is much that is problematic about these assertions. First, Malcolm supplies no notes to them. She does not define "people" nor give proof of the attitude that she assigns them. What evidence is there that the people wanted the Congress to copy English policies or that their "concern" was "not allayed until the passage of the Second Amendment?" What evidence is there that the English Bill of Rights' provision for "individuals to have arms" was before the members of the First Congress? Where is there comment about removing the restrictions in Article VII to ensure no "infringement" on the right to have arms? While everyone might agree that the English Bill of Rights was of central importance to the colonists,[164] and that members of the First Congress were familiar with all its provisions, the fact is that the record of the debates, the correspondence, and other documents relating to the creation of the American Bill of Rights contains no direct reference to Article VII.

159. MALCOLM, *supra* note 2, at 134.

160. *Id.*

161. *Id.* at 151.

162. *Id.* at 162.

163. *Id.* at 150-51.

164. It has been said that with Magna Carta and the Petition of Right the Bill of Rights formed the "models in hand, or at least in mind" when the colonists drew up their claim. Schwoerer, *supra* note 59, at 2.

When delegates refer to arming the people, they do so in the context of assuring a reliable militia, discussing the question of conscientious objectors, or expressing strong objections to a standing, professional army.[165]

One may suggest that the absence of reference to Article VII and its right of the subject to have arms under restrictions reflects the fact that the article had no relevance to American needs. How could it? The status of the constitutional right of the individual to hold arms in English law in 1789, at the time of the meetings held in Philadelphia to draft the American Bill of Rights, remained the terms of Article VII. Those terms had not been changed since the Bill of Rights became law in November 1689. Over the intervening one hundred years, no one had stepped forward to introduce an amendment bringing Article VII into conformity with what Professor Malcolm believes to have been the intention of the members of the Convention. True, over the years, voices were raised, tracts written, and two law cases decided in favor of the right of the individual to have a gun. These expressions of opinion, however, did not represent majority public opinion nor did they rise to the level of constitutional change. In some instances, the charge that the government disarmed subjects and disallowed them the right to have arms was a propaganda ploy that critics used against the government. It is clear that people may declaim and express their outrage over an issue in parliamentary debate, they may print tracts and pamphlets insisting upon their viewpoint, two law cases may decide an issue in ways that please such people. But, none of these things create a constitutional right. The constitutional right of the individual to hold arms at the end of the eighteenth century was what it was at the beginning—a restricted right. If the Americans ignored all these restrictions, as Malcolm claims, then they were not following the English constitutional example. Logically, she contradicts her own thesis in making that claim.

In point of fact, however, the Americans did follow the English, but not in the way Malcolm thinks. The Americans, like the English, favored the militia, and wrote an awkwardly worded amendment that would assure that the militia would be appropriately armed by the individuals who served in it.

165. *See* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 4, 12, 17, 19, 22, 30, 38-39, 48 (Helen E. Veit et al. eds., 1991).

V

This Article began with the hope that, in offering an interpretation different from that of Professor Malcolm, it might clarify and illuminate the English intellectual and constitutional antecedents and the meaning of the much disputed Second Amendment to our Constitution. In my view, *To Keep and Bear Arms* is a well-written study that advances its argument in compelling terms, sometimes in unguarded language. But, despite the trappings of historical scholarship, the analysis of text and context is sometimes open to question, the research is not meticulous, and the argument is not irrefutable. In offering a different view, I contend that Englishmen did not secure to "ordinary citizens" the right to possess weapons. Article VII of the Bill of Rights did secure the right to have arms to English subjects, according to their religion, as was "suitable" to their economic standing, and "according to the law" that governed such matters—in other words to upper-class Protestants. The Article is an excellent example of class law and of law erected on religious, social, and economic prejudices. It was a reaction to the policies of King Charles II and his Catholic brother, King James II, and reflected the hatred of standing armies in time of peace and the conviction that the militia, as an instrument that was effectively controlled by parliament and the upper classes, could provide a safeguard against standing armies and an absolute king. Drafted by upper-class Protestants who had their own interests at heart, Article VII was a gun control measure. Throughout the eighteenth century, protests against disarming subjects and fervent assertions that the right of gun possession applied to every Protestant appeared at moments of crisis and sometimes were used as a propaganda weapon against the government. Despite these moves, the government continued to restrict possession of guns. At the end of the eighteenth century, after winning the war against Great Britain, the colonists drew up a written constitution and soon thereafter added to it a series of amendments. The delegates to the First Congress knew the English precedents, including Article VII; some delegates insisted that they laid claim to all the rights of Englishmen. But there is no evidence that they regarded Article VII as the source of the Second Amendment to their own Bill of Rights. Why should they have, when that Article restricted a right to guns in ways entirely unacceptable to them? In short, Professor Malcolm's book did not, as she claimed, "set the American controversy over the meaning of the Second

Amendment . . . upon a foundation of fact."[166] The fact is, there was no unrestricted English right of the individual to possess guns for the colonists to inherit.

166. MALCOLM, *supra* note 2, at x.