

# Tracing the Ideological Origins of the Second Amendment

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A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment II, the United States *Bill of Rights*<sup>1</sup>

It is difficult for foreign observers to discuss the Second Amendment of the United States *Constitution* in the same breath as human rights. Invoked by political partisans and firearm lobbyists in support of liberal gun control legislation, it has enabled extraordinarily high rates of violent crime and homicide. Understood today, it seems a dangerous historical anachronism peculiar to American cultural conditions.<sup>2</sup> Outside that ecosystem, the content of the amendment is rarely recognised as a civil right, let alone a human right.

However, treating the Second Amendment as a *sui generis* invention of revolutionary America obscures the transnational intellectual tradition from which its drafters drew inspiration. This essay argues that the 'right to keep and bear arms', as understood by its proponents and their contemporaries, should be read as one manifestation of a 'right of revolution', and as an attempt to moderate that right. Resisting government was popularly considered a natural, universal and infeasible prerogative of the people – characteristics which earn it a place in the narrative of human rights evolution. Indeed, it was arguably an early articulation of the familiar modern human right to self-determination.<sup>3</sup> Interpreted as an auxiliary right to the more ancient right

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<sup>1</sup> United States *Bill of Rights*, 1789, US National Archives and Records Administration, available at [http://www.archives.gov/exhibits/charters/bill\\_of\\_rights\\_transcript.html](http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html), accessed 28 April 2013.

<sup>2</sup> See Jeremy Rabkin's discussion of this problem in historiography: Jeremy Rabkin, 'Constitutional Firepower: New Light on the Meaning of the Second Amendment to Keep and Bear Arms, the Origins of an Anglo-American by Joyce L. Malcolm', *Journal of Criminal Law and Criminology*, Vol. 86, No. 1 (1995), 231.

<sup>3</sup> Alexander Martinenko, 'The Right of Secession as a Human Right', *Annual Survey of International and Comparative Law*, Vol. 3, No. 1 (1996), 20-1.

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of revolution, the Second Amendment serves as a valuable case study in how particularist rights derived from positive law were rhetorically translated into universal rights antecedent to the law.

The *Declaration of Independence* provides strong textual indicia that a general conception of a right of revolution sat at the heart of colonial political thought by 1776. Affirming popular sovereignty, and the subordinate relation of government to the governed, the framers asserted inextinguishable, supreme oversight over the legitimacy of government: ‘whenever any *Form* of Government becomes destructive of these ends [i.e. securing certain... unalienable Rights], *it is the Right of the People to alter or to abolish it, and to institute new Government...* [emphases added].<sup>4</sup> Deferring to the example set by the Congressional declaration, state and local polities followed suit with almost identical declarations of support couched in similar language and with similar content, albeit diverse styles.<sup>5</sup> In a field of constitutional history dominated by top-down, textual-cum-legal studies of the framer elite, these subnational declarations of independence offer a historian ‘the best opportunity to hear the voice of the people from the spring of 1776.’<sup>6</sup> The unanimity of these documents is compelling evidence that of those colonies in favour of independence, both the political elite and the ordinary (franchised) citizen conceived of a right to determine the structure of government. The right to abolish or alter government in the face of ‘Tyranny’ was not, however, a device of Thomas Jefferson’s creation. It was received from Europe, formally via rhetorical adaptation of English law, and then informally through pamphlets, sermons and other public commentary citing the work of theorists like John Locke.

Prior to 1776, colonists regarded English law with veneration. Many provincial assemblies in the ‘middle colonies’ between New England and Virginia prohibited their Congressional representatives from consenting to independence at all or, in the case of Pennsylvania and New Jersey, to any change in the system of government: their quarrel was with elements of the government such as the King and his governors, and not with government itself.<sup>7</sup> When grievances were aired, agitators framed them as interferences with their rights as English subjects. Preachers, among others, saw the colonial policies of George III as a ‘plan to subvert the British constitution.’<sup>8</sup> Nominally, colonial charters guaranteed ‘all the rights of natural subjects, as if born and abiding in England’ and it was against these standards that governmental ‘oppression’ was measured.<sup>9</sup>

This pre-Revolution rhetorical strategy thus drew on an existing civil rights tradition, recognised by both the metropole and the colonies, with its roots in common law and the English *Bill of Rights* of 1689.<sup>10</sup> Colonial commentators, for instance, frequently sparred over Sir William Blackstone’s *Commentaries on the Laws of England*.<sup>11</sup> There, the English jurist offered some cautious support for a right of revolution: ‘whenever a question arises between the society at large and any magistrate

4 United States *Declaration of Independence*, 1776, US National Archives and Records Administration, available at [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html), accessed 3 May 2013.

5 Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Random House, 1997), 74-5.

6 For discussion of the historiographic value of local declarations of independence, see Maier, *American Scripture: Making the Declaration of Independence*, 49.

7 Maier, *American Scripture: Making the Declaration of Independence*, 30.

8 T. H. Breen, *American Insurgents American Patriots* (New York: Hill and Wang, 2010), 260.

9 Leonard W. Levy, *Origins of the Bill of Rights* (New Haven and London: Yale University Press, 1999), 139.

10 Lynn Hunt, *Inventing Human Rights* (New York, London: W.W. Norton & Company), 120-1; Leonard W. Levy, *Origins of the Bill of Rights* (New Haven and London: Yale University Press, 1999), 139.

11 Bernard Bailyn, *The Ideological Origins of the American Revolution* (Massachusetts: Harvard University Press, 1967), 187.

vested with powers originally delegated by that society, it must be decided by the voice of the society itself'.<sup>12</sup> Colonists interpreted it as such. In an unusual case of judicial rebellion, Chief Justice William Drayton of South Carolina explained to a newly-empanelled jury the legal basis for revolution, drawing on this reading of Blackstone. On those grounds, he peremptorily declared South Carolina independent of Britain.<sup>13</sup>

The *Bill of Rights* likewise served as a legal expression of the right of revolution. Five times between 1327 and 1485, and twice in the seventeenth century, an English monarch had been deposed. In each instance, the overthrow was accompanied by an explanatory declaration, of which the 1689 document was the most recent and illustrious example.<sup>14</sup> These declarations justified the change in regime via reference to a few recognised bases, such as royal incompetence (*rex inutilis*) or wilful violation of established law.<sup>15</sup> The 1689 declaration did so by systematically enumerating examples of abuse by the 'late' (i.e. newly-disempowered) King James II.<sup>16</sup> With a similar catalogue listing British examples of 'Misrule', the 1776 declaration consciously sought to invoke this tradition.<sup>17</sup>

The right to 'abolish or amend' government derived from rights as Englishmen, however, was increasingly untenable. Firstly, it relied on a positivist interpretation of rights which meant that the scope of those rights was left to the mercy of executive and legislative prerogative. Blackstone, for instance, spoke of a 'law of redress against public oppression' derived from 'precedents' (i.e. the common law) which 'authorized' the public to denounce and dethrone a monarch (emphases added).<sup>18</sup> Yet if rights were generated and authorised by law, they could equally be withheld. The Crown, for one, held that settlers enjoyed English rights and laws at its discretionary pleasure – colonisation was not the consensual project envisaged by these settlers.<sup>19</sup> It is clear that Congressional delegates were anxious about this exclusion from the English rights regime. In May 1776, delegates issued a declaration accusing the King and Parliament of excising 'the inhabitants of these united colonies from the protection of his Crown'.<sup>20</sup> If the colonies were excluded from these laws then, theoretically, so too was the right to amend government.

Secondly, the natural and common law rights described by Blackstone and the *Bill of Rights* applied exclusively to English citizens. The term 'subject' was employed frequently in both texts to the exclusion of broader references to 'man' or 'mankind'. But relying on this particularist conception of rights to justify independence would be inconsistent with the objective of independence: namely, to repudiate 'subjection'.<sup>21</sup> Any revolution would require the adoption of a universal theory of rights divorced from English legal history, and colonial agitators recognised as much. As early as

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12 William Blackstone, 'Of the Absolute Right of Individuals', *Commentaries on the Laws of England*, 1765-9, The Avalon Project, available at [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk1ch1.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp), accessed 3 May 2013, 205.

13 Maier, *American Scripture: Making the Declaration of Independence*, 69-72.

14 Maier, *American Scripture: Making the Declaration of Independence*, 51.

15 Maier, *American Scripture: Making the Declaration of Independence*, 51.

16 English *Bill of Rights*, 1689, The Avalon Project, available at [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp), accessed 5 May 2013.

17 Maier, *American Scripture: Making the Declaration of Independence*, 47-59.

18 Blackstone, 'Of the Absolute Right of Individuals', 238.

19 Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory* (New York: Cambridge University Press, 2011), 16-7.

20 Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory*, 260.

21 Hunt, *Inventing Human Rights*, 120.

1766, influential lawyers such as John Dickinson were re-characterising rights as anterior to law: ‘*declarations* but not *gifts* of liberties... born with us... created in us by the decrees of Providence’.<sup>22</sup> As Dickinson illustrates, popular thinkers infused rights with religious connotations, which elicited zealous enthusiasm from the public and, significantly, provided an irrefutable basis for those rights.<sup>23</sup> Alexander Hamilton wrote that the right to revolution was common to all oppressed peoples:

An inherent right of the peoples of Turkey, France, Russia, Spain and other despotic kingdoms... to overthrow the yoke of slavery at any possible moment ... and create government which responds to the principles of civil freedom.<sup>24</sup>

In his seminal 1776 pamphlet *Common Sense*, Thomas Paine similarly universalised the rhetoric of rights with a final climactic appeal to support ‘the RIGHTS of MANKIND’.<sup>25</sup> In the same spirit, the Congressional declaration of 1776 invoked ‘the Laws of Nature and of Nature’s God’. More often than not, the invocation of a deity led lay colonists to believe that God *expected* them to resist tyranny, and that to do so was virtuous – the right was not merely a freedom.<sup>26</sup>

The reception of a universal theory from Europe was the result of a transfusion of Enlightenment ideals from the Old World to the New. Theorists including Locke, Rousseau, Montesquieu, Beccaria, and Pufendorf were frequently invoked by pamphleteers and commentators in the decades prior to 1776.<sup>27</sup> Scholarship concerning the origins of the *Declaration of Independence* devotes considerable attention to studying their texts. Jefferson himself acknowledged that the declaration was a melting pot of ideas borrowed from abroad, and a detailed study of the Scottish and English philosophers who influenced his drafts would provide some insight into how the educated framers conceived of rights.<sup>28</sup> But as T.H. Breen, applying a bottom-up, cultural perspective, argues in his popular history of the Revolution:

Many Americans had never read Locke’s work... They are probably best described as popular Lockeanes. They subscribed to his rights-based philosophy without much caring about intellectual genealogies.<sup>29</sup>

Bernard Bailyn also notes that luminaries like Locke were often misappropriated to support whatever a commentator happened to be arguing.<sup>30</sup> It is more instructive, then, to consider only the most salient features of Enlightenment thinking, as they were represented to the colonial public. Locke, for example, was popularly understood through his *Second Treatise on Civil Government*

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22 John Dickinson, as quoted in Bailyn, *The Ideological Origins of the American Revolution*, 187. Cf. Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory*, 261.

23 For discussion of this phenomenon, see Breen, *American Insurgents American Patriots*, 249-50.

24 Alexander Hamilton, quoted in Alexander Martinenko, ‘The Right of Secession as a Human Right’, *Annual Survey of International and Comparative Law*, Vol. 3, No. 1 (1996), 21.

25 Thomas Paine, *Common Sense* (London: Pelican Books, 1976), 122.

26 Breen, *American Insurgents American Patriots*, 251, 256; James Darsey, *The Prophetic Tradition and Radical Rhetoric in America* (New York: New York University Press, 1997), 49.

27 For a survey of Enlightenment thinkers and their influence on colonial commentators, see Bailyn, *The Ideological Origins of the American Revolution*, 25-30; Maier, *American Scripture: Making the Declaration of Independence*, 135.

28 For Jefferson’s acknowledgment, see Maier, *American Scripture: Making the Declaration of Independence*, 124.

29 Breen, *American Insurgents American Patriots*, 242.

30 Bailyn, *The Ideological Origins of the American Revolution*, 28.

which a Boston printer had republished in 1773 with the aim of giving ‘to every intelligent Reader a better View of the Rights of Men’.<sup>31</sup> Among its most celebrated passages, Locke wrote that when the ‘supreme executive power neglects and abandons that charge [of providing for the public good]... the people are at liberty to provide for themselves, by erecting a new legislative’.<sup>32</sup> This formed the essence of popular Revolutionary thought.

Nevertheless, Locke placed a number of caveats on the right to ‘provide for themselves’. His treatment of the right explains the sort of debates taking place within the colonies over the extent of the right: *who* could exercise it, *how* they could exercise it, *when* they could exercise it, and how it could be inoculated after the establishment of stable government. These themes became the basis for debates over drafting and ratifying the Second Amendment. Resistance by force, Locke warned, will ‘unhinge and overturn all polities, and, instead of government and order, leave nothing but anarchy and confusion’.<sup>33</sup> Revolutionary Americans feared anarchy as much as tyranny – Jefferson borrowed verbatim from Locke when he wrote in the *Declaration of Independence* that only a ‘long train of abuses’ could legitimise rebellion, as did Paine in *Common Sense*.<sup>34</sup>

Despite their apprehension about anarchy, laymen understood Locke’s right to usurp government as implying the use of arms.<sup>35</sup> If the rights enumerated in the English *Bill of Rights* were received and universalised by the colonists, so too was the right of ‘subjects which are Protestants’ to ‘have arms for their defence suitable to their conditions and as allowed by law’.<sup>36</sup> Within the English tradition, this right was understood as a political safeguard against arbitrary government, linked to the right of petition, what Blackstone called the ‘fifth auxiliary right’ (and which he distinguishes from a separate right to personal self-defence).<sup>37</sup> Samuel Adams, quoting Blackstone, interpreted the use of arms for revolution as deriving from a ‘natural right of resistance and self-preservation’.<sup>38</sup>

But having secured independence, the nascent national legislature was faced with the prospect of having to extinguish the right of revolution, at least in its violent form. After the War of Independence concluded, the confederation suffered a series of local rebellions. In most cases, the insurgents framed their cause as an exercise of the natural right to resist government, and to nullify laws.<sup>39</sup> Shay’s Rebellion of 1786, the largest such uprising, did not invoke the positivist right

31 *Boston Gazette*, 1 March 1773, as quoted in Breen, *American Insurgents American Patriots*, 247.

32 John Locke, *Second Treatise of Civil Government*, 1690, Constitution Society, available at <http://www.constitution.org/jl/2ndtr19.htm>, accessed 9 May 2013, s. 219-20. Also see ss. 224-6, 233-7.

33 John Locke, *Second Treatise of Civil Government*, s. 203.

34 Cf. second paragraph of the *Declaration of Independence* to John Locke, *Second Treatise of Civil Government*, s. 225, and Paine, *Common Sense*, 119. For a discussion of American discomfort with anarchy, see Maier, *American Scripture: Making the Declaration of Independence* (New York: Random House, 1997), 136.

35 Breen, *American Insurgents American Patriots*, (New York: Hill and Wang, 2010), 257. See, for instance, Paine, *Common Sense*, 119; ‘To the representatives of the religious society of the people called Quakers’, 124. In support of revolution by force of arms, see also James Burgh, *Political Disquisitions*, 1774 which Levy argues was equally as influential as Locke: Levy, *Origins of the Bill of Rights*, 138.

36 *English Bill of Rights*, 1689, The Avalon Project, available at [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp), accessed 5 May 2013.

37 Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York: Oxford University Press, 2006), 15. See William Blackstone, ‘Of the King and His Title’, *Commentaries on the Laws of England*, 1765-9, The Avalon Project, available at [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk1ch3.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk1ch3.asp), accessed 3 May 2013, 139.

38 Samuel Adams, quoted in Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 14.

39 For the agrarian rebellions of the 1780s: W. Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill

to bear arms guaranteed by the Massachusetts constitution, but rather a natural right to assemble and defy the state's 'tyrannical government'.<sup>40</sup> However, if the people were now sovereign, a right of revolution became constitutionally and rhetorically illogical.<sup>41</sup>

In response, pamphleteers – including those such as Paine, who had supported an armed revolution for independence – began to place limits on the permissibility of violence. Writing under the pseudonym Publius in 1787 in defence of the draft US *Constitution*, Hamilton (with John Jay and James Madison) sternly cautioned individual citizens against 'rush[ing] tumultuously to arms'.<sup>42</sup> Writing in 1793, Paine implored French leaders to incorporate a statement into the *Declaration of the Rights of Man and Citizen* that 'men united in society should have *legal* means of resisting oppression' (emphasis added).<sup>43</sup> These concerns were sporadically addressed in the individual constitutions of states. In George Mason's draft of the Virginia *Declaration of Rights*, the right to alter or abolish government required the support of 'a majority of the community' – that is, it was a collective not individual right – and was only exercisable 'in such manner as shall be judged [by that majority] most conducive to the public weal'.<sup>44</sup>

It is against this background that negotiations in 1789 over drafting and ratifying the Second Amendment can should be read. A clause which protected the right of revolution-by-force addressed many of the concerns raised by theorists such as Locke, as well as commentators including Hamilton. Through the conceit of the 'well-regulated Militia', it provided a structured outlet in which individuals could, nominally, exercise their natural right to resist government: its placement adjacent the First Amendment, with guarantees of freedom of assembly and petition, is some textual evidence for the revolutionary basis of the Second Amendment.<sup>45</sup>

Yet the provision emphasised collective action. It was the only *Bill of Rights* amendment with a preamble, which emphasised the importance of a collective 'militia' for the defence of a 'State'. Approaching the task with a legal agenda, jurists refuse to interpret this as any indicator of the drafters' intent.<sup>46</sup> But a historian is not so restricted; as understood by the federal drafters, the militia served as a military resource to be called upon in response to an external threat like invasion, or an illegitimate rebellion.<sup>47</sup> The 1777 *Article of Confederation*,<sup>48</sup> for instance, positively obliged states to maintain militias for this purpose.<sup>48</sup>

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and Wang, 2007), 152-3. For post-Constitutional rebellions like the Whiskey Rebellion: Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 28, 76, 93-4.

40 Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 33.

41 Christian Fritz, *American Sovereigns: the People and America's Constitutional Tradition before the Civil War* (Cambridge University Press, 2008). 24.

42 Alexander Hamilton, 'Federalist No. 28', *The Federalist Papers*, 1787, Library of Congress, available at [http://thomas.loc.gov/home/histdox/fed\\_28.html](http://thomas.loc.gov/home/histdox/fed_28.html), accessed 5 May 2013.

43 Thomas Paine, 'Declaration of Rights', in *The Writings of Thomas Paine*, ed. Moncure Daniel Conway (New York: GP Putnam's Sons, 1894-9), 131.

44 *Virginia Declaration of Rights*, 1776, Constitution Society, available at [http://www.constitution.org/bcp/virg\\_dor.htm](http://www.constitution.org/bcp/virg_dor.htm), accessed 8 May 2013. The Pennsylvania *Constitution* incorporated similar clauses.

45 Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven and London: Yale University Press, 1998), 47.

46 See, for example, Justice Anthony Scalia, *District of Columbia v Heller*, 554 U.S. 570 (2008).

47 See James Madison, quoted in Neil Cogan, ed., *The Complete Bill of Rights: the Drafts, Debates, Sources and Origins* (Oxford: Oxford University Press, 1997), 192.

48 Article VI, *Articles of Confederation*, 1777, US House of Representatives Office of the Law Revision Council, available at <http://uscode.house.gov/pdf/Organic%20Laws/artconf.pdf>, accessed 8 May 2013.

It is clear from submissions made during the ratification process, however, that the states – which had, after all, pioneered colonial protections for the right to bear or keep arms – understood it as a ‘military check on federalism’ and federal tyranny.<sup>49</sup> Although it was never included in the final draft, many states including Virginia, Pennsylvania, South Carolina, North Carolina and New York accompanied their own constitutional militia guarantees with a prohibition on federal ‘standing armies’, and suggested the same for the federal *Bill of Rights*.<sup>50</sup> These subnational polities, asserted Anti-Federalists-*cum*-Republicans, maintained the balance between federal and individual power.<sup>51</sup>

States, then, were intended to be the repository of a vestigial right of rebellion. As Hamilton wrote in *The Federalist* No. 28, the states provided a system for organising resistance to the central government, without which a rebelling citizenry would be chaotic and ‘without concert’.<sup>52</sup> Citizens intended the amendment to have a regulatory effect, and for state and local governments to have a practical role in raising and directing the militias.<sup>53</sup> By implication, this would only occur if, and only if, doing so was justified by public support. By making consensus a precondition for exercising the right to bear arms, the provision protected society from the violence of individuals with narrow agendas – the anarchy to which post-Revolutionary commentators referred with alarm.<sup>54</sup> As it was expressed in the amendment, and understood by the law American, the right was also a duty. If a state or county saw fit to raise a militia, lay Americans saw it as their civic *obligation* to participate, and to support the insurgency of the majority.<sup>55</sup>

The Second Amendment thus served to channel the right of revolution, transforming it into a form which would be recognisable and sustainable – that is, neither anarchical nor diluted – in the post-Revolutionary context. Through the idea of conventions and declarations, Americans had already found some legal, non-violent expression for the right of revolution: yet these new institutions ultimately relied on the latent threat of popular force.<sup>56</sup> This article has largely avoided the sort of text-parsing, judicial history of the *Bill of Rights* favoured by constitutional literature. Courts and legal historians have their own commitment to history; they are driven by competing demands of determining the original intent of the Second Amendment, but then appropriating it to serve the needs of contemporary law enforcement. Like all rights-based instruments, the *Bill of Rights* is an organic document with enduring utility. Yet interpreting the Second Amendment as the heir of a right of revolution is not congenial to the stability of modern government or public safety.<sup>57</sup> For reasons of judicial expedience, that reading has been expunged, to some extent, from historical debate.

This article has also avoided a rigorous adherence to the ‘state rights to raise a militia versus individual right to self-defence’ paradigm through which the Second Amendment is usually analysed. That dichotomy was developed later in the nineteenth century during the Civil War.

49 Amar, *The Bill of Rights: Creation and Reconstruction*, 50.

50 Levy, *Origins of the Bill of Rights*, 266; Neil Cogan, ed., *The Complete Bill of Rights: the Drafts, Debates, Sources and Origins* (Oxford: Oxford University Press, 1997), 181-2. For a discussion of colonists’ suspicion of standing armies in Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 12, 47.

51 Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 93-4.

52 Alexander Hamilton, ‘Federalist No. 28’, *The Federalist Papers*, 1787, Library of Congress, available at [http://thomas.loc.gov/home/histdox/fed\\_28.html](http://thomas.loc.gov/home/histdox/fed_28.html), accessed 5 May 2013.

53 Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 2-3.

54 Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 3.

55 Cornell discusses the historical evidence for this interpretation of the Second Amendment at length: see Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, 2-7 for an overview.

56 Amar, *The Bill of Rights: Creation and Reconstruction*, 328.

57 Justice Anthony Scalia, *District of Columbia v. Heller*, 554 U.S. 570 (2008), 21

Instead, it has tried to demonstrate the transnational inheritance of particularist rights based in positive law – a right of revolution available to English subjects, and a right to bear arms available to Protestants – and their conversion in the colonies into universal rights derived from natural law, with an attendant civic obligation. The right of revolution was seen to require exercise through force of arms, and the Second Amendment functioned to preserve that political safeguard beyond the struggle for independence. If nothing else, tracing the ideological origins of the right of revolution – its basis in rhetoric of universal and natural rights – serves as an important lesson in historicising human rights: they might not enjoy enduring legitimacy, but rights like that of armed resistance were conceived of in proto-human rights terms.

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