No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA *ET AL.*,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AND HISTORY PROFESSOR JOYCE LEE MALCOLM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

[The Right Inherited from England]

C. KEVIN MARSHALL
(Counsel of Record)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
Counsel for Amici Curiae

QUESTION PRESENTED

Whether the following provisions — D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

United States Cases

TABLE OF AUTHORITIES
(continued)

Page

English Cases

English Statutes & Laws

TABLE OF AUTHORITIES
(continued)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATEMENT OF INTEREST[1]

The Cato Institute is a public-policy research foundation in Washington, D.C. Named after *Cato's Letters* (published in England in the 1720s), it seeks to include in public debate traditional American principles of limited government, individual liberty, free markets, and peace. Cato therefore promotes understanding of the Constitution's common-law context.

Professor Joyce Lee Malcolm long has been the leading authority on the historical English right to arms. Her works include two books published by Harvard: *Guns and Violence: The English Experience* (2002) ("*G&V*"), and *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994) ("*K&B*"). The latter was cited below, Pet. App. 21a n.8, and in *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring); Antonin Scalia, *A Matter of Interpretation* 136-37 (1997); and *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel, *passim* (Aug. 24, 2004) ("*OLC Opinion*"), *available at* www.usdoj.gov/olc/opinions.htm; among other places. She has a Ph.D in comparative history from Brandeis University, is a Fellow of the Royal Historical Society, and is Professor of Legal History at George Mason University School of Law.

---

[1] The parties have letters on file with the Clerk consenting to the filing of *amicus* briefs in support of either party upon seven-days' written notice; *amici* complied with this condition. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the brief's preparation or submission. No person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Over a century ago, this Court declared it "perfectly well settled" that the Bill of Rights was "not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors," including the rights' "well-recognized exceptions." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). Indeed, "[t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925).

Robertson included among those inherited rights "the right of the people to keep and bear arms (art. 2)." 165 U.S. at 281-82. The court below briefly made "reference to" the Second Amendment's foundation in English law. *See* Pet. App. 20a-21a. But Petitioners make none, citing neither the English Bill of Rights, nor any English case, nor Blackstone (yet citing him for another purpose, Pet. Br. 17), nor any other English authority—nor even the three leading early commentators on the Constitution, all of whom recognized the Amendment's English foundation.

Amici therefore set out below the right to have and use arms in English law by the time of the Founding. *Amici* then show how early American authorities claimed and extended that right, including in interpreting the Second Amendment. The English right was a right of individuals, not conditioned on militia service; individuals might exercise the right collectively, but the unquestioned core was a broadly

applicable and robust right to "keep" firearms in one's home for self-defense. Even the "well-recognized exceptions" confirmed this core right, by focusing on the carrying, not the keeping, of weapons.

That core right is what the District of Columbia tramples. It bans keeping a handgun in one's home (including use there in self-defense) and keeping any functional firearm in one's home. Pet. App. 4a, 48a-55a; Resp. Br. 52-54. The Second Amendment, like the English right, may well present difficult questions concerning its outer limits. But this case does not. This Court should affirm.

ARGUMENT

I. THE ENGLISH RIGHT TO HAVE AND USE ARMS BELONGED TO INDIVIDUALS BROADLY, REGARDLESS OF MILITIA SERVICE, AND PARTICULARLY PROTECTED THEIR "KEEPING" OF GUNS FOR SELF-DEFENSE.

The English right to arms emerged in 1689, and in the century thereafter courts, Blackstone, and other authorities recognized it. They recognized a personal, individual right. It could not have been a federalism provision, and none of them conditioned it on militia service—depredations by the king's militia having provided one reason for it. Pre-existing restrictions fell away as the right developed after 1689, such that by the Second Amendment's adoption Americans had inherited a broadly applicable and robust individual right that had been settled for at least fifty years. This right of course had limits, but they did not intrude on the core right to keep firearms to defend home and family: They confirmed it.

A. The English Right was, by Well Before the Founding, a Broadly Applicable Right of Individuals, not Depending on Militia Service.

1. The right to arms was declared in the 1689 Declaration of Rights, part of England's Glorious Revolution. A "Convention" Parliament adopted the Declaration; William and Mary accepted it before Parliament proclaimed them King and Queen; and the ensuing regular Parliament enacted it as the Bill

of Rights. William Blackstone, 1 *Commentaries* *128, *211-16 ("*Blackstone*").[2]

The Declaration presented twelve indictments against King James II (Mary's father), including for having "caus[ed] several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law." Then, in a parallel list of thirteen articles, it stated: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." 1 W. & M., Sess. 2, c.2, § 1 (1689).

This article set out a personal right. *See* Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 283 (1981) (recognizing that many articles "guaranteed rights to the individual," including the right "to bear arms (under certain restrictions)"). Neither the article nor the indictment tied having arms to militia service, which the Declaration nowhere mentioned. Rather, being "armed" and "employed" were distinct. Furthermore, the right belonged to "Subjects," allowed arms "for their Defence"; indeed, Parliament adopted such language in lieu of the House of Commons' drafts referring to "their common Defence," *see G&V* at 58-59.

The article's two concluding clauses—"suitable to their Conditions and as allowed by Law"—were not specially expounded. Blackstone noted them without explanation, 1 *Blackstone* at *143-44, and the judge of a prominent trial in 1820 treated them as just indicating that the right was not unlimited. *King v.*

---

[2] For consistency, this brief in citing Blackstone uses the star pagination in Tucker's edition, discussed below in Parts I.A.3 and II.B.1.

Dewhurst, 1 St. Tr. 529, 597-98 (Lancaster Assize 1820).

To the extent the final clause recognized that Parliament might regulate the right's scope, it is unremarkable: In "the English constitutional experience," *Loving v. United States*, 517 U.S. 748, 766 (1996), evident with the Declaration, rights restricted the Crown's prerogative power, not "law." Federalists highlighted this—pointing to the Declaration—in opposing a bill of rights. *See Federalist No. 84*, at 578-79 (Cooke ed., 1961) (Hamilton). Yet Americans borrowed English rights as the foundation for more secure rights in a distinct constitutional structure. As James Madison conceded in proposing the Bill of Rights to Congress, although "it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States." Speech of June 8, 1789, *reprinted in Creating the Bill of Rights* 80 (Veit *et al.* eds., 1991).

But the English experience does mean that, to determine the bearing of an English right on the Constitution, one must determine how English law regulated it and how it had grown by the Founding. This too is unremarkable: The Declaration contains no freedom of the press; it was five years later that "the press became properly free," and merely upon expiration of a licensing act, 4 *Blackstone* at *152 n.a, which Parliament could have revived "by Law." Even that freedom only set the foundation for a broader American right.

2. As explained below, by the 1700s, the English right had shed many pre-1689 restrictions, most based on "Conditions" (wealth). The one general regulation that remained "by Law" only barred

carrying weapons in a threatening manner, and is explained below in Part I.C. Three pre-existing restrictions particularly fell away:

First, a 1671 act had provided that anyone not among the few rich qualified to hunt game was "not allowed to have or keep" any "guns." 22 & 23 Car. II, c.25, § 3. In a 1693 game act, and again in 1706, Parliament omitted "guns" from the list of implements that those not qualified could not "keep or use." 5 Ann., c.14, § 4 (1706); *see* 4 & 5 W. & M., c.23 (1693).

The courts interpreted this omission as protecting a broadly applicable right to keep a gun so long as one did not hunt game with it. In 1704, the Devonshire Quarter Sessions, in ordering searches for hunting implements, cautioned that no Protestant subjects were to be "'disturbed in keeping arms for their own preservation.'" *K&B* at 127. The first decision of a principal court was *King v. Gardiner* in 1738. 93 Eng. Rep. 1056 (K.B.); 95 Eng. Rep. 386 (different reporter). The Court of Common Pleas six years later thought the matter "settled and determined." *Mallock v. Eastly*, 87 Eng. Rep. 1370, 1374 (1744). And in 1752 the King's Bench, citing *Gardiner*, thought it "not to be imagined" that Parliament had intended "to disarm all the people of England." *Wingfield v. Stratford*, 96 Eng. Rep. 787, 787-88. Richard Burn pasted *Gardiner* into his authoritative manual for local officers, first published in 1755. 2 *The Justice of the Peace, and Parish Officer*, tit. "Game," 232-33 (11th ed. 1769) ("*JP*"); *see also* 1 *Blackstone* at *354 (recommending Burn); 4 *id.* at *175 (citing Burn regarding game).

Second, a statute from 1548 had primarily outlawed shot, by which "an infinite sort of fowl" and

"much Game" had been killed. 2 & 3 Edw. VI, c.14. The question arose in 1692 whether it remained in force, and the King's Bench concluded that it did. *King v. Alsop*, 87 Eng. Rep. 256. Parliament repealed it three years later, noting its desuetude. 6 & 7 Will. III, c.13, § 3 (1695).

Finally, an even older statute, from Henry VIII, had restricted ownership of cross-bows and short "hand-guns" (generally those under a yard) to the rich, those earning at least 100 pounds a year. 33 Hen. VIII, c.6, §§ 1-2 (1541). It also fined anyone, lacking such wealth, who should "carry, or have in his or their journey, going or riding in the King's highways or elsewhere," any loaded cross-bow or "gun," except in war. *Id.* § 3.

This statute also fell into desuetude in the wake of the Bill of Rights and had been pronounced obsolete before the Founding. The English Reports record no successful prosecution after 1689. *See King v. Bullock*, 87 Eng. Rep. 315 (K.B. 1693); *King v. Litten*, 89 Eng. Rep. 644 (K.B. 1693); *King v. Silcot*, 87 Eng. Rep. 186 (K.B. 1691); *King v. Lewellin*, 89 Eng. Rep. 440 (K.B. 1689). They record no prosecution at all after 1693.

One reason the statute withered was that it had come to be considered a game act. After 1689, even in local courts it is "difficult to find a case in which anyone was fined for possession of a gun of any sort unless it was connected with a poaching incident or with possession of other hunting equipment." *K&B* at 127.

Burn confirmed this understanding, and the statute's obsolescence. In editions before the Founding, he placed it last in a litany of game laws; simply summarized it; and cited no case after *Silcot*.

See 2 *JP* at 240-43. In a note, he acknowledged it was "undoubtedly in force, and consequently may be put in execution," but explained, "nevertheless it seemeth now to be obsolete, the object thereof [primarily encouraging "the use of the long bow"] being a matter not in any use, and the effect of it with respect to the game being superseded as it were by the several subsequent statutes." *Id.* at 243 n.; *see id.* at 245 n. (object "doth not now exist"); *Sander's Case*, 85 Eng. Rep. 311, 311 n.(1) (K.B. 1671) (editor's note, 1799, describing statute as "obsolete, as the object of it is a matter no longer in any use") (footnote omitted). Beginning in 1800, the treatise dismissed the statute in one sentence, as "a matter more of curiosity than of use." 2 *JP* at 439 (J. Burn ed., 19th ed.). Parliament formally repealed it in 1831, in a litany repealing twenty-seven game laws covering 400 years. 1 & 2 Will. IV, c.32, § 1.

3. Thus, in the 1700s, English subjects of all classes possessed a broad individual right to have arms. Blackstone confirmed this in the 1760s. He delineated three "primary . . . rights of the people of England," which echo in our Constitution: "the right of personal security, the right of personal liberty, and the right of private property." 1 *Blackstone* at *129. He identified five "auxiliary subordinate rights of the subject"—"to protect and maintain" these. *Id.* at *140-41. Fourth was the right of petition, and fifth was the right to have arms, both of which, he noted, the Bill of Rights had recognized. *Id.* at *143-44. He reiterated that "the subjects of England are entitled . . . to the right of having and using arms." *Id.* at *144. A posthumous edition by Edward Christian, published in the early 1790s, added that "every one is at liberty to keep or carry a gun, if he does not use it

for the destruction of game." William Blackstone, 2 *Commentaries* *412 n.8 (Lewis ed., 1900) (reprinting Christian's annotation); *see* St. George Tucker, 2 *Blackstone's Commentaries*, advertisement & *145 n.42 (1803) ("*Tucker's Blackstone*") (using and discussing Christian's edition).

Jean-Louis de Lolme likewise explained before the Founding, drawing on Blackstone, that the Declaration had "expressly ensured to individuals the right of publicly preferring complaints against the abuses of government and, moreover, of being provided with arms for their own defence." 2 *The Rise and Progress of the English Constitution* 886 (Stephens ed., 1838) (1784). De Lolme was well known. *See* 1 *Tucker's Blackstone* at 316.

Particularly striking confirmation of the right is the 1780 opinion from London's Recorder, on the legality of a private self-defense association. He was the city's legal adviser and primary criminal-court judge. *See* 3 *Blackstone* at *80-81 n.i & *334; 4 *id.* at *404. His opinion, prompted by the Gordon Riots, was "of wide interest." Leon Radzinowicz, 4 *A History of English Criminal Law* 107 (1968); *see G&V* at 87-88.

Acknowledging the "difficulty" of defining the "limits" of the "rights of the people" to "bear arms, and to instruct themselves in the use of them, *collectively*," the Recorder began with basics:

> The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to

> assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that this right, which every Protestant most unquestionably possesses *individually*, *may*, and in many cases *must*, be exercised *collectively*, is likewise a point I conceive to be most clearly established . . . .

"Legality of the London Military Foot-Association" (1780), *reprinted in* William Blizard, *Desultory Reflections on Police* 59, 59-60 (1785) ("*Recorder*").

Forty years later, the judge in *Dewhurst* asked, "are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law?" 1 St. Tr. at 601. He too answered that "people in the ordinary class of life" had a "clear right to arms." *Id.*

4. In none of the above does the right of English subjects depend on militia service. This is no surprise: The 1662 Militia Act had authorized royally appointed militia officers, on their own warrants, "to search for and seize all arms" of anyone they judged "dangerous to the peace of the kingdom." 13 & 14 Car. II, c.3, § 14.[3] Both James II and his father "made effective use" of it "to try to snuff out political and religious dissent." Schwoerer, *Declaration* at 76; *see K&B* at 36-38, 43-53, 85, 100, 115-16, 123 (examples). It is part of the context for the Declaration's indictment.

Thus, the right enacted in the Bill partly "reflected the idea that the Militia Laws were grievous and tacitly denied the right of the government to confiscate weapons." Schwoerer, *Declaration* at 76. Blackstone later explained that any royal

[3] Persons having more than 100 pounds per year provided "a case of pistols" for horsemen; others provided muskets of at least a yard for infantry. *Id.* §§ 5 & 21.

proclamation "for disarming any protestant subjects, will not bind." 1 *Blackstone* at *271. In discussing the right, he did not connect it to militia service, *id.* at *143-44; in discussing the militia, he did not mention the right, *id.* at *412-13.

B. The Core of the English Right, Settled by at Least the 1730s, was the Right of Ordinary Subjects to "Keep" Firearms for Defense of Their Homes and Families.

As discussed further below in Part I.C, there was room for debate as to the outer limits of the right of English subjects when bearing arms. But one thing was not open to doubt: The core of the right, especially by the Founding, was the right of ordinary individuals to "keep"—possess and own—firearms for defense of their homes and families.

The Declaration suggested this, in securing subjects' right to "have Arms for their Defence." Even a contemporaneous law restricting Roman Catholics allowed such a person, with permission of a justice of the peace, to "have or keep . . . necessary weapons . . . for the defence of his house or person." 1 W. & M., Sess. 1, c.15, § 4 (1689). The restrictive class statute of Henry VIII still emphasized that a subject living in or near a town could keep a gun (of the length permitted for the non-rich) "for the defence of his person or house," and that one outside a town could "keep and have in his said house, for the only defence of the same, hand-guns" of the permitted length. 33 Hen. VIII, c.6, §§ 4 & 7.

The cases recognizing the significance of the new game laws emphasized this core of the right. In *Gardiner*, a defendant charged with "keeping a gun" noted that the 1706 act did not list guns and argued,

with regard to its prohibition of "other engines," that "though there are many things for the bare keeping of which a man may be convicted; yet they are only such as can only be used for destruction of the game, whereas a gun is necessary for defence of a house, or for a farmer to shoot crows." The King's Bench agreed: "[A] gun differs from nets and dogs, which can only be kept for an ill purpose." 93 Eng. Rep. at 1056.[4] The Court of Common Pleas considered settled that "a man may keep a gun for the defence of his house and family" and "must use the gun to kill game before he can incur any penalty." *Mallock*, 87 Eng. Rep. at 1374. And the King's Bench reiterated that "a gun may be kept for the defence of a man's house, and for divers other lawful purposes." *Wingfield*, 96 Eng. Rep. at 787.

Even earlier, the Quarter Sessions order noted above had protected subjects' "'keeping [of] arms for their own preservation.'" *K&B* at 172. And by 1717 most justices on the King's Bench accepted that "the keeping a gun" might be done "for the defence of [one's] house," rather than "to destroy the game." *King v. Filer*, 93 Eng. Rep. 657 (K.B. 1722); *see Gardiner*, 95 Eng. Rep. at 387.

William Hawkins in his treatise, first published in 1716, clarified that a law (discussed below) regulating being armed in public still left one free to "assembl[e] his neighbours and friends in his own

---

[4] An apparently separate case the next year was to the same effect. *King v. Gardner*, 87 Eng. Rep. 1240, 1241 (K.B. 1739) (defendant, arguing that "to charge only that he kept a gun is improper, for it includes every man that keeps a gun," and that guns are kept "for the defence of a man's house"); *id.* (Lee, C.J.) (words of statute "do not extend to prohibit a man from keeping a gun for his necessary defence").

house, against those who threaten to do him any violence therein, because a man's house is as his castle." 1 *Treatise on the Pleas of the Crown*, ch. 63, § 8 (Leach ed., 6th ed. 1788) ("*Hawkins*"); *see id.*, ch. 65, § 10 (same); *Payton v. New York*, 445 U.S. 573, 596 n.44 (1980) (explaining rule).

Blackstone twice connected the arms right to personal defense. He described it as "a public allowance under due restrictions, of the natural right of resistance and self-preservation," and as "for self-preservation and defence." 1 *Blackstone* at *144. A few pages earlier, he highlighted the law's not punishing homicide "*se defendendo*" or "to preserve" one's limbs, as showing the "high value" of life and limb. *Id.* at *130; *see* 4 *id.* at *180-85 (elaborating). He declared self-defense "the primary law of nature" and explained that a person "forcibly attacked in his person or property" could "repel force by force." 3 *id.* at *3-4; *cf.* 1 *id.* at *251 (distinguishing resistance to government).

The Recorder thought "clear and undeniable" the right of subjects to have arms "for their *own* defence," and listed "immediate self-defence" as the first lawful use of arms. *Recorder* at 59, 63 (emphasis added). And the court in *Dewhurst* began with the proposition that a man "in the ordinary class of life . . . has a clear right to arms to protect himself in his house." 1 St. Tr. at 601.

C. Rather than Interfering with the Freedom of Individuals to Keep Firearms for Self-Defense, English Law in the 1700s Protected the Peace by Directly Punishing Belligerent Uses of Those Arms.

English law in the 1700s thus did not meddle with the ability of ordinary English subjects to keep firearms. The law was not indifferent to keeping the peace: It was becoming harsher, notoriously so in the Black Act, which in 1723 added innumerable felonies—punished with forfeiture and execution. *See G&V* at 64-70; 4 *Blackstone* at *4, *18, *97-98, *245. Yet the law did not restrict individuals in keeping arms (or in simply carrying them), but rather kept the peace by punishing those who broke it, with a firearm or otherwise; and by punishing, through one common-law rule, those who carried weapons in public belligerently. That this liberal regime endured in such a context shows how robust the English right was—particularly the core right to keep.

1. Of course one had no right to use firearms to attack others, commit other crimes, or otherwise breach the peace or violate private property. Blackstone, for example, while criticizing ancient game laws, approved restrictions on trespassing. 4 *Blackstone* at *416; 2 *id.* at *411-12. He catalogued offenses against the peace (and a quasi-nuisance) that often involved weapons. *See OLC Opinion* at 48 n.195; 4 *Blackstone* at *125-26 (striking in palace or courts, or injuring those under court protection); *id.* at *131 (conveying arms to a prisoner), *176-77 (homicide), *243 (robbery with a sword).

Moreover, "the common law hath ever had a special care and regard for the conservation of the peace." 1 *Blackstone* at *349. One way of conserving

it, apart from prosecutions, was to demand a surety from persons who posed particular risks. And one circumstance justifying a surety was if someone "shall go about with unusual weapons or attendants, to the terror of the people." *Hawkins*, ch. 60, § 1; *see* 4 *Blackstone* at *254-55 (same).

2. Beyond this, English law depended on one general regulation of the right: a common-law rule against going about armed so as to terrify the people. Related was the medieval Statute of Northampton. It provided that "no man, great nor small," except royal officials and subjects responding to "a cry made for arms to keep the peace," could

> be so hardy [1] to come before the king's justices, or other of the king's ministers doing their office, with force and arms, [2] nor bring no force in affray of peace, [3] nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere,

on pain to "forfeit their armour" and be imprisoned "at the king's pleasure." 2 Edw. III, c.3 (1328), *quoted in Hawkins*, ch. 63, § 4 (numbers added).

By the 1600s, the courts had reduced this to the common-law offense. *See Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (Croke, J.); *K&B* at 81 (local-court example). According to Professor Malcolm, the statute "does not appear to have been enforced" then—except that men "were occasionally indicted for carrying arms to terrorize their neighbors." *K&B* at 184 n.36 & 104, respectively; *see id.* at 191-92 n.32 (similar).

This interpretation was confirmed in the agitation of the Glorious Revolution. An information charged that Sir John Knight, a torment to James II, "did

walk about the streets armed with guns, and that he went into" a church, "in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686); *see K&B* at 104-05. He had been carrying pistols. *King v. Knight*, 90 Eng. Rep. 330 (different reporter). The Chief Justice explained that the statute's "meaning" was "to punish people who go armed to terrify the king's subjects," which had been "a great offense at the common law." 87 Eng. Rep. at 76. The statute was "almost gone in desuetudinem," but "where the crime shall appear to be malo animo, it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security)." 90 Eng. Rep. at 330. Knight was acquitted and bound to good behavior. 87 Eng. Rep. at 76.

Hawkins thereafter discussed Northampton in a chapter on affray—fighting in public to the terror of the people. He thought it "certain," based on Northampton, "That in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people." *Hawkins*, ch. 63, § 4. Blackstone tracked this formulation. 4 *Blackstone* at *149.

It followed that "no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people," by causing "suspicion of an intention to commit an[ ] act of violence or disturbance of the peace." *Hawkins*, ch. 63, § 9. *Dewhurst* thus concluded that "[a] man has a clear right to protect himself when he is going singly or in a small party

upon the road where he is traveling or going for the ordinary purpose of business." 1 St. Tr. at 601-02. Hawkins added that Northampton also did not bar arming oneself "to suppress dangerous rioters, rebels, or enemies." *Hawkins* ch. 63, § 10. The Recorder shared this view. *See Recorder* at 62.

Hawkins did not elaborate on "dangerous and unusual" weapons. Given general usage, a firearm likely was "dangerous." *See*, *e.g.*, *King v. Oneby*, 92 Eng. Rep. 465, 467 (K.B. 1727) ("dangerous weapon" includes "a pistol, hammer, large stone &c. which in probability might kill B. or do him some great bodily harm"). Unusualness might contribute to causing a terror: "[P]ersons of quality" were "in no danger of offending against this statute by wearing common weapons." *Hawkins*, ch. 63, § 9.

Northampton, in its third subsection, did make it illegal to "go [ ]or ride armed" before officials or in "fairs," "markets," or any other "part," suggesting a concern with particular places. But this was subject to the judicial gloss just described. Before *Knight*, "the strict prohibition" in this subsection "had never been enforced." *K&B* at 104. *Knight* involved going armed to a "part"—a church—yet the court did not suggest this was illegal per se, apart from whether Knight was carrying pistols "malo animo," "to terrify the king's subjects." 90 Eng. Rep. at 330; 87 Eng. Rep. at 76, respectively. The location could be relevant, however, given that Hawkins approved going armed with attendants "in such places, and upon such occasions" as was common. *Hawkins*, ch. 63, § 9. And if an affray did occur, the law could punish it more based on "the place wherein it is committed," particularly courts or churches. *Id.* § 23. Blackstone, following Hawkins, mentioned

aggravated punishment where "the particular place ought to restrain and regulate men's behavior more than in common ones." 4 *Blackstone* at *145-46.

3. The difficulties arose not from law-abiding individuals going about their business—much less keeping arms—but rather from armed groups. English law dreaded mobs, riots, and rebellions. It long had specially punished crimes by three or more persons. *See* 4 *id.* at *146-47. Charles II restricted "tumultuous petitioning." *Id.* at *147. And in the 1710s, Parliament added the Riot Act, which made it a felony for twelve or more persons to disobey orders to disperse. *See id.* at *142-43, *147.

An *armed* mob would be worse, and so an armed group posed a particular risk of causing terror. The commission of justices of the peace, from 1590, charged them based on Northampton to inquire into persons who went or rode "in companies, with armed force against the peace." *Butt v. Conant*, 129 Eng. Rep. 834, 849 (C.P. 1820).

After 1689, the law wrestled with reconciling this concern and the arms right. Hawkins concluded that "persons of quality" not only could wear common weapons but also could "hav[e] their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them." *Hawkins*, ch. 63, § 9. Yet "persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people," were guilty of unlawful assembly. *Id.*, ch. 65, § 4.

The London Recorder, although finding the basic individual right "clear and undeniable," wondered "[w]here, then, shall we draw the line?" on the right

of private, collective bearing. *Recorder* at 59 & 61. His "best consideration" was that a private group needed to (1) have a "lawful" "purpose and object"; (2) "demean themselves in a peaceable and orderly manner" consistent with it; (3) not assemble in numbers that "manifestly and greatly exceed" that purpose; and (4) not "act without the authority of the civil magistrate" unless suppressing "sudden, violent, and felonious, breaches of the peace." *Id.* at 62 (emphases omitted).

The court in *Dewhurst* similarly had "no difficulty in saying you have no right to carry arms to a public meeting if the number of arms which are so carried are calculated to produce terror and alarm." 1 St. Tr. at 602; *see id.* (similar). The court relied on Hawkins. *Id.* at 596-97.

Unsurprisingly, when Parliament thirty years after the Founding enacted its first restrictions on the English right since before the Declaration, it was spurred by riots and the resulting "Peterloo Massacre," which in turn led to the unlawful assembly at issue in *Dewhurst*. *See generally King v. Hunt*, 106 Eng. Rep. 768 (K.B. 1820); *G&V* at 95-98. And Parliament restricted what the Recorder had cautiously allowed, barring unauthorized "Meetings and Assemblies" to learn "the Use of Arms" or military movement, and denouncing those who had caused "great Terror and Alarm [to] His Majesty's peaceable and loyal Subjects." 60 Geo. III, c.1, § 1 (1819).[5] Yet this difficult area was far afield from

---

[5] Another act authorized officers, in certain counties "disturbed" by riots, to search for and seize weapons kept "for any purpose dangerous to the Public Peace" (with a warrant upon the oath of one credible witness) and (with a warrant) to arrest persons "found carrying Arms" and justly suspected of

keeping arms for self-defense or simply carrying them—each of which *Dewhurst* reaffirmed as "a clear right," four months later. 1 St. Tr. at 601.

II. THE SECOND AMENDMENT SECURES AT LEAST THE INDIVIDUAL RIGHT INHERITED FROM ENGLAND, AS EARLY AMERICAN AUTHORITIES DEMONSTRATE.

The English right was invoked in America before and soon after the Second Amendment's adoption—including in authority interpreting that Amendment. Americans not only inherited England's individual right but also expanded it, dropping England's religious and class restrictions and coming to see it as the foundation for a citizen militia. Like the English, they confirmed the core right of keeping for self-defense by focusing regulation not on keeping but rather on belligerent bearing.

A. Authorities Before the Second Amendment's Adoption Recognized the Right Inherited from England and, due to the Revolution, that it Facilitated not only Self-Defense but also a Militia of the People.

Early Americans well knew their inheritance from England. Alexander Hamilton celebrated the Glorious Revolution, *see Federalist No. 26*, at 165-66, and the Declaration contains the foundation not only

---

(continued…)

such a purpose. 1 Geo. IV, c.2, §§ 1, 3, 8 (1819). It was "hotly contested in Parliament." The government conceded it was "'not congenial with the constitution'" and infringed "'the rights and the duties of the people,'" but justified it on "'necessity.'" It expired after two years. *G&V* at 96-97.

of the Second Amendment but also of the First Amendment's Petition Clause and the Eighth Amendment, among other things.

As part of this inheritance, they claimed the individual right to arms. In Boston in 1768, as tensions rose, a town meeting led by Samuel Adams, John Hancock, and others resolved that this right in the Declaration was "founded in Nature, Reason and sound Policy, and is well adapted for the necessary Defence of the Community"; praised the colony's law requiring "every listed Soldier and other Householder" to be armed; and requested that, to "be prepared in Case of Sudden Danger," any Bostonian lacking arms "observe the said Law." Boston Chronicle at 363 (Sept. 19, 1768), *quoted in* Stephen P. Halbrook, *A Right to Bear Arms* 1-2 (1989) ("*Bear*").

British troops occupied Boston two weeks later. *Id.* at 2. The Maryland Gazette republished the resolution, *id.* at 61, and Boston newspapers defended it:

> [I]t is certainly beyond human art and sophistry, to prove the British subjects, to whom the *privilege* of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip'd with *arms*, &c. are guilty of an *illegal act*, in calling upon one another to be provided with them, as the *law directs*.

Boston Gazette & Country J. at 2 (Jan. 30, 1769), *quoted in Bear* at 6; *see Boston under Military Rule, 1768-1769*, at 61 (Dickerson ed., 1936) ("*Boston*") (reprinting from different paper).

A subsequent anonymous article by Adams recounted the Glorious Revolution and quoted both discussions of the right by the recently-published

Blackstone. Adams attacked critics of the town vote, "calling upon the inhabitants to *provide themselves with arms for their defence*," as insufficiently "attend[ing] to the rights of the constitution." Boston Gazette at 3 (Feb. 27, 1769), *reprinted in* 1 *The Founders' Constitution* 90 (Kurland & Lerner eds., 1987).

A New York newspaper denounced the troops' "licentious and outrageous behavior" and argued:

> It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.

"Boston, March 17," N.Y.J. Supp. at 1 (Apr. 13, 1769), *reprinted in Boston* at 79; *Bear* at 7 (same).

A year later, the right was reaffirmed in the "Boston Massacre" murder trial of British soldiers for firing on a harassing crowd. John Adams, their counsel, argued that they had acted in self-defense. In closing, he quoted Hawkins and conceded: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence." 3 *Legal Papers of John Adams* 247-48 (Wroth & Zodel eds., 1965). Adams also later recognized the propriety of "arms in the hands of citizens, to be used . . . in private self-defence," which he distinguished from militia service. 3 *Defence of the Constitutions of Government of the United States of America* 475 (1787).

Soon after Lexington and Concord, North Carolina's royal governor denounced those urging people "to be prepared with Arms" and train under

committees of safety. North Carolina's congressional delegates, however, publicly urged the committees "to form yourselves into a Militia" in the exercise of "the Right of every *English* subject to be prepared with Weapons for his Defense." N.C. Gazette (Newbern) at 2 (July 7, 1775), *quoted in Bear* at 29-30.

Thomas Paine that year in a Pennsylvania magazine even satirized the game laws, for allowing local English judges to disarm commoners on the pretext that they had hunted with guns. *Bear* at 24-25. Pennsylvania's 1776 Declaration of Rights protected hunting, and a newspaper article defended this by arguing that, even though "guns are not engines appropriated to kill game," aristocrats still used the game laws to disarm commoners, through false witnesses. *Id.* at 24. Noah Webster later mocked the minority of Pennsylvania's ratifying convention for proposing that the Constitution protect hunting, because America lacked the feudalism that had prompted English-style game laws. "America," Daily Advertiser (Dec. 31, 1787), *reprinted in* 1 *Debate on the Constitution* 553, 559-60 (Bailyn ed., 1993). He had a point: An early American adaptation of Burn omitted the "Game" chapter. *Burn's Abridgement, or the American Justice* 198 (Ladd ed., 2d ed. 1792).

As the admonition of North Carolina's delegates highlights, Americans came to add to the English arms right, which was tied to individual self-defense, an affection for a citizen militia, and came to view the right as its foundation. The Boston resolution even suggests this, describing the right as "adapted for" community defense. The Revolution incubated such notions. *See OLC Opinion* at 51-55 & 24-31; Resp. Br. 20-29. This notion did not *restrict* or *replace* the

English right, but rather built on it. A similar dynamic apparently had occurred in England. Whigs' "claim that the right not only ensured individual self-defense, but served as a restraint on government," and their corresponding demand for a reformed militia, could not prevail in 1689, and only "gradually came to be accepted in the eighteenth century." *K&B* at 122; *see* Schwoerer, *Declaration* at 75-76 (similar).

B. Authorities Soon After the Second Amendment's Adoption Recognized it as Securing—and Expanding—the Right Inherited from England, with the Additional Purpose of Facilitating a Militia of the People.

The American embrace of the right inherited from England, along with the affection for militias built on it, continued in the earliest authorities after the Second Amendment's adoption. They also recognized, and praised, that the right as transplanted to America lacked England's religious and aristocratic restrictions.

1. Each of the three leading early commentators on the Constitution viewed the Amendment as built on the foundation of the individual English right, and each viewed it as better because broader.

St. George Tucker set out his views in his 1803 edition of Blackstone. In an introductory essay on the Constitution, he quoted the Second Amendment, and, like Blackstone, connected the right to "self defence." He noted the Declaration's "right of bearing arms," but criticized its religious limitation and qualification based on "condition," which had allowed use of game laws to undermine the right. 1 *Tucker's Blackstone, Note D*, at 300. He reiterated this criticism in discussing the Second Amendment right

together with the First's right of assembly and petition, explaining that both exceeded their English antecedents. *Id.* at 315-16; *see id.* at 289 & 357 (further mention).

In annotating Blackstone's descriptions of the right, Tucker praised the Second Amendment "right of the people" for omitting "any qualification as to their condition or degree, as is the case in the British government," and again criticized the game acts. 2 *Tucker's Blackstone* at *143-44 nn.40-41; *see id.* at *145 n.42 (explaining England's hunting restrictions). And in a note to one of Blackstone's critiques of the game laws, Tucker lamented that "it seems to be held" that no one but aristocrats has "any right to keep a gun in his house" or "keep a gun for their defence." But "in America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty." 3 *id.* at *414 n.3. (He here omitted Christian's clarifying note, quoted in Part I.A.3.) In none of these passages did Tucker suggest that the Second Amendment *added* a restriction—dependence on militia service.

William Rawle likewise contrasted the Second Amendment right with the English one— "secured to protestant subjects only" and "cautiously described to be that of bearing arms for their defence, 'suitable to their conditions, and as allowed by law.'" He denounced the game laws for allowing forfeiture of a gun used to kill game, and noted Blackstone's critique. *View of the Constitution of the United States of America* 126 (2d ed. 1829) ("*View*"). Rawle concurred in the preamble's praise of the militia, viewed the Amendment's operative text as a "corollary" from this, and emphasized that the

operative text's "prohibition is general," barring any "flagitious attempt" by Congress, or a State, "to disarm the people." *Id.* at 125-26; *see id.* at 153 ("In a people permitted and accustomed to bear arms, we have the rudiments of a militia.").

Joseph Story, in explaining the Second Amendment, devoted a paragraph to England's "similar provision" ("confined" to Protestants). He quoted the Declaration, cited Blackstone's descriptions, and followed Tucker's criticism of the effect of the game laws on England's "defensive privilege." 3 *Commentaries on the Constitution of the United States* § 1891 (1833). Story elsewhere noted the Declaration's "right to bear arms." *Id.* § 1858.

These three were not alone. Henry Tucker, a judge and law professor, explained that "in America" the "right of bearing arms" was "not limited and restrained by an arbitrary system of game laws as in England; but is practically enjoyed by every citizen." *Commentaries on the Laws of Virginia* 43 (1831). And Blackstone's "auxiliary" right was "secured with us by" the Second Amendment. *Id.*

The leading commentator after the Civil War, Thomas Cooley, described the Second Amendment as a "modification and enlargement from the English Bill of Rights" and "enabl[ing] the government to have a well-regulated militia." *General Principles of Constitutional Law* 271 (1880). He also explained that state constitutions' "defences to personal liberty" included "the right of the people to keep and bear arms." He recounted the Glorious Revolution, described a "well-regulated militia" as an alternative to a standing army, and observed that one "cannot exist unless the people are trained to bearing arms."

He also cited two cases recognizing a broad individual right. *Treatise on the Constitutional Limitations* 350 (1868).

2. Several of the earliest cases likewise acknowledged the English foundation of the right to keep and bear arms. The leading antebellum one was *State v. Reid* in 1840. The Alabama Supreme Court upheld a ban on carrying guns or knives secretly, under the State constitution's provision that "[e]very citizen has a right to bear arms, in defence of himself and the State." 1 Ala. 612, 614-15 (1840). The court began with its origins in England's "provisions in favor of the liberty of the subject." Quoting the Declaration, the court explained: "The evil which was intended to be remedied . . . was a denial of the right of Protestants to have arms for their defense, not an inhibition to wear them secretly." *Id.* at 615. But "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 616-17.

Soon after, the Tennessee Supreme Court upheld a conviction for secretly carrying a bowie knife, under the State's right of "free white men . . . to keep and bear arms for their common defence." It too recognized the English roots; although mangling them, perhaps because of "common defence" in the state provision, the court still concluded that Tennessee "citizens have the unqualified right to keep" arms. *Aymette v. State*, 21 Tenn. 154, 156-58 (1840). For analysis of *Aymette* and related Tennessee cases, see *OLC Opinion* at 87, 91-96.

In 1846, the Georgia Supreme Court in *Nunn v. State* (which Cooley cited) reversed a conviction for openly carrying a pistol. 1 Ga. 243 (1846). The court distinguished *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and applied the Second Amendment. It viewed both the Amendment and state protections as securing the pre-existing English right: "[T]he Constitution of the United States, in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before, in the act of 1689." 1 Ga. at 249. This right was "re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta.*" In the United States, "a reason why this right shall not be infringed" was that its "free enjoyment" would "prepare and qualify a *well-regulated militia*." "The right of the whole people," "and not militia only," furthered this "important end." *Id.* at 250-51.

C. Early American Authorities Likewise Adopted the English Focus on Directly Punishing Belligerent Uses of Arms, rather than Interfering with the Freedom of Individuals to Keep them for Defense of Home and Family.

Not only did American authorities recognize the foundation of the right to keep and bear arms in the English right, but they also confirmed the core of that right by focusing on directly punishing belligerent uses of those arms. As in England, the focus was on applying—and adapting—the common-law rule against terrorizing the people. That is why in 1868 Cooley could "happily" note the paucity of cases on "regulat[ing] this right," making it unnecessary to

determine "[h]ow far" a legislature could go. *Constitutional Limitations* at 350. There was no federal regulation of private firearms until 1934. *OLC Opinion* at 3.

1. As in England, the right did not authorize breaching the peace. The Massachusetts Supreme Court in a libel case likened the freedom of the press to the "right to keep fire arms," which did not protect "him who uses them for annoyance or destruction." *Commonwealth v. Blanding*, 20 Mass. 304, 314 (1825). The Michigan Territory's Supreme Court, also in a libel case, explained that the Constitution "grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into a right in him who keeps a gun to destroy his neighbor." *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 1829 WL 3021, at *12.

The three earliest suggestions for the Bill of Rights expressed this truism. Pennsylvania's convention minority proposed protecting the right to bear arms, yet allowing disarming "for crimes committed, or real danger of public injury from individuals." Bernard Schwartz, 2 *The Bill of Rights: A Documentary History* 665 (1971). Samuel Adams and other delegates urged the Massachusetts convention to recommend barring Congress from "prevent[ing] the people of the United States, who are peaceable citizens, from keeping their own arms." *Id.* at 674-75. The New Hampshire convention proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Id.* at 761.

2. Also as in England, the main further restriction (apart from racial ones, mirroring England's on non-Protestants, *see*, *e.g.*, *State v. Newsom*, 27 N.C. 250 (1844)) was the Statute of Northampton, as reduced

to the common law. *See K&B* at 140 ("usual restrictions" on using firearms "to terrify" applied). Tucker, like Hawkins, implicitly treated it (as enacted in Virginia) as a species of affray, which requires terror. *See* 5 *Tucker's Blackstone* at *146 n.6, *149 n.14. Rawle observed that a "disturbance of the public peace" would abuse the Second Amendment right, and, citing Hawkins, that a person's "carrying of arms . . . attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them" would justify a surety. *View* at 126.

The fullest antebellum judicial treatment was in *State v. Huntly*, 25 N.C. 418 (1843). Northampton was not in force, but the court, discussing Blackstone, Hawkins, Burn, *Knight*, and Coke, held the offense was at common law. It affirmed a conviction but cautioned that the "carrying of a gun *per se* constitutes no offense. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun." *Id.* at 422-23.

The overriding issue in antebellum cases was the constitutionality of new bans on carrying weapons secretly. Apart from the initial divided decision in *Bliss v. Commonwealth*, 12 Ky. 90 (1822), *overruled by* Ky. Const. art. XIII, § 25 (1850), every court upheld or approved them. In addition to *Reid*, *Aymette*, and *Nunn* (which approved them while finding keeping and openly carrying pistols protected), see, *e.g.*, *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833); *State v. Buzzard*, 4 Ark. 18 (1842); and *State v. Chandler*, 5 La. Ann. 489 (1850).

Courts implicitly extended the common law by analogy, based on an overwhelming consensus that any person carrying secretly must be planning to

terrorize someone and, correspondingly, that carrying secretly did not serve self-defense. *Reid* described the law as intended "to put down lawless aggression and violence," barring carrying in "such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others." 1 Ala. at 617. Absent evidence, it was "only when carried openly" that arms could be "efficiently used for defence." *Id.* at 619. *Aymette* referred to the "terror which a wanton and unusual exhibition of arms might produce" and the danger of "desperadoes with concealed arms." It rejected any right to bear arms "merely to terrify the people or for purposes of private assassination," and thought "the manner in which they are worn and circumstances under which they are carried indicate to every man the purpose." 21 Tenn. at 159-60; *see also Chandler*, 5 La. Ann. at 489-90 (law "became absolutely necessary" to prevent surprise "assassinations"; Second Amendment protected open carrying). Thus, this Court, in later declaring "laws prohibiting the carrying of concealed weapons" consistent with the Second Amendment, had cause to think them within a "well-recognized" exception, even though not one specifically "inherited from our English ancestors." *Robertson*, 165 U.S. at 281-82.

3. Laws regarding carrying in particular places seem to have been connected to fear of armed groups and in any event to have had in mind the common law. Several colonial statutes *required* bringing arms to church, while "[t]he usual restriction on the *use* of firearms in crowded areas" applied—a restriction implicit in the common-law rule and no doubt barring firing without cause. *K&B* at 139-40 (emphasis

added); *cf.* Pet. Br. 3, 42. Tucker appended Northampton's first subsection (coming before judicial officers "with force and arms") to the offense of *injuring* persons under judicial protection, and indicated that Virginia laws regarding churches barred disturbances. *See* 5 *Tucker's Blackstone* at *126, *54 & *146; *see also Aymette*, 21 Tenn. at 159 (no right of "ruffians to enter the theatre in the midst of the performance, with drawn [weapons], or to enter the church in the same manner, during service, to the terror of the audience"). The 1776 Delaware Constitution provided that "[t]o prevent any violence or force being used at . . . elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day." *Quoted in OLC Opinion* at 55 n.225; *see also Reid*, 1 Ala. at 616 (stating that no right existed "to bear arms upon all occasions and in all places," but focusing on threatening carrying).

The right of assembly was less restricted. *See* 5 *Tucker's Blackstone* at *146-48. But Rawle recognized regarding the Second Amendment that "[a]n assemblage of persons with arms, for an unlawful purpose, is an indictable offense." *View* at 126. The Minutemen had begun as private associations, *see OLC Opinion* at 51-53—unlawful to the British—but, after the Civil War, Americans faced struggles with such groups similar to England's. Cooley in 1880 thought the Second Amendment required a view akin to the Recorder's, while this Court in 1886 briefly upheld under the Second Amendment a state restriction of private armed associations similar to the 1819 British law discussed above. *Compare General Principles* at 271, *with Presser v. Illinois*, 116 U.S. 252, 264-65. As in

England, however, this area of dispute was far removed from the core right of keeping for self-defense, which neither questioned.

CONCLUSION

The District of Columbia laws violate the core of the right to arms inherited from England and secured by the Second Amendment. The Court should affirm.

Respectfully submitted,

C. KEVIN MARSHALL
(Counsel of Record)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for Amici Curiae

February 8, 2008