

# CHARLESTON LAW REVIEW

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# HOW THE BRITISH GUN CONTROL PROGRAM PRECIPITATED THE AMERICAN REVOLUTION

*David B. Kopel\**

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Understanding the United States Constitution requires understanding the British practices that drove the Americans to armed revolution. For example, Supreme Court Justices have looked at the British government’s violation of the right of confrontation,<sup>1</sup> the use of general warrants,<sup>2</sup> unrepresentative

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government as exemplified by taxation without representation,<sup>3</sup> unrepresentative government as exemplified by the grotesquely malapportioned “rotten boroughs” which elected the Members of Parliament,<sup>4</sup> and the violation of the right to trial by jury via use of vice-admiralty courts.<sup>5</sup> Similarly, the enumeration of the right to petition in the First Amendment is in part a result of the Royal Governors denying towns their right to send them petitions of complaint.<sup>6</sup>

As a general rule, Justice Harlan’s oft-cited<sup>7</sup> dissenting opinion in *Poe v. Ullman* explained that judges engaged in “the supplying of content” to the constitutional concept of “liberty” should do so “having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”<sup>8</sup>

Like the First Amendment in the 1930s, the Second Amendment today is at an early stage of judicial exposition. The Supreme Court’s decisions in *District of Columbia v. Heller* and

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revised and extended version of a portion of the textbook written by Kopel. Kopel’s website is <http://www.davekopel.org>.

Thanks to David Young, Clayton Cramer, Adam Winkler, and readers of the Volokh Conspiracy weblog for helpful suggestions. Any errors are the fault of King George III and his nefarious ministers.

1. See *Crawford v. Washington*, 541 U.S. 36, 47 (2004) (“Controversial examination practices [had been] used in the Colonies.”).

2. See *Henry v. United States*, 361 U.S. 98, 101 (1959).

3. See *Texas v. Johnson*, 491 U.S. 397, 435 (1989) (Rehnquist, C.J., dissenting).

4. See *Wesberry v. Sanders*, 376 U.S. 1, 15 (1964).

5. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340–41 (1979) (Rehnquist, J., dissenting). For background on the vice-admiralty courts, see CARL UBBELHOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1961) (arguing that the Americans overstated the alleged problems with those courts).

6. See, e.g., RICHARD D. BROWN, *REVOLUTIONARY POLITICS IN MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS: 1772–1774*, at 57 (1970).

7. See, e.g., *Washington v. Glucksburg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring); *Montana v. Egelhoff*, 518 U.S. 37, 74 n.1 (1996) (Souter, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (plurality opinion); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 780 n.10 (1986) (Stevens, J., concurring); *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion).

8. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

*McDonald v. City of Chicago* both treated history and tradition as extremely important in determining the legal meaning of the Second Amendment, and its enforcement by the Fourteenth Amendment.<sup>9</sup> Federal courts have differed in exactly how to use history and tradition, but there is little doubt that history and tradition are crucial to resolving modern gun control issues.<sup>10</sup>

This Article chronologically reviews British gun control which precipitated the American Revolution: the 1774 import ban on firearms and gun powder; the 1774–1775 confiscation of firearms and gun powder from individuals and from local governments; and the use of violence to effectuate the confiscations. It was these events which changed a situation of rising political tension into a shooting war.

Each of these British abuses provide insight into the scope of the modern Second Amendment. Although these abuses are not being repeated precisely in their original form, they are examples of a general type of abuse—just as criminal trials of Americans in vice-admiralty courts were one way in which the right to trial by jury could be denied.

From the events of 1774–1775, we can discern that import restrictions or bans on firearms or ammunition are constitutionally suspect—at least if their purpose is to disarm the public, rather than for the normal purposes of import controls (e.g., raising tax revenue, or protecting domestic industry). We can discern that broad attempts to disarm the people of a town,

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9. *District of Columbia v. Heller (Heller)*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. \_\_\_, 130 S. Ct. 3020 (2010).

10. *E.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) (describing the “original public meaning as both a starting point and an important constraint on the analysis” of the Second Amendment); *Heller v. District of Columbia (Heller II)*, No. 10-7036, 2011 WL 4551558, at \*23–27 (D.C. Cir. Oct. 4, 2011) (Kavanaugh, J., dissenting) (arguing that courts should look to history and tradition in assessing the constitutionality of particular gun controls.).

The most complete legal history narrative of the Founding Era and the right to arms is STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008). Many of the original sources cited in this Article are reprinted in *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS IN COMMENTARIES ON LIBERTY, FREE GOVERNMENT AND AN ARMED POPULACE: 1787–1792* (David E. Young ed., 2d ed. 1995).

or to render them defenseless, are anathema to the Second Amendment; such disarmament is what the British tried to impose, and what the Americans fought a war to ensure could never again happen in America. Similarly, gun licensing laws that have the purpose or effect of allowing only a minority of the people to keep and bear arms would be unconstitutional. Finally, we see that government violence—which should always be carefully constrained and controlled—should be especially discouraged when it is used to take firearms away from peaceable citizens. Use of the military for law enforcement is particularly odious to the principles upon which the American Revolution was based.

## I. FROM THE TEA PARTY TO THE IMPORT BAN

### A. The Intolerable Acts

In 1773, Parliament enacted the Tea Act, reinforcing a tax which the Americans considered flagrantly unlawful.<sup>11</sup> They believed that taxation without consent was simply theft, for only through a representative legislature could the people consent to taxation.<sup>12</sup>

Moreover, the tea tax was to be used to pay for the support of royal governors and other royal dependents in America, thus

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11. Tea Act, 13 Geo. 3, c. 44 (1773) (Eng.). The Tea Act was a scheme to get rid of excess tea owned by the British East India Company. The tea tax itself was not new but, rather, was the last remnant of the 1767 Townshend Duties, all of which (except for tea) had been repealed in 1770. While the taxes were supposed to raise some revenue, their essential point was to affirm the principle that Parliament could tax the American colonies without their consent. In the mainstream British view, the Americans had “virtual representation” in Parliament, even though the Americans had not voted to elect any of the Members of Parliament.

12. *E.g.*, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies*, in 2 THE POLITICAL WRITINGS OF JOHN DICKINSON 309 (Paul Leicester Ford ed., Philadelphia 1895) (Parliament cannot tax New Yorkers by requiring that the New York legislature pay for the quartering of British soldiers in New York. New Yorkers cannot “be legally taxed but by their own representatives.” Therefore, Parliament’s suspension of the New York legislature was punishment for what New Yorkers legally had a right to do.). In the American view, Americans could only be taxed by their own colonial legislatures.

making the royal administration entirely dependent on the crown and independent of the people whom it was governing.<sup>13</sup>

The Tea Act required Americans to buy their tea solely from the East India Company, a monopoly created by Parliament.<sup>14</sup> As Americans were well aware, the East India Company had turned itself into the actual government of east India, and there, the Company's irresponsible, ruthless, and inhumane greed had been directly responsible for millions of deaths in the Bengal famine of 1770.<sup>15</sup>

So, to many Americans, the issues were simple: Would the Americans surrender their natural right of self-government—a right guaranteed by the colonial charters? Would they submit to the tea tax—the tip of the spear for the principle that Parliament could tax, govern, and impose its rule without American consent? Would they allow England to press down upon America the corrupt class of royal toadies who would rule America by force, as they did east India? Would they allow England to siphon off the productive wealth of Americans and gladly watch Americans die in order to enhance their own corrupt profits?<sup>16</sup>

Mass opposition by the people of Boston prevented the unloading of three tea ships moored in the Boston harbor.<sup>17</sup> The Royal Governor, Thomas Hutchinson, decided that the ships must be unloaded on December 17, 1773.<sup>18</sup> So on the evening of December 16, about a hundred Bostonians—supported by a crowd of thousands who safeguarded them—disguised themselves with war paint and Indian clothing, boarded the three ships carrying East India Company cargo, and dumped forty-six tons of tea into the water.<sup>19</sup>

13. Tea Act, 13 Geo. 3, c. 44 (1773) (Eng.).

14. *Id.*

15. See generally BENJAMIN L. CARP, *DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY & THE MAKING OF AMERICA* (2010).

16. *Id.* at 13–24.

17. ROBERT J. ALLISON, *THE AMERICAN REVOLUTION* 17 (2011).

18. *Id.*

19. CARP, *supra* note 15, at 13–24. Earlier that day, a meeting of several thousand men from Boston and nearby towns had voted that the tea ships must leave the harbor that day. *Id.*

Among the participants in the Tea Party was the physician Elisha

Furious about the Boston Tea Party, Parliament in 1774 passed the Coercive Acts, known in the Colonies as the Intolerable Acts.<sup>20</sup> The Acts included several harsh measures:

- The Boston Port Act shut the port of Boston until the damages from the Tea Party were repaid;<sup>21</sup>
- The Massachusetts Government Act put most of the colonial government under the direct control of the crown-appointed Royal Governor appointed by the King, and abolished the rights that had been recognized by the colonial charter.<sup>22</sup> The Act also forbade holding town meetings, a common form of municipal self-government, more than once a year;<sup>23</sup>
- The Administration of Justice Act authorized the Royal Governor to move trials of royal officials outside of Massachusetts<sup>24</sup>—a law that George Washington denounced as the “Murder Act” because he feared it would allow British officials to commit crimes with impunity;<sup>25</sup>
- The Quartering Act authorized the Governors of every colony to designate unoccupied buildings or public accommodations (e.g., inns) for quartering British soldiers.<sup>26</sup> The 1774 Quartering Act was a response to the colonial legislatures’ general neglect of their obligation (imposed by Parliament’s 1765 Quartering

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Story. *Id.* at 239. His son, Joseph Story, became one of the greatest Justices of the United States Supreme Court and the preeminent legal scholar of early nineteenth century America. His treatises explained the Second Amendment as an individual right whose main purpose was to deter tyranny and to restore constitutional government in case a tyrant seized power. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1388–97.

20. *The Coercive Acts*, U.S. HIST., <http://www.u-s-history.com/pages/h647.html> (last visited Feb. 10, 2012).

21. Port Act, 14 Geo. 3, c. 19, § 1 (1774) (Eng.).

22. *Id.*

23. American Rebellion Act, 14 Geo. 3, c. 45 (1774) (Eng.).

24. *Id.* at c. 39.

25. David L. Ammerman, *The Tea Crisis and Its Consequences through 1775*, in *A COMPANION TO THE AMERICAN REVOLUTION* 204 (Jack P. Greene & J. R. Pole eds., 2004).

26. Quartering Act, 14 Geo. 3, c. 54 (1774) (Eng.).

Act)<sup>27</sup> to provide quarters for British soldiers in North America. Once the French had been driven out of North America by the 1763 Anglo-American victory in the French and Indian War, the Americans expected the British troops who had been sent to fight the war to be sent back home.<sup>28</sup> Parliament decided to keep the troops in North America after the war ended, and many Americans regarded the presence of a standing army as a plot to intimidate and oppress the colonists;<sup>29</sup>

- The Quebec Act defined the Quebec colony as extending far down into the Allegheny Mountains, thereby negating many American land claims in the West.<sup>30</sup>

The Intolerable Acts were offensive, but it was the possibility that the British might deploy the army to enforce them that primed many colonists for armed resistance. The Patriots of Lancaster County, Pennsylvania, resolved: “[t]hat in the event of Great Britain attempting to force unjust laws upon us by the strength of arms, our cause we leave to heaven and our rifles.”<sup>31</sup>

A South Carolina newspaper essay, reprinted in Virginia, urged that any law that had to be enforced by the military was necessarily illegitimate:

When an Army is sent to enforce Laws, it is always an Evidence that either the Law makers are conscious that they had no clear and indisputable right to make those Laws, or that they are bad [and] oppressive. Wherever the People themselves have had a hand in making Laws, according to the first principles of our Constitution there is no danger of Non-submission, Nor can there be need of an Army to enforce

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27. Importation Act, 5 Geo. 3, c. 5 (1765) (Eng.) (“An act for punishing mutiny and desertion, and for better payment of the army and their quarters.”).

28. AMERICAN MILITARY HISTORY 22 (Brad Lookingbill ed., 2011).

29. *Id.*

30. Quebec Act, 14 Geo 3, c. 83 (1774) (Eng.).

31. Horace Kephart, *The Birth of the American Army*, 98 HARPER’S NEW MONTHLY MAG., Dec. 1898–May 1899, at 963 (quoting the Hanover Resolves (June 4, 1774)).



them.<sup>32</sup>

The Royal Governor of Massachusetts, General Thomas Gage, dispatched the Redcoats to break up an illegal town meeting in Salem.<sup>33</sup> But when large numbers of armed Americans appeared in response, the British retreated.<sup>34</sup> Gage's aide John Andrews explained:

[T]here was upwards of three thousand men assembled there from the adjacent towns, with full determination to rescue the Committee if they should be sent to prison, Even if they were Oblig'd to repel force by force, being sufficiently provided for such a purpose; as indeed they are all through the country— every male above the age of 16 possessing a firelock with double the quantity of powder and ball enjoin'd by law.<sup>35</sup>

Military rule would be difficult to impose on an armed populace. Gage had only 2,000 troops in Boston.<sup>36</sup> There were thousands of armed men in Boston and more in the surrounding area.<sup>37</sup> One response to the problem was to deprive the Americans of gunpowder.

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32. William Tennent, Letter to the Editor, *Some of the Blessings of Military Law, or the Insolence of Governor Gage*, S.C. GAZETTE, Aug. 23, 1774, available at <http://digital.tcl.sc.edu/cdm/compoundobject/collection/wtj/id/320/rec/4> (The letter was published in the South Carolina Gazette, August 23, 1774, under the pseudonym "A Carolinian.").

33. RAY RAPHAEL, A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION: HOW COMMON PEOPLE SHAPED THE FIGHT FOR INDEPENDENCE 55 (Howard Zinn ed., 2001).

34. *Id.*

35. *Id.* at 44 The essay also argued for the superiority of a well-regulated militia to a standing army, the former being no threat to liberty. *Id.*

36. ROBERT P. RICHMOND, POWDER ALARM: 1774, at 82 (1971).

37. *Id.* at 82–83, 86–87.

## B. The Powder Alarm

Modern smokeless gunpowder is stable under most conditions.<sup>38</sup> The black powder of the eighteenth century was far more volatile.<sup>39</sup> Accordingly, large quantities of black powder were often stored in a town's powder house, typically a reinforced brick building.<sup>40</sup> The powder house would hold merchants' reserves—large quantities stored by individuals—as well as powder for use by the local militia.<sup>41</sup> Although colonial laws generally required militiamen (and sometimes every householder, as well) to supply their own firearm and a minimum quantity of powder, not everyone could afford it.<sup>42</sup> Consequently, the government sometimes supplied public arms and powder to individual militiamen.<sup>43</sup> Policies varied on whether militiamen who had been given public arms would keep them at home.<sup>44</sup> Public arms would often be stored in a special armory, which might also be the powder house.<sup>45</sup>

The British became concerned that Massachusetts towns had been withdrawing their gunpowder from the powder houses.<sup>46</sup> Before dawn on September 1, 1774, 260 Redcoats acting on General Gage's order sailed up the Mystic River and seized hundreds of barrels of powder from the Charlestown powder house (next to the present site of Tufts University, in what is now Somerville).<sup>47</sup> The only powder that was left to take belonged to the colonial government, so Gage was within his legal rights to seize it. But the seizure still incensed the public.<sup>48</sup>

The "Powder Alarm," as it became known, was a serious

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38. Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91, 103 (1989) [hereinafter Halbrook *Origins of the Second Amendment*].

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 104.

44. *Id.*

45. *Id.*

46. See DAVID HACKETT FISCHER, *PAUL REVERE'S RIDE* 44–51 (1994).

47. *Id.* at 44–45.

48. *Id.* at 45.

provocation. By the end of the day on September 1, 20,000 militiamen had mobilized and started marching toward Boston.<sup>49</sup> In Connecticut and western Massachusetts, rumors quickly spread that the Powder Alarm actually involved fighting in the streets of Boston.<sup>50</sup> More accurate reports reached the militia companies before those militia reached Boston, and so the war did not begin in September.<sup>51</sup> The militia message, though, was unmistakable: if the British used violence to seize arms or powder, the Americans would treat that seizure as an act of war, and the militia would fight. And that is exactly what happened several months later, on April 19, 1775.

The people of Worcester County, Massachusetts, had already been meeting in county convention, with delegates sent by the towns.<sup>52</sup> Five days after the Powder Alarm, on September 6, the militia of the towns of Worcester County assembled on the Worcester Common.<sup>53</sup> Backed by the formidable array, the Worcester Convention took over the reins of government, and ordered the resignations of all militia officers, who had received their commissions from the Royal Governor.<sup>54</sup> The officers promptly resigned, and then received new commissions from the Worcester Convention.<sup>55</sup>

That same day that Worcester County ended all royal authority over the militia, the people of Suffolk County (which includes Boston) assembled and adopted the Suffolk Resolves.<sup>56</sup>

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49. ALLEN FRENCH, *THE DAY OF CONCORD AND LEXINGTON: THE NINETEENTH OF APRIL, 1775*, at 19 (1925).

50. BROWN, *supra* note 6, at 225–27.

51. *Id.*

52. *Id.* at 216.

53. *Id.*

54. *Id.*

55. *Id.* at 217. Shortly before the Powder Alarm, Gage had written to Lord Dartmouth, warning that “In Worcester, they keep no Terms, openly threaten Resistance by Arms, preparing them, casting Ball and providing Powder, and threaten to attack any Troops who dare to oppose them.” Letter from Gen. Gage to Lord Dartmouth (Aug. 27, 1774), in 1 *THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY: 1763–1775*, at 366 (Clarence Edwin Carter ed., Archon Books 1969) (1931).

56. Joseph Warren, *The Suffolk Resolves*, AMERICA’S HOME PAGE (Sept. 6, 1774), [http://ahp.gatech.edu/suffolk\\_resolves\\_1774.html](http://ahp.gatech.edu/suffolk_resolves_1774.html).

The nineteen points of political principle, grievance, and plans for action included:

9. That the fortifications begun and now carrying on upon Boston Neck<sup>57</sup> are justly alarming to this county, and gives us reason to apprehend some hostile intention against that town, more especially as the commander in chief has, in a very extraordinary manner, removed the powder from the magazine at Charlestown, and has also forbidden the keeper of the magazine at Boston, to deliver out to the owners, the powder, which they had lodged in said magazine . . . .<sup>58</sup>

11. That whereas our enemies have flattered themselves that they shall make an easy prey of this numerous, brave and hardy people, from an apprehension that they are unacquainted with military discipline; we, therefore, for the honour, defence and security of this county and province, advise, as it has been recommended to take away all commissions from the officers of the militia, that those who now hold commissions, or such other persons, be elected in each town as officers in the militia, as shall be judged of sufficient capacity for that purpose, and who have evidenced themselves the inflexible friends to the rights of the people; and that the inhabitants of those towns and districts, who are qualified, do use their utmost diligence to acquaint themselves with the art of war as soon as possible, and do, for that purpose, appear under arms at least once every week.<sup>59</sup>

In other words, the people of Suffolk County, aggrieved at the seizure of gun powder, took control of the local militia away from the Royal Governor (by replacing the Governor's appointed officers with officers elected by the militia), and resolved to engage in group practice with arms at least weekly.

The Suffolk Resolves were distributed across the colonies;

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57. An isthmus connecting Boston to the mainland. The surrounding waters were later filled in by development.

58. Warren, *supra* note 56. According to Richmond, the only powder left on September 1, 1774, belonged to the state government, of which the Royal Governor was the chief executive. RICHMOND, *supra* note 36, at 5. However, the Suffolk Resolves indicate that merchants still had some of their own powder in the Charleston Powder House. *See* Warren, *supra* note 56.

59. Warren, *supra* note 56.

Paul Revere rode them down to the First Continental Congress, which had just assembled in Philadelphia.<sup>60</sup> The Congress unanimously condemned Britain's "wicked ministerial measures," endorsed the course of action that had been adopted by the Suffolk Resolves, and urged all the other colonies to send supplies to help the Bostonians.<sup>61</sup>

Governor Gage directed the Redcoats to begin general, warrantless searches for arms and ammunition.<sup>62</sup> Many of these searches were conducted when people tried to enter Boston by ship, or by the narrow land "neck" which led to the city.<sup>63</sup> Nearby Worcester County sent a complaint to General Gage:

This county are constrained to observe, they apprehend the people justifiable in providing for their own defence, while they understood there was no passing the neck without examination, the cannon at the north battery spiked up, and many places searched, where arms and ammunition were suspected to be, and if found, seized; yet as the people have never acted offensively, nor discovered any disposition so to do, till as above related, the county apprehend this can never justify the seizure of private property.<sup>64</sup>

According to the *Boston Gazette*, of all General Gage's offenses, "what most irritated the People" was "seizing their Arms and Ammunition."<sup>65</sup>

When the Massachusetts Assembly convened, General Gage declared it illegal, so the representatives reassembled as the "Provincial Congress," with the wealthy merchant John Hancock presiding.<sup>66</sup> On October 26, 1774, the Massachusetts Provincial Congress adopted a resolution condemning military rule and

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60. RICHMOND, *supra* note 36, at 78.

61. 1 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 39 (Washington Chancy Ford ed., 1904) (adopted Sept. 10, 1774). The full text of the Suffolk Resolves was entered in the Congress's official journal. *Id.* at 9-14.

62. RICHMOND, *supra* note 36, at 81-87.

63. *Id.*

64. THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS 645 (1838) (cataloging the Worcester Convention of September 21, 1774).

65. See Halbrook Origins of the Second Amendment, *supra* note 38, at 105 (quoting BOS. GAZETTE, Dec. 5, 1774, at 4, col. 1).

66. *Id.* at 104.

criticizing Gage for “unlawfully seizing and retaining large quantities of ammunition in the arsenal at Boston.”<sup>67</sup> The Provincial Congress urged all militia companies to organize and elect officers.<sup>68</sup> The new elections would mean removal of officers who had been appointed by the Royal Governor.<sup>69</sup> At least a quarter of the militia (the famous Minute Men) was directed to “equip and hold themselves in readiness to march at the shortest notice.”<sup>70</sup> The Provincial Congress further declared:

That, as the security of the lives, liberties and properties of the inhabitants of this province depends, under Providence, on their knowledge and skill in the art military, and in their being properly and effectually armed and equipped, it is therefore recommended, [if any of the inhabitants have not provided themselves with arms and ammunition according to law,] that they immediately provide themselves therewith; and [that] they use their utmost diligence to perfect themselves in military skill . . . .<sup>71</sup>

That is, everyone who did not already have a gun should get one, and start practicing with it diligently. So as one historian put it, “one of the anxieties of every citizen was to get a good gun and keep in repair.”<sup>72</sup>

In flagrant defiance of royal authority, the Provincial Congress appointed a Committee of Safety and vested it with the power to call forth the militia.<sup>73</sup> The militia of Massachusetts no longer answered to the British government. It was now the instrument of what was becoming an independent government of Massachusetts.

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67. THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS 31 (1838) (detailing the First Provincial Congress of Massachusetts on October 26, 1774).

68. *Id.* at 33.

69. *Id.*

70. *Id.*

71. *Id.* at 34.

72. FRENCH, *supra* note 49, at 24.

73. BERNHARD KNOLLENBERG, GROWTH OF THE AMERICAN REVOLUTION: 1766–1775, at 219–21 (1975).

## C. Disarmament Orders from London

Information traveled across the Atlantic at the speed of a sailing ship. The average trip was two months, so it is unknown precisely when the British government learned of the Powder Alarm and the American response. But we do know that the British government generally approved of Gage's policies. Lord Dartmouth, the royal Secretary of State for America, sent Gage a letter on October 17, 1774, urging him to disarm New England, to the extent reasonably possible:

Amongst other things which have occurred on the present occasion as likely to prevent the fatal consequence of having recourse to the sword, that of disarming the Inhabitants of the Massachusetts Bay, Connecticut and Rhode Island, has been suggested. Whether such a Measure was ever practicable, or whether it can be attempted in the present state of things you must be the best judge; but it certainly is a Measure of such a nature as ought not to be adopted without almost a certainty of success, and therefore I only throw it out for your consideration.<sup>74</sup>

Gage received Dartmouth's letter on December 3.<sup>75</sup> His reply explained that the only way to take guns away from the Americans would be to use force: "Your Lordship's Idea of disarming certain Provinces would doubtless be consistent with Prudence and Safety, but it neither is nor has been practicable without having Recourse to Force, and being Masters of the Country."<sup>76</sup>

Gage's letter was made public by a reading in the British House of Commons.<sup>77</sup> It was then picked up and publicized in

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74. Letter from Lord Dartmouth to Gen. Gage (Oct. 17, 1774), *in* 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY: 1763–1775, at 175 (Clarence Edwin Carter ed., Archon Books 1969) (1933).

75. Letter from Gen. Gage to Lord Dartmouth (Dec. 15, 1774), *in* 1 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY: 1763–1775, at 386 (Clarence Edwin Carter ed., Archon Books 1969) (1931).

76. *Id.* at 387.

77. 18 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 106 (London, T.C. Hansard,

America as proof of Britain's malign intentions.<sup>78</sup>

#### D. The Import Ban

Two days after Lord Dartmouth dispatched his disarmament recommendation to General Gage, King George III and his ministers blocked importation of arms and ammunition to America.<sup>79</sup> The six-month decree was repeatedly renewed, remaining in effect until the Anglo-American peace treaty in 1783.<sup>80</sup>

Read literally, the order only required a government permit to export arms or ammunition from Great Britain to America. In practice, no permits were granted. The Crown sent orders to the colonial governors (via Gage, for distribution), and to the British navy, to immediately block all arms and ammunition shipments

Peterborough-Court, Fleet-Street 1813).

78. See 1 MERCY OTIS WARREN, *HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION* 159 (Lester H. Cohen ed., Liberty Fund 1994) (1805).

79. The proclamation imposing the ban stated:

And His Majesty judging it necessary to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, out of this Kingdom, doth therefore, with the advice of his Privy Council, hereby order, require, prohibit and command that no Person or Persons whatsoever (except the Master General of the Ordnance for his Majesty's Service) do, at any time during the space of Six Months from the date of this Order in Council, presume to transport into any parts out of this Kingdom, or carry coastways any Gunpowder, or any sort of Arms or Ammunition, on board any Ship or Vessel, in order to transporting the same to any part beyond the Seas or carrying the same coastways, without Leave and Permission in that behalf, first obtained from his Majesty or his Privy Council, upon Pain of incurring and suffering the respective Forfeitures and Penalties inflicted by the aforementioned Act . . . .

5 Acts Privy Council 401, *in* Brief of the National Shooting Sports Foundation, Inc., as Amicus Curiae in Support of Respondent at 13–14 n.31, *Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008) (No. 07-290) [hereinafter Brief in Support of Respondent], *available at* [http://rkba.org/judicial/heller/07-290\\_RespondentAmCuNSSFound.pdf](http://rkba.org/judicial/heller/07-290_RespondentAmCuNSSFound.pdf). The proclamation was based on the powers specified in 29 Geo. 2, c. 16 (Eng.).

80. JAMES TRUSLOW ADAMS, *REVOLUTIONARY NEW ENGLAND: 1691–1776*, at 412 (1923).



into the thirteen colonies.<sup>81</sup>

Letters from other British officials sent along with the orders raised concerns about the thriving illegal (from the British perspective) arms trade between North America and the Netherlands.<sup>82</sup> The concerns were well founded. Benjamin Franklin was masterminding the import of arms and ammunition from the Netherlands, France, and Spain.<sup>83</sup>

The Boston Committee of Correspondence<sup>84</sup> learned of the arms embargo, and promptly dispatched Paul Revere to New Hampshire, with the warning that two British ships were headed to Fort William and Mary, near Portsmouth, New Hampshire, to seize firearms, cannons, and gunpowder.<sup>85</sup> On December 14, 1774, four hundred New Hampshire patriots preemptively captured all the material at the fort.<sup>86</sup> A New Hampshire newspaper argued that the capture was prudent and proper, reminding readers that the ancient Carthaginians had consented to “deliver up all their Arms to the Romans,” and were decimated by the Romans soon after.<sup>87</sup> The parallels with America seemed

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81. KNOLLENBERG, *supra* note 73, at 204–05.

82. *E.g.*, Letter from Lord Dartmouth to Gen. Gage (Oct. 19, 1774), in 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY: 1763–1775, at 176–77 (Clarence Edwin Carter ed., Archon Books 1969) (1933).

83. RICHMOND, *supra* note 36, at 95.

84. Historically in the colonies, Committees of Correspondence had been informal organizations that took over some of the functions of local government when the formal government was unable to function properly, or was hostile to the public will. A common function was to organize public objection or action against a problem, or a threat to liberty. In response to rising tensions with Great Britain, a Boston town meeting in 1772 created Committee of Correspondence, consisting of twenty-one men. Similar committees formed in other colonies. *See generally* BROWN, *supra* note 6.

85. *Id.*

86. ADAMS, *supra* note 80, at 412.

87. Halbrook Origins of the Second Amendment, *supra* note 38, at 110 (1989) (quoting N.H. GAZETTE & HIST. CHRON., Jan. 13, 1775, at 1, col. 1, available at <http://www.guncite.com/journals/Rev-hal.html>). In 149 B.C., the Romans ordered the conquered Carthaginians to surrender all their weapons. 1 DAVID DEMING, SCIENCE AND TECHNOLOGY IN WORLD HISTORY: THE ANCIENT WORLD AND CLASSICAL CIVILIZATION 156 (2010). Once the Carthaginians did so, the Roman destroyed the city and slaughtered approximately ninety percent of the inhabitants. *Id.*

plain:

Could they [the Ministry] not have given up their Plan for enslaving *America* without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies? . . . And shall we like the *Carthaginians*, peaceably surrender our Arms to our Enemies, in Hopes of obtaining in Return the Liberties we have so long been contending for?

. . . .

I . . . hope that no person will, at this important Crisis, be unprepared to act in his own defence, should he, by necessity, be driven thereto. And I must here beg leave to recommend consideration to the people on this Continent, whether, when we are by an arbitrary decree prohibited the having Arms and Ammunition by importation, we have not by the law of self-preservation, a right to seize upon all those within our power, in order to defend the liberties which God and Nature have given us.<sup>88</sup>

Edmund Burke, the intellectual founder of conservative political thought, was among the minority of Members of Parliament who urged accommodation of American concerns.<sup>89</sup> He introduced the “Speech on Conciliation with the Colonies,” which proposed to stop British taxation of domestic commerce in the thirteen colonies.<sup>90</sup> Speaking in support of the Resolutions, Burke compared the attempt to disarm America with the previous disarmament of the Welsh:

Sir, during that state of things, Parliament was not idle. They attempted to subdue the fierce spirit of the Welsh by all sorts of rigorous laws. They prohibited by statute the sending all sorts of arms into Wales, as you prohibit by proclamation (with something more of doubt on the legality) the sending arms to

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88. *A Watchman*, N.H. GAZETTE & HIST. CHRON., Jan. 13, 1775, at 1, reprinted in 1 AMERICAN ARCHIVES, 4th ser. 1064–65 (Peter Force ed., Washington, D.C. 1846).

89. Speech on Moving His Resolution for Conciliation Colonies (Mar. 22, 1775), in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 180–222 (Peter J. Stanlis ed., 1963).

90. *Id.*

America. They disarmed the Welsh by statute, as you attempted (but still with more question on the legality) to disarm New England by an instruction.<sup>91</sup>

Another moderate, the Duke of Manchester, “cautioned the House to proceed with deliberation, as America had now three millions of people, and most of them were trained to arms, and he was certain they could now produce a stronger army than Great-Britain.”<sup>92</sup>

The British government, however, was in no mood for conciliation. The October-November 1774 elections for the House of Commons had strengthened the ruling Tories so that they could ignore the Whigs’ opposition to Tory determination to subdue America speedily and by force.<sup>93</sup>

The Massachusetts Provincial Congress took steps to accelerate domestic arms manufacture. The Congress offered to purchase “so many effective arms and bayonets as can be delivered in a reasonable time upon notice given to this congress at its next session.”<sup>94</sup> Massachusetts also urged American

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91. *Id.* at 208. Burke was probably referring to the Penal Laws against Wales which were enacted by Parliament in response to the Welsh Revolt (1400–15), led by Owain Glyndŵr (in English, Owen Glendower). The laws were little enforced after 1440, and are widely thought to have been repealed by the Laws in Wales Acts (1535 and 1542). However, formal repeal was not accomplished until 1624. 4 & 5 Jac. 1, c. 1 (1624) (Eng.); 21 Jac. 1, c. 10, 28 (1624) (Eng.). Similar laws were imposed at various times against Ireland and against Scotland, for the purpose of suppressing national independence movements. *See, e.g., Heller*, 554 U.S. at \_\_\_, 128 S. Ct. 2783, 2795 n.10 (describing laws to disarm the Scottish Highlanders); An Act for the Better Securing the Government, by Disarming Papists, 7 Will. 3, c. 5 (1695) (Eng.) (stating that no Irish Catholics may have arms, or ammunition, or be instructed in how to manufacture them; all Irish Catholic homes may be searched for arms); An Act for the Preservation of the Game, 10 Will. 3, c. 8 (1698) (Eng.) (“No papist shall be employed as a fowler for any protestant, or under colour thereof keep fire arms.”); An Act to Explain, Amend, and Make More Effectual an Act . . . Disarming Papists, 13 Geo. 2, c. 6 (1739) (Eng.) (stating that justices of the peace, magistrates, and other local officials must conduct annual searches for Irish Catholic arms).

92. Brief in Support of Respondent, *supra* note 79, at 12 n.28 (quoting PA. REP., April 17, 1775, at 2, col. 3).

93. THOMAS WRIGHT, CARICATURE HISTORY OF THE GEORGES 332–33 (London, John Camden Hotten, Piccadilly 1860).

94. 2 WILLIAM VINCENT WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 273 (Boston, Little, Brown, & Co, 1865).

gunsmiths and other “such persons as are skilled in the manufacturing of firearms and bayonets, diligently to apply themselves thereto, for supplying such of the inhabitants as may still be deficient.”<sup>95</sup> A few weeks earlier, the Congress had resolved: “That it be recommended . . . to all the inhabitants of this Colony, that they be diligently attentive in learning the use of arms . . . .”<sup>96</sup>

## II. COERCIVE DISARMAMENT AND AMERICAN DEFIANCE

The ideology underlying all forms of American resistance to British usurpations and infringements was explicitly premised on the right of self-defense of all inalienable rights; from the self-defense foundation was constructed a political theory in which the people were the masters and government the servant, so that the people have the right to remove a disobedient servant. The philosophy was not novel, but was directly derived from political and legal philosophers such as John Locke, Hugo Grotius, and Edward Coke.<sup>97</sup>

The British government was not, in a purely formal sense, attempting to abolish the Americans’ common law right of self-defense. Yet in practice, that was precisely what the British were attempting. First, by disarming the Americans, the British were attempting to make the practical exercise of the right of personal self-defense much more difficult. Second, and more fundamentally, the Americans made no distinction between self-defense against a lone criminal or against a criminal government.<sup>98</sup> To the Americans (and to their British Whig

95. THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS 103 (William Lincoln ed., Boston, Dutton & Wentworth 1838).

96. Resolution of the Continental Congress (Jan. 17, 1775), *reprinted in* DANIEL R. GOODLOE, *THE BIRTH OF THE REPUBLIC* 331 (Chicago, New York, & San Francisco, Belford, Clarke & Co. 1889).

97. *See, e.g.*, BROWN, *supra* note 6, at 68–74 (1976) (explaining the Boston Committee of Correspondence’s first letter to the other towns in Massachusetts in these terms); David B. Kopel et al., *The Human Right of Self-Defense*, 22 *BYU J. PUB. L.* 43 (2008) (explaining personal self-defense as the foundation of the political philosophy of Grotius, Puffendorf, Vattel, Burlamaqui, and other European scholars on whom the Americans relied).

98. *See* Don B. Kates, *The Second Amendment and the Ideology of Self-*

ancestors), the right of self-defense necessarily implied the right of armed self-defense against tyranny.

#### A. Patrick Henry Calls Virginia to Arms

The troubles in New England inflamed the other colonies. The day after Burke proposed his “Resolutions for Conciliation with America” to Parliament, the Virginia legislature witnessed one of the most famous speeches of the Revolution.<sup>99</sup> The Virginia House of Burgesses was meeting as a special Convention in Richmond, because the Royal Governor, Lord Dunmore, had suspended the Virginia Assembly.<sup>100</sup>

Patrick Henry’s great speech to the convention on March 23, 1775, used an escalating series of rhetorical questions, climaxed by a call to arms.<sup>101</sup> Although there is no extant text of Henry’s speech, the version that became well-known by succeeding generations was compiled by U.S. Attorney General (1817–29) William Wirt in his biography *Sketches of the Life and Character of Patrick Henry*.<sup>102</sup> He explained that the British plainly meant

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*Protection*, 9 CONST. COMMENT 96 (1992).

99. WILLIAM S. WIRT, *SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY* 121–23 (Philadelphia, James Webster 1817).

100. *Id.* at 113–14.

101. *Id.* at 121–23.

102. *Id.* Patrick Henry was an Anglican, but his Presbyterian mother often took him to hear the brilliant Virginia Presbyterian minister Samuel Davies, who directly influenced Henry on the necessity of manly resistance to tyranny, and whose evangelical, emotional, dramatic, and direct style of preaching greatly influenced Henry’s oratory as a lawyer and then as a politician. See HENRY MAYER, *A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REVOLUTION* 36–39 (1991). For example, during the French & Indian War, Davies had preached:

Must peace then be maintained? Maintained with our perfidious and cruel invaders? Maintained at the expense of property, liberty, life, and everything dear and valuable? Maintained when it is in our power to vindicate our right and do ourselves justice? Is the word of peace then our only business? No; in such a time even the God of Peace proclaims by His providence, “To arms!”

Samuel Davies, *The Curse of Cowardice*, Sermon Before the Militia of Hanover County, Virginia (May 8, 1758), in *ON FAITH AND FREE GOVERNMENT* 93 (Daniel C. Palm ed., 1997).

to subjugate America by force of arms.<sup>103</sup> Every attempt by the Americans at peaceful reconciliation had been rebuffed.<sup>104</sup> The only remaining alternatives for the Americans were to accept slavery or to take up arms.<sup>105</sup> If the Americans did not act soon, the British would soon disarm them, and all hope would be lost.<sup>106</sup> The numerous Americans in their vast land, “armed in the holy cause of liberty,” would be invincible:

I ask gentlemen, sir, what means this martial array if its purpose be not to force us to submission? Can gentlemen assign any other possible motive for it? Has Great Britain any enemy, in this quarter of the world to call for all this accumulation of navies and armies? No, sir, she has none. They are meant for us: they can be meant for no other. They are sent over to bind and rivet upon us those chains which the British ministry have been so long forging.

Sir, we have done everything that could be done to avert the storm which is now coming on. We have petitioned—we have remonstrated—we have supplicated—we have prostrated ourselves before the throne, and have implored its interposition to arrest the tyrannical hands of the ministry and Parliament. Our petitions have been slighted; our remonstrances have produced additional violence and insult; our supplications have been disregarded; and we have been spurned, with contempt, from the foot of the throne!

In vain, after these things, may we indulge the fond hope of peace and reconciliation. There is no longer any room for hope. If we wish to be free—if we mean to preserve inviolate those inestimable privileges for which we have been so long contending—if we mean not basely to abandon the noble struggle in which we have been so long engaged, and which we have pledged ourselves never to abandon until the glorious object of our contest shall be obtained—we must fight! I repeat it, sir, we must fight! An appeal to arms and to the God of Hosts is all that is left us!

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103. WIRT, *supra* note 99, at 121–23.

104. *Id.*

105. *Id.*

106. *Id.*

They tell us, sir, that we are weak—unable to cope with so formidable an adversary. But when shall we be stronger? Will it be the next week, or the next year? Will it be when we are totally disarmed, and when a British guard shall be stationed in every house? Shall we gather strength by irresolution and inaction? Shall we acquire the means of effectual resistance by lying supinely on our backs, and hugging the delusive phantom of Hope, until our enemies shall have bound us hand and foot?

Sir, we are not weak, if we make a proper use of those means which the God of nature hath placed in our power. Three millions of people, armed in the holy cause of liberty, and in such a country as that which we possess, are invincible by any force which our enemy can send against us.

Besides, sir, we shall not fight our battles alone. There is a just God who presides over the destinies of nations, and who will raise up friends to fight our battles for us. The battle, sir, is not to the strong alone; it is to the vigilant, the active, the brave. Besides, sir, we have no election. If we were base enough to desire it, it is now too late to retire from the contest. There is no retreat but in submission and slavery! Our chains are forged, Their clanking may be heard on the plains of Boston! The war is inevitable—and let it come! I repeat it, sir, let it come!

It is in vain, sir, to extenuate the matter. Gentlemen may cry, Peace, Peace—but there is no peace. The war is actually begun. The next gale that sweeps from the north will bring to our ears the clash of resounding arms! Our brethren are already in the field! Why stand we here idle? What is it that gentlemen wish? What would they have? Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty, or give me death!<sup>107</sup>

The Convention adopted various resolutions proposed by Henry, including: “That a well regulated Militia, composed of Gentlemen and Yeomen, is the natural Strength, and only

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107. Patrick Henry, Liberty or Death, Speech at the Second Revolutionary Convention of Virginia (Mar. 23, 1775), *available at* <http://patrickhenrycenter.com/speeches.aspx>.

Security, of a free Government.”<sup>108</sup> In contrast, a standing army is “always subversive of the quiet, and dangerous to the liberties of the people.”<sup>109</sup> A well-regulated militia would “secure our inestimable rights and liberties from those further violations with which they are threatened.”<sup>110</sup>

The Convention formed a committee—including Patrick Henry, Richard Henry Lee, George Washington, and Thomas Jefferson—“to prepare a plan for the embodying, arming, and disciplining such a number of men as may be sufficient” to defend the commonwealth.<sup>111</sup> The Convention urged “that every Man be provided with a good Rifle” and “that every Horseman be provided . . . with Pistols and Holsters, a Carbine, or other Firelock.”<sup>112</sup> When the Virginia militiamen assembled a few weeks later, many wore canvas hunting shirts adorned with the motto “Liberty or Death.”<sup>113</sup>

In South Carolina, patriots established a government, headed by the “General Committee.”<sup>114</sup> According to the Committee:

[B]y the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them; it was therefore recommended, to all persons, to provide themselves immediately, with at least twelve and a half rounds of powder, with a proportionate quantity of bullets.<sup>115</sup>

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108. WIRT, *supra* note 99, at 116.

109. *Id.*

110. L. CARROLL JUDSON, *BIOGRAPHY OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE: AND OF WASHINGTON AND PATRICK HENRY* 255 (Philadelphia, J. Dobson, & Thomas, Coperthwait & Co. 1839).

111. J.N. BRENAMAN, *A HISTORY OF VIRGINIA CONVENTIONS* 19 (1902) (quoting resolutions proposed by Patrick Henry).

112. WIRT, *supra* note 99, at 145.

113. MAYER, *supra* note 102, at 251.

114. JOHN DRAYTON, *EYEWITNESS ACCOUNTS OF THE AMERICAN REVOLUTION: MEMOIRS OF THE AMERICAN REVOLUTION AS RELATING TO THE STATE OF SOUTH CAROLINA* 166 (1969)

115. *Id.* (internal quotations omitted).



## B. The Independent Militia Arise

Americans no longer recognized the royal governors as the legitimate commanders-in-chief of the militia.<sup>116</sup> As noted above, Worcester County, Massachusetts, and the Massachusetts Provincial Congress had acted first, in September 1774, by terminating the commissions of all royally-appointed militia officers and providing officers chosen by the people.<sup>117</sup>

The First Continental Congress, assembling that same month, soon learned what Massachusetts had done.<sup>118</sup> Congress's plan was to urge a complete economic boycott of trade with Great Britain.<sup>119</sup> But what if the boycott failed to solve the problem? Virginia's Patrick Henry and Richard Henry Lee introduced a resolution urging mobilization of the militia and preparation for war, since "America is not Now in a State of Peace."<sup>120</sup> With some changes in wording to soften the language (such as putting it in the subjunctive tense, thereby making it less direct), the resolution was adopted by the unanimous vote of all the colonies' delegations.<sup>121</sup> However, the message that Congress sent to the American people in October did not mention the militia, but simply set forth the details of the boycott, and announced the formation of the Continental Association (comprised of the colonies' governments) to coordinate the boycott.<sup>122</sup>

So without formal legal authorization, Americans began to form independent militia, outside the traditional chain of command of the royal governors. In Virginia, George Washington and George Mason organized the Fairfax Independent Militia Company.<sup>123</sup> Other independent militia embodied in Virginia

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116. BROWN, *supra* note 6, at 216.

117. *Id.*

118. MAYER, *supra* note 102, at 223–27; 1 JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788, at 23–26 (Washington, D.C., Way & Gideon 1823).

119. MAYER, *supra* note 102, at 223–27.

120. *Id.* at 223.

121. *Id.* at 223–27.

122. *Id.* at 226.

123. *Id.* at 242.

along the same model.<sup>124</sup> The volunteer militiamen pledged that “we will, each of us, constantly keep by us” a firelock, “six pounds of Gunpowder [and] twenty pounds of Lead.”<sup>125</sup>

In 1775, George Mason drafted the *Fairfax County Militia Plan for Embodying the People*.<sup>126</sup> The *Plan* affirmed that “a well regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen” was needed to defend “our ancient Laws & Liberty” from the Redcoats.<sup>127</sup>

And we do each of us, for ourselves respectively, promise and engage to keep a good Fire-lock in proper Order, & to furnish Ourselves as soon as possible with, & always keep by us, one Pound of Gunpowder, four Pounds of Lead, one Dozen Gun Flints, & a pair of Bullet-Moulds, with a Cartouch Box, or powder-horn, and Bag for Balls.<sup>128</sup>

Later, in *Remarks on Annual Elections for the Fairfax Independent Company*, Mason explained that “all men are by nature born equally free and independent.”<sup>129</sup> Because government creates “the most arbitrary and despotic powers this day upon earth,” liberty can only be protected by “frequently appealing to the body of the people.”<sup>130</sup> Roman history, argued Mason, showed that freedom could not be maintained if the government relied on mercenaries.<sup>131</sup> Rather, the people must be taught “the use of arms and discipline” so they can “act in defence of their invaded liberty.”<sup>132</sup>

Independent militia also formed in Connecticut, Rhode Island, New Hampshire, Maryland, and South Carolina.<sup>133</sup> They chose their own officers and rejected the authority of officers who

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124. See generally E.M. SANCHEZ-SAAVEDRA, A GUIDE TO VIRGINIA MILITARY ORGANIZATIONS IN THE AMERICAN REVOLUTION: 1774–1787 (1978).

125. 1 THE PAPERS OF GEORGE MASON 211 (Robert A. Rutland ed., 1970).

126. *Id.* at 215.

127. *Id.*

128. *Id.* at 216.

129. *Id.* at 229.

130. *Id.* at 230.

131. *Id.*

132. *Id.* at 229.

133. KNOLLENBERG, *supra* note 73, at 214–16.

had been appointed by the royal governors.<sup>134</sup>

John Adams firmly defended the newly constituted Massachusetts militia:

“The new-fangled militia,” as the specious Massachusettsensis<sup>135</sup> calls it, is such a militia as he never saw. They are commanded through the province, not by men who procured their commissions from a governor as a reward for making themselves pimps to his tools, and by discovering a hatred of the people but by gentlemen whose estates, abilities and benevolence have rendered them the delight of the soldiers . . . . [I]n a land war, this continent might defend itself against all the world.<sup>136</sup>

### C. Gun Confiscation at Lexington and Concord

The American War of Independence—as it was commonly called at the time—began on April 19, 1775, when 700 Redcoats under the command of Major John Pitcairn left Boston to seize American arms at Lexington and Concord.

The militia that assembled at the Lexington Green and the Concord Bridge consisted of able-bodied men aged sixteen to sixty.<sup>137</sup> They supplied their own firearms, although a few poor men had to borrow a gun.<sup>138</sup> Warned by Paul Revere and Samuel Dawes of the British advance, the young women of Lexington assembled cartridges late into the evening of April 18.<sup>139</sup>

At dawn, the 700 British regulars confronted about 200

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134. *Id.*

135. The young Loyalist lawyer Daniel Leonard, who wrote a series of anti-revolution essays in the *Massachusetts Gazette* and *Boston Post-Boy* in 1774–1775.

136. Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Feb. 6, 1775), *republished in* JOHN ADAMS & JONATHAN SEWALL, NOVANGLUS AND MASSACHUSETTENSIS; OR POLITICAL ESSAYS, PUBLISHED IN THE YEARS 1774 AND 1775, ON THE PRINCIPAL POINTS OF CONTROVERSY, BETWEEN GREAT BRITAIN AND HER COLONIES 32 (Applewood Books 2009) (1819).

137. ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 61, 70 (1976).

138. *Id.* at 61–70. The Lexington militia included at least one black man. DENNIS FRADIN, SAMUEL ADAMS 110 (1998); ALICE HINKLE, PRINCE ESTABROOK: SLAVE AND SOLDIER 25–30 (2001). He was freed after serving in the Continental Army. *Id.*

139. GROSS, *supra* note 137, at 61–70.

militiamen at Lexington. “Disperse you Rebels—Damn you, throw down your Arms and disperse!” ordered Major Pitcairn.<sup>140</sup> American folklore remembers the perhaps apocryphal words of militia commander Captain John Parker: “Don’t fire unless fired upon! But if they want to have a war, let it begin here!”<sup>141</sup> It does seem to have been the established American policy to put the onus of firing first on the British. Yet someone pulled a trigger, and although the gun did not go off, the sight of the powder flash in the firing pan instantly prompted the Redcoats to mass fire.<sup>142</sup> The Americans were quickly routed.<sup>143</sup>

With “huzzah” of victory, the Redcoats marched on to Concord, where one of Gage’s spies had told him that the largest Patriot reserve of gunpowder was stored.<sup>144</sup> By one account, the first man in Concord to assemble after the sounding of the alarm was the Reverend William Emerson, gun in hand.<sup>145</sup>

At Concord’s North Bridge, the town militia met with some of the British force, and after a battle of two or three minutes, drove off the British.<sup>146</sup> As the Reverend’s grandson, Ralph Waldo Emerson, later recounted:

By the rude bridge that arched the flood,  
Their flag to April’s breeze unfurled,  
Here once the embattled farmers stood,  
And fired the shot heard round the world.<sup>147</sup>

Notwithstanding the setback at the bridge, the Redcoats had sufficient force to search the town for arms and ammunition. But

140. See Halbrook *Origins of the Second Amendment*, *supra* note 38, at 112.

141. FISCHER, *supra* note 46, at 189.

142. *Id.* at 191–97.

143. See Halbrook *Origins of the Second Amendment*, *supra* note 38, at 112; FRENCH, *supra* note 49, at 98 n.5, 106–13, 118–23. Parker’s musket today hangs in the chamber of the Massachusetts Senate. A trigger lock was attached to the musket in 1998 under a gun control law enacted that year. The next year, the legislature repealed the trigger lock mandate for antique firearms, and the trigger lock was removed. Act of July 23, 1998, ch. 180, 1998 Mass. Acts, *amended by* Act of March 5, 1999, ch. 1, § 4 1999 Mass. Acts.

144. FRENCH, *supra* note 49, at 59.

145. *Id.* at 150.

146. *Id.* at 164.

147. RALPH WALDO EMERSON, *Hymn: Sung at the Completion of the Concord Monument*, in *COLLECTED POEMS AND TRANSLATIONS* 125 (1994).

the main powder stores at Concord had been hauled to safety before the Redcoats arrived.<sup>148</sup>

When the British began to withdraw back to Boston, things got much worse for them. Armed Americans were swarming in from nearby towns. They would soon outnumber the British two-to-one.<sup>149</sup> Although some of the Americans cohered in militia units operating under a unified command, a great many of them fought on their own, taking sniper positions at whatever opportunity presented itself.<sup>150</sup> Rather than fight in open fields, like European soldiers, the Americans hid behind natural barriers, fired from ambush positions, and harried the Redcoats all the way back to Boston.<sup>151</sup> Only British reinforcements dispatched from Boston saved the British expedition from annihilation—and the fact that the Americans started running out of ammunition and gun powder.<sup>152</sup>

One British officer complained that the Americans acted like “rascals” and fought as “concealed villains” with “the cowardly disposition . . . to murder us all.”<sup>153</sup> One British officer reported: “These fellows were generally good marksmen, and many of them used long guns made for Duck-Shooting.”<sup>154</sup>

British Lieutenant-General Hugh Percy, who had led the rescue of the beleaguered expeditionary force, recounted:

Whoever looks upon them as an irregular mob, will find himself much mistaken. They have men amongst them who

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148. Henry J. Sage, *The American Revolution 1775–1777*, ACAD. AM. (2010), <http://www.academicamerican.com/revolution/topics/Amrev1775-1777.html>.

149. *Id.*

150. FRENCH, *supra* note 49, at 220.

151. *Id.* at 220–70.

152. *Id.* The British expedition was well aware as they marched towards Lexington that the Americans were getting ready to fight. *Id.* Thanks to warnings from Paul Revere and William Dawes, the word had been spread that the British were coming. *Id.* The news was further disseminated by the ringing of church bells, and firing of guns as a signal alarm. *Id.* The sounds of the American guns and bells evidently led Pitcairn to send a request for reinforcements, as the number of armed Americans in the area was far larger than Pitcairn’s force, or, indeed, the entire British army stationed in Boston.

153. GROSS, *supra* note 137, at 129.

154. FREDERICK MACKENZIE, A BRITISH FUSILIER IN REVOLUTIONARY BOSTON 67 (Allen French ed., 1926) (quoting an unnamed officer).

know very well what they are about, having been employed as Rangers [against] the Indians & Canadians, & this country being much [covered with] wood, and hilly, is very advantageous for their method of fighting.

Nor are several of their men void of a spirit of enthusiasm, as we experienced yesterday, for many of them concealed themselves in houses, & advanced within [ten yards] to fire at me & other officers, tho' they were morally certain of being put to death themselves in an instant.<sup>155</sup>

Among the American fighters that day were several women and men who were too old for the militia, including a group of elderly men led by David Lamson—a “mulatto.”<sup>156</sup>

At day's end, there were fifty Americans killed, thirty-nine wounded, and five missing.<sup>157</sup> Among the British sixty-five were killed, 180 wounded, and twenty-seven missing.<sup>158</sup> On a per-shot basis, the Americans inflicted higher casualties than the British regulars.<sup>159</sup>

That night, the American militiamen began laying siege to Boston where General Gage's standing army was located.<sup>160</sup>

Two days later in Virginia, Britain again moved to disarm the Americans. On April 21, 1775, Royal authorities confiscated twenty barrels of gunpowder from the public magazine in the capital city of Williamsburg and destroyed the public firearms there by removing their firing mechanisms.<sup>161</sup> In response to complaints, manifested most visibly by the mustering of a large

155. Letter from Earl Percy to Gen. Edward Harvey (Apr. 20, 1775), in HUGH PERCY, *LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK: 1774–1776*, at 52–53 (Charles Knowles Bolton ed., 1902).

156. See PETER OLIVER'S *ORIGIN & PROGRESS OF THE AMERICAN REBELLION: A TORY VIEW* (Douglass Adair & John A. Schutz eds., Stanford University Press 1967) (1781); see also FISCHER, *supra* note 46, at 170–71, 243–44; FRENCH, *supra* note 49, at 158; J.E. Tyler, *An Account of Lexington in the Rockingham Mss. at Sheffield*, 10 WM. & MARY Q. (3d ser.) 99, 106 (1953) (letter to Lord Rockingham from Massachusetts, probably written by a high-ranking naval officer; “even Weamin had firelocks”).

157. ALLISON, *supra* note 17, at 21.

158. FISCHER, *supra* note 46, at 321.

159. *Id.* at 408 n.61.

160. FRENCH, *supra* note 49, at 265.

161. VA. GAZETTE, Aug. 5, 1775, at 2, available at <http://research.history.org/DigitalLibrary/VirginiaGazette/VGIssueThumbs.cfm?IssueIDNo=75.DH.37>.

independent militia led by Patrick Henry, Governor Dunmore explained he was surprised to hear the people were under arms on this occasion, and that he should not think it prudent to put powder into their hands in such a situation.<sup>162</sup> The confrontation ended peacefully when emissaries of the Governor delivered a legal note promising to pay restitution.<sup>163</sup>

### III. THE UNDECLARED WAR TO CONFISCATE ARMS

#### A. Gun Confiscation in Boston

At Lexington and Concord, coercive disarmament had not worked out for the British. Back in Boston, General Gage recognized that British troops there were heavily outnumbered by armed Bostonians. “[K]nowing that many of the Boston householders had arms, he was afraid the town would rise at his back.”<sup>164</sup> So Gage set out to disarm the Bostonians, but through a strategy that avoided direct force.

On April 23, 1775, Gage offered the Bostonians the opportunity to leave town if they surrendered their arms.<sup>165</sup>

The Boston Selectmen voted to accept the offer, and a massive surrender of arms began.<sup>166</sup> Within days, 2,674 guns were deposited.<sup>167</sup> They consisted, according to one historian, of “1778 fire-arms” (muskets or rifles), “634 pistols, 973 bayonets”

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162. MAYER, *supra* note 102, at 256–57.

163. *Id.*

164. FRENCH, *supra* note 49, at 56.

165. Directing

that upon the inhabitants in general lodging their arms in Faneuil Hall, or any other convenient place, under the care of the selectmen, marked with the names of the respective owners, that all such inhabitants as are inclined, may depart from the town . . . and that the arms aforesaid at a suitable time would be return'd to the owners.

RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON AND OF THE BATTLES OF LEXINGTON, CONCORD, AND BUNKER HILL 94 (Boston, Charles C. Little & James Brown 1849).

166. JAMES THACHER, A MILITARY JOURNAL DURING THE AMERICAN REVOLUTIONARY WAR, FROM 1775 TO 1783, at 35 (Boston, Cottons & Barnard 1827).

167. JOHN ROWE, LETTERS AND DIARY OF JOHN ROWE: BOSTON MERCHANT, 1759–1762, 1764–1779, at 293–94 (Anne Row Cunningham ed., 1902).

(bayonets attached to the long guns), and “38 blunderbusses” (short-barreled shotguns).<sup>168</sup>

Based on an estimate of 15,000 Bostonians, there was one gun surrendered for every 5.6 residents.<sup>169</sup> Historian Page Smith estimates the Boston population to have been somewhat higher.<sup>170</sup> Still, he concludes that the surrendered guns “were a very substantial armory for a city of some 16,000, many of whom were women and children.”<sup>171</sup> If we take into account those weapons that had already been taken out of the city by Patriots, it is probably not far off the mark to say that “every other male Bostonian over the age of eighteen possessed some type of firearm.”<sup>172</sup> These estimates do not, of course, take into account any firearms that the Bostonians secreted away or otherwise refused to surrender.

Having collected the arms, Gage then refused to allow the Bostonians to leave.<sup>173</sup> He claimed that many more arms had been secreted away than surrendered. Indeed, a large proportion of the surrendered guns were “training arms”—large muskets with bayonets that would be difficult to hide. Eventually, a system of passes was set up, allowing Bostonians to leave town. But the passes were difficult to obtain, and even then, Bostonians were often prohibited from taking their household goods or food. After several months, food shortages in Boston convinced Gage to allow easier emigration from the city.<sup>174</sup>

Gage’s Boston disarmament program incited other Americans to take up arms. Benjamin Franklin, returning to Philadelphia after an unsuccessful diplomatic trip to London, “was highly pleased to find the Americans arming and preparing for the worst events, against which he thinks our spirited

168. FROTHINGHAM, *supra* note 165, at 95.

169. DOUGLAS SOUTHALL FREEMAN, 3 *GEORGE WASHINGTON: A BIOGRAPHY* 576 n.161 (1951).

170. PAGE SMITH, 1 *A NEW AGE NOW BEGINS: A PEOPLE’S HISTORY OF THE AMERICAN REVOLUTION* 506 (1976).

171. *Id.*

172. *Id.*

173. THACHER, *supra* note 166, at 35.

174. HALBROOK, *supra* note 10, at 85–91.



exertions will be the only means under God to secure us.”<sup>175</sup>

A letter on behalf of the Massachusetts Provincial Congress warned the Provincial Congress of New York of:

[T]he breach of a most solemn treaty with respect to the inhabitants of Boston when they had surrendered their arms and put themselves wholly in the power of a military commander. [New Yorkers should avail] yourselves of every article which our enemies can improve with the least advantage to themselves for effecting the like desolation, horrors and insults on the inhabitants of your city and Colony, or which might enable you to make the most effectual defence. . . . If you should delay securing them until they should be out of your power, and within a few days you should behold these very materials improved in murdering you, and yourselves perishing for the want of them, will not the chagrin and regret be intolerable.<sup>176</sup>

The government in London dispatched more troops and three more generals to America—William Howe, Henry Clinton, and John Burgoyne.<sup>177</sup> The generals arrived on May 25, 1775, with orders from Lord Dartmouth:

That all Cannon, Small Arms, and other military Stores of every kind that may be either in any public Magazine, or secretly collected together for the purpose of aiding Rebellions, should also be seized and secured, and that the persons of all such as, according to the Opinions of His Majesty’s Attorney and Solicitor General, have committed themselves in Acts of Treason & Rebellion, should be arrested & imprisoned.<sup>178</sup>

Per Dartmouth’s orders, Gage imposed martial law on June

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175. *New York, May 11*, 37 SCOTS MAG. 308 (Edinburgh, A. Murray & J. Cochran 1775).

176. Letter from Hon. Joseph Hawley to the Provincial Congress of New York (May 26, 1775), in 2 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK: 1775-1776-1777, at 10 (1842).

177. ALLISON, *supra* note 17, at 22.

178. Letter from Lord Dartmouth to Gen. Gage (Apr. 15, 1775), in 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY: 1763–1775, at 191 (Clarence Edwin Carter ed., Archon Books 1969) (1933).

12 and offered a general pardon to all rebels; except for Samuel Adams and John Hancock, provided they would immediately desist and submit.<sup>179</sup> The Americans declined.<sup>180</sup>

The war underway, Americans continued to show their skill at arms. They captured Fort Ticonderoga in upstate New York.<sup>181</sup> At the June 17, 1775, Battle of Bunker Hill, the militia held their ground against the British regulars and inflicted heavy casualties, until they ran out of gunpowder and were finally

179. The declaration of martial law by a general or a governor, rather than by a legislature, was itself considered illegal, and another justification for revolution. As U.S. Supreme Court Justice Levi Woodbury later recounted:

In the Annual Register for 1775, p. 133, June 12th, it may be seen that General Gage issued his proclamation, pardoning all who would submit, except Samuel Adams and John Hancock, and further declaring, "that, as a stop was put to the due course of justice, martial law should take place till the laws were restored to their due efficacy."

Though the engagements at Lexington and Concord happened on the 19th of April, 1775, though Parliament had in February previous declared the Colonies to be in a state of rebellion, and though thousands of militia had assembled near Bunker Hill before the 12th of June, no martial law had been established by Parliament, and not till that day did General Gage, alone and unconstitutionally, undertake, in the language of our fathers, to "supersede the course of the common law, and, instead thereof, to publish and order the use and exercise of martial law."

Another of these outrages was by Lord Dunmore, in Virginia, November 7th, 1775, not only declaring all the slaves of rebels free, but "declaring martial law to be enforced throughout this Colony" This was, however, justly denounced by the Virginia Assembly as an "assumed power," which the king himself cannot exercise," as it "annuls the law of the land and introduces the most execrable of all systems, martial law." It was a return to the unbridled despotism of the Tudors, which, as already shown, one to two hundred years before, had been accustomed, in peace as well as war, to try not only soldiers under it, but others, and by courts-martial rather than civil tribunals, and by no settled laws instead of the municipal code, and for civil offences no less than military ones.

Luther v. Borden, 48 U.S. (7 How.) 1, 65 (1849) (Woodbury, J., dissenting) (citations omitted).

180. CHARLES J. CAES, *LEGEND OF THE THIRD HORSEMAN* 268 (2009).

181. Cannons from Fort Ticonderoga were hauled down to Boston. George Washington's deployment of those cannons outside Boston in 1776 forced Gage to evacuate his troops from Boston without a fight. ALLISON, *supra* note 17, at 27.

driven back.<sup>182</sup> Had Gage not confiscated the gunpowder from the Charleston Powder House the previous September, the Battle of Bunker Hill probably would have resulted in an outright defeat of the British.<sup>183</sup> General Gage acknowledged that the Americans were not mere rabble. He asked London for more troops and mercenaries.<sup>184</sup>

On June 19, Gage renewed his demand that the Bostonians surrender their arms, and he declared that anyone found in possession of arms would be deemed guilty of treason.<sup>185</sup>

Meanwhile, the Continental Congress had voted to send ten companies of riflemen from Pennsylvania, Maryland, and Virginia to aid the Massachusetts militia.<sup>186</sup>

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182. See FRENCH, *supra* note 49, at 62.

183. *Id.*

184. *Id.*

185. Proclamation by Governor Thomas Gage (June 19, 1775), available at <http://www.lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?var/lib/philologic/databases/amarch/.3851>. The proclamation stated:

Whereas, notwithstanding the repeated assurances of the Selectmen and others, that all the inhabitants of the town of *Boston* had *bona fide* delivered their Fire-Arms unto the persons appointed to receive them, though I had advices at the same time of the contrary; and whereas I have since had full proof that many had been perfidious in this respect, and have secreted great numbers; I have thought fit to issue this Proclamation, to require of all persons who have yet Fire-Arms in their possession immediately to surrender them at the Court-House, to such persons as shall be authorized to receive them; and hereby to declare that all persons in whose possession any fire arms may hereafter be found, will be deemed enemies to His Majesty's Government.

*Id.*

General Gage promised to return the Bostonians' guns if they gave him temporary custody of them. In 1972, the Provisional Irish Republican Army was waging a terrorist campaign in Northern Ireland—which is part of the United Kingdom. The PIRA was arming itself in part by stealing guns from registered gun owners in the independent Republic of Ireland, to the south. The Republic's legislature enacted a temporary custody order, which required the surrender of certain types of firearms for a thirty day period when a person's license for that gun expired. (Licenses were for a term of years, not lifetime.) The police then kept the guns, and refused to renew the licenses. The guns remained in police custody for thirty-four years, until a High Court lawsuit forced their return.

186. See Letter from John Hancock to Elbridge Gerry, in 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 135 (Edmund C. Burnett ed., 1921).

## B. Declaration of Causes and Necessity of Taking up Arms

On July 6, 1775, the Continental Congress adopted the Declaration of Causes and Necessity of Taking Up Arms.<sup>187</sup> The Declaration was written by Thomas Jefferson and the great Pennsylvania lawyer John Dickinson.<sup>188</sup> Among the grievances were General Gage's efforts to disarm the people of Lexington, Concord, and Boston.<sup>189</sup>

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187. See John Dickinson, The Declaration by the Representatives of the United Colonies of North America (July 6, 1775), in 2 THE POLITICAL WRITINGS OF JOHN DICKINSON, ESQUIRE, LATE PRESIDENT OF THE STATE OF DELAWARE, AND OF THE COMMONWEALTH OF PENNSYLVANIA 38–43 (Wilmington, Del., Bonsal & Niles 1801).

188. *Id.*

189. *Id.*

Soon after intelligence of these proceedings [a new British tax plan] arrived on this Continent, general *Gage* who in the course of the last year had taken possession of the town of Boston, in the Province of *Massachusetts-Bay*, and still occupied it as a garrison, on the 19th day of *April* sent out from that place a large detachment of his army, who made an unprovoked assault on the inhabitants of the said Province, at the Town of *Lexington*, as appears by the affidavits of a great number of persons, some of whom were officers and soldiers of that detachment, murdered eight of the inhabitants, and wounded many others. From thence the troops proceeded in warlike array to the Town of *Concord*, where they set upon another party of the inhabitants of the same province, killing several and wounding more, until compelled to retreat by the country people suddenly assembled to repel this cruel aggression. Hostilities, thus commenced by the *British* Troops, have been since prosecuted by them without regard to faith or reputation.—The inhabitants of *Boston*, being confined within that town by the general their governour, and having, in order to procure their dismission, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the governour ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.

By this perfidy, wives are separated from their husbands, children from their parents, the aged and the sick from their relations and friends, who wish to attend and comfort them; and those who have been used to live in plenty, and even elegance, are reduced to

In an earlier draft, Dickinson had written that “the Governor ordered the Arms deposited as aforesaid that they might be preserved for their Owners, to be seized by a Body of soldiers . . . .”<sup>190</sup> Drafts by Jefferson complained that “their arms . . . . deposited with their own magistrates to be preserved as their property were immediately seized by a body of armed men under

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deplorable distress . . . .

Our cause is just. Our union is perfect. Our internal resources are great, and, if necessary, foreign assistance is undoubtedly attainable.—We gratefully acknowledge, as signal instances of the Divine favour towards us, that His providence would not permit us to be called into this severe controversy until we were grown up to our present strength, had been previously exercised in warlike operations, and possessed of the means of defending ourselves. With hearts fortified with these animating reflections, we most solemnly, before God and the world, DECLARE, that, exerting the utmost energy of those powers which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance, employ for the preservation of our liberties; being, with one mind, resolved to die freemen rather than live slaves.

. . . .

We have not raised armies with ambitious designs of separating from *Great-Britain*, and establishing independent states. We fight not for glory or for conquest. We exhibit to mankind the remarkable spectacle of a people attacked by unprovoked enemies, without any imputation or even suspicion of offence.—*They* boast of their privileges and civilization, and yet proffer no milder conditions than servitude or death.

In our own native land, in defence of the freedom that is our birth-right, and which we ever enjoyed till the late violation of it—for the protection of our property, acquired solely by the honest industry of our forefathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before.

With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the universe, we most devoutly implore his divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war.

*Id.*

190. 2 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 151 (1905).

orders from the [said General].”<sup>191</sup>

On July 8, the Continental Congress followed up with an open letter to the people of Great Britain complaining that “your Ministers (equal Foes to *British* and *American* freedom) have added to their former Oppressions an Attempt to reduce us by the Sword to a base and abject submission.”<sup>192</sup> As a result:

On the Sword, therefore, we are compelled to rely for Protection. Should Victory declare in your Favour, yet Men trained to Arms from their Infancy, and animated by the Love of Liberty, will afford neither a cheap or easy Conquest. Of this at least we are assured, that our Struggle will be glorious, our Success certain; since even in Death we shall find that Freedom which in Life you forbid us to enjoy.<sup>193</sup>

One observer pressed the patriots’ cause in a publication that commented on the American gun culture.<sup>194</sup> John Zubly, an immigrant from Switzerland who was serving as a Georgia delegate to the Continental Congress, wrote a pamphlet entitled *The Law of Liberty*, which was published in London and Philadelphia.<sup>195</sup> It excoriated Gage for “[d]etaining the inhabitants of Boston, after they had, in dependance on the General’s word of honour, given up their arms, to be starved and ruined . . .”<sup>196</sup> He warned that “in a strong sense of liberty, and the use of fire-arms almost from the cradle, the Americans have vastly the advantage over men of their rank almost every where else.”<sup>197</sup> Indeed, children were “shouldering the resemblance of a gun before they are well able to walk.”<sup>198</sup> “The Americans will fight like men, who have every thing at stake,” and their motto was “DEATH OR FREEDOM.”<sup>199</sup> The town of Gorham, Massachusetts (now part of the state of Maine), sent the British

191. *Id.* at 136.

192. *Id.* at 169.

193. *Id.*

194. *See generally* JOHN JOACHIM ZUBLY, *THE LAW OF LIBERTY* (Philadelphia 1775).

195. *Id.*

196. *Id.* at 12.

197. *Id.* at 14.

198. *Id.*

199. *Id.*

government a warning that even “many of our Women have been used to handle the Cartridge, and load the Musquet . . . .”<sup>200</sup>

It was feared that the Massachusetts gun confiscation was the prototype for confiscation throughout America. For example, according to a newspaper article published in three colonies:

It is reported, that on the landing of the General Officers, who have sailed for America, a proclamation will be published throughout the provinces, inviting the Americans to deliver up their arms by a certain stipulated day; and that such of the colonists as are afterwards proved to carry arms shall be deemed rebels, and be punished accordingly.<sup>201</sup>

### C. The Independent Militia Spread

Independent militia had been forming before Lexington and Concord, but the events of April 19 convinced many more Americans to arm themselves and to embody militia independent of royal control.<sup>202</sup> A report from New York City observed that “the Inhabitants . . . [have] seized the city arms . . . ; have taken the keys of the Custom House by military force; [and] shut up the port.”<sup>203</sup> Further, “the whole city and province are subscribing an association, forming companies, and taking every method to defend our rights. The like spirit prevails in the province of New Jersey, where a large and well disciplined militia are now fit for action.”<sup>204</sup> The New York General Committee (a Patriot organization) resolved “that it be Recommended to every Inhabitant, to perfect himself in Military Discipline, and be provided with Arms, Accoutrements, and Ammunition, as by Law directed.”<sup>205</sup>

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200. BROWN, *supra* note 6, at 118 (containing the letter of Jan. 7, 1773).

201. *London, April 24*, VA. GAZETTE, June 24, 1775, at 1 (also published in *New York Journal* on the same date, and in the *Maryland Gazette* on July 20).

202. See ALLISON, *supra* note 17, at 21 (discussing John Adams’ call for Congress to adopt the militiamen around Boston as a Continental Army after the events at Lexington and Concord).

203. MARIUS SCHOONMAKER, THE HISTORY OF KINGSTON, NEW YORK 167 (New York, Burr Printing House 1888).

204. N.Y.J., May 5, 1775, [http://files.usgwarchives.net/nj/statewide/news\\_papers/1775news3.txt](http://files.usgwarchives.net/nj/statewide/news_papers/1775news3.txt).

205. 2 THE MEMORIAL HISTORY OF THE CITY OF NEW-YORK 482 (James G.

General Gage sent the news to London: “[Massachusetts], Connecticut, and Rhode Island are in open Rebellion and I expect the same Accounts of New-Hampshire. They are arming at New-York and as we are told, in Philadelphia, and all the Southern Provinces . . . .”<sup>206</sup>

In Virginia, Lord Dunmore already knew the trouble that Patrick Henry’s independent militia could cause.<sup>207</sup> Henry’s example was being copied everywhere: “Every County is now Arming a Company of men whom they call an independent Company for the avowed purpose of protecting their Committee, and to be employed against Government if occasion require.”<sup>208</sup> Henry’s militia seized the public arms in Williamsburg.<sup>209</sup>

North Carolina’s Royal Governor, Josiah Martin, issued a proclamation against “endeavouring to engage the People to subscribe papers obliging themselves to be prepared with Arms, to array themselves in companies, and to submit to the illegal and usurped authorities of Committees.”<sup>210</sup> Martin complained that “[t]he Inhabitants of this County on the Sea Coast are . . . arming men, electing officers and so forth. In this little Town [New Bern] they are now actually endeavoring to form what they call independent Companies under my nose . . . .”<sup>211</sup>

North Carolina’s three delegates to the Continental Congress<sup>212</sup> sent a message to the Committees of Safety (local Patriot organizations) declaring:

It is the Right of every English Subject to be prepared with Weapons for his Defense. We conjure you . . . to form

Wilson ed., New York, New York History Co. 1892).

206. Letter from Gen. Gage to Lord Dartmouth, (May 25, 1775), in 1 *THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY: 1763–1775*, at 401 (Clarence Edwin Carter ed., Archon Books 1969) (1931).

207. WILLIAM C. RIVES, *HISTORY OF THE LIFE AND TIMES OF JAMES MADISON* 89–95 (Boston, Little, Brown & Company 1859).

208. *Id.* at 65.

209. *See Williamsburg, May 6*, VA. GAZETTE, May 6, 1775, at 3.

210. R.D.W. CONNER, 1 *HISTORY OF NORTH CAROLINA* 360 (1919).

211. *Id.* at 362.

212. The delegation consisted of Richard Caswell, William Hooper, and Joseph Hewes.



yourselves into a Militia . . . . Carefully preserve the small Quantity of Gunpowder which you have amongst you, it will be the last Resource when every other Means of Safety fails you; Great-Britain has cut you off from further supplies . . . . We cannot conclude without urging again to you the necessity of arming and instructing yourselves, to be in Readiness to defend yourselves against any Violence that may be exerted against your Persons and Properties.<sup>213</sup>

Furious, Governor Martin issued a “Fiery Proclamation” condemning the attempt “to excite the people of North Carolina to usurp the prerogative of the Crown by forming a Militia and appointing officers thereto and finally to take up arms against the King and His Government.”<sup>214</sup> Independent militia were banned, and Martin declared that “persons who hath or have presumed to array the Militia and to assemble men in Arms within this Province without my Commission or Authority have invaded His Majesty’s just and Royal Prerogative and violated the Laws of their Country to which they will be answerable for the same.”<sup>215</sup>

A Virginia gentleman wrote a letter to a Scottish friend explaining what was happening in America:

We are all in arms, exercising and training old and young to the use of the gun. No person goes abroad without his sword, or gun, or pistols . . . . Every plain is full of armed men, who all wear a hunting shirt, on the left breast of which are sewed, in very legible letters, “*Liberty or Death*.”<sup>216</sup>

#### D. Falmouth Destroyed

In the summer of 1775, Lord Dartmouth relieved General Gage of his American command, replacing him with General

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213. William Hooper, et al., *To the Committees of the Several Towns and Counties of the Province of North Carolina*, N.C. GAZETTE, July 7, 1775, at 2.

214. Governour Josiah Martin, Proclamation (Aug. 15, 1775), available at <http://lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.5927>.

215. *Id.*

216. Letter from a Gentleman in Virginia to His Friend in Edinburgh, Scotland (Sept. 1, 1775), in 3 AMERICAN ARCHIVES, ser. 4, at 620 (Peter Force ed., Washington, D.C., 1846).

Howe.<sup>217</sup> This was no gesture of conciliation. Americans' refusal to surrender their firearms now prompted a different response. Royal Admiral Samuel Graves ordered that all seaports north of Boston be burned.<sup>218</sup>

When the British navy showed up at Falmouth, Massachusetts (today's Portland, Maine)<sup>219</sup>, the town attempted to negotiate.<sup>220</sup> British "Captain Mowat informed the Committee at Falmouth, there had arrived orders from England, about ten days since, to burn all the seaport Towns on the Continent, that would not lay down and deliver up their arms, and give hostages for their future good behaviour."<sup>221</sup> Falmouth would avoid destruction only if "we would send off four carriage guns<sup>222</sup> deliver up all our small arms, ammunition & c. and send four gentlemen of the town as hostages, which the town would not do."<sup>223</sup> The townspeople gave up eight muskets, which was hardly sufficient, and so Falmouth was destroyed by naval bombardment.<sup>224</sup> George Washington (whom the Continental Congress had recently appointed Major General and Commander-in-Chief of the just-created Continental Army on June 14), urged colonial newspapers to print stories on the destruction, highlighting British brutality.<sup>225</sup>

The next year, the thirteen colonies would adopt the Declaration of Independence. The Declaration listed the tyrannical acts of King George III, including his methods for carrying out gun control: "He has plundered our seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our

217. ALLISON, *supra* note 17, at 22.

218. FISCHER, *supra* note 46, at 284.

219. Maine was split from Massachusetts in the Compromise of 1820.

220. *America: Falmouth Destroyed*, 37 SCOTS MAG. 659 (Edinburgh, A. Murray & J. Cochran 1775).

221. *Id.*

222. Cannons mounted on a wheeled carriage, so that they can be moved from place to place.

223. *America: Falmouth Destroyed*, 37 SCOTS MAG. 659 (Edinburgh, A. Murray & J. Cochran 1775).

224. *Id.*

225. See N.Y.J., Nov. 2, 1775, at 3; Letter from George Washington to Esek Hopkins (Oct. 21, 1775), in 6 REVOLUTIONARY CORRESPONDENCE FROM 1775 TO 1782, at 132 (1867).

people.”<sup>226</sup>

#### IV. EPILOGUES

The British never lost sight of the fact that without their gun control program, they could never control America. In 1777, with British victory seeming likely, Colonial Undersecretary William Knox drafted a plan entitled “What Is Fit to Be Done with America?”<sup>227</sup> The plan aimed to ensure that there would be no future rebellions.<sup>228</sup> It provided that the Church of England would be established in every one of the thirteen colonies as the state church.<sup>229</sup> Parliament would have power to tax within America.<sup>230</sup> A hereditary aristocracy would be established.<sup>231</sup> There would be a permanent standing army, and

The Militia Laws should be repealed and none suffered to be re-enacted, [and] the Arms of all the People should be taken away . . . nor should any Foundery or manufactuary of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence . . . .<sup>232</sup>

The first Congress under the 1789 U.S. Constitution enacted a comprehensive tariff, with taxes of up to 12.5% on some goods; ten percent on certain other goods, including gunpowder, printing paper, writing paper, and unbound books; at five percent on everything else.<sup>233</sup>

After the Revolution, independent or semi-independent

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226. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

227. William Knox, Considerations on the Great Question, What Is Fit to be Done with America, Memorandum to the Earl of Shelburne (1763), in 1 SOURCES OF AMERICAN INDEPENDENCE: SELECTED MANUSCRIPTS FROM THE COLLECTIONS OF THE WILLIAM L. CLEMENTS LIBRARY 140 (Howard H. Peckham ed., 1978).

228. *Id.*

229. *Id.*

230. *Id.* at 146.

231. *Id.*

232. *Id.* at 176.

233. There were also taxes specified at a particular amount, rather than an ad valorem percentage, on many other goods. 1 Stat. 24 (1789). The Hamilton Tariff was the second law enacted by the new Congress.

militia became an accepted feature of American life.<sup>234</sup> The federal Militia Act of 1792 recognized independent militia, and incorporated them into the federal militia:

And whereas sundry corps of artillery, cavalry and infantry now exist in several of the said states, which by the laws, customs, or usages thereof have not been incorporated with, or subject to the general regulation of the militia.

Sec. 11. Be it further enacted, That such corps retain their accustomed privileges, subject, nevertheless, to all other duties required by this act, in like manner with the other militia.<sup>235</sup>

After the end of the War of 1812, most states did little to train their militia.<sup>236</sup> Accordingly, some civic-minded men founded new volunteer militia organizations.<sup>237</sup> The movement started in the 1830s.<sup>238</sup> By 1850 it had expanded nationwide.<sup>239</sup> Typically, these independent militia would receive a corporate charter from the state, and the Governor would issue commissions to the officers.<sup>240</sup> Some of the militia organizations were purely local, while others had chapters in several states.<sup>241</sup> The quality of training varied widely.<sup>242</sup> Some companies sported fancy uniforms and excelled in complicated marches.<sup>243</sup> But few developed much skill in combat shooting or tactics.<sup>244</sup> Mass enlistments from the volunteer militia filled the ranks of the U.S. Army during the Mexican-American War (1846–1848), and these volunteers at least had more military training than raw recruits.<sup>245</sup> In the chaotic early days of the American Civil War

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234. See MARCUS CUNLIFFE, *SOLDIERS AND CIVILIANS: THE MARTIAL SPIRIT IN AMERICA: 1775–1865* (1968).

235. 1 Stat. 271 (1792).

236. CUNLIFFE, *supra* note 234, at 205–12.

237. See generally JERRY M. COOPER, *THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA: 1865–1920* (2002); CUNLIFFE, *supra* note 234.

238. CUNLIFFE, *supra* note 234, at 205–12.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

(1861–1865), volunteer militia saved Washington, D.C. from Confederate conquest.<sup>246</sup> The National Guard, which first arose in some states near the end of the Civil War, was in its earliest incarnations an independent militia.<sup>247</sup> However, the Guard eventually traded independence for state and then federal funding, and today is almost entirely under the control of the federal Department of Defense.<sup>248</sup>

The Posse Comitatus Act was enacted in 1878, forbidding use of the Army in domestic law enforcement, and providing a formal rule against one of the practices that had spurred the Revolution.<sup>249</sup> However, beginning in 1981, enormous loopholes were created in the Posse Comitatus Act, allowing extensive military participation in domestic enforcement of drug laws.<sup>250</sup> Among the consequences was military participation in the deadly attack on the Branch Davidian compound at Waco, Texas, in February 1993, which had the purported purpose of enforcing federal laws against the untaxed manufacture of machine guns.<sup>251</sup>

## V. SOME LESSONS FOR TODAY

To the Americans of the Revolution and the Founding Era, the late twentieth century claim that the Second Amendment is a collective right and not an individual right might have seemed incomprehensible. The Americans owned guns individually, in their homes. They owned guns collectively, in their town armories and powder houses. They would not allow the British to confiscate their individual arms, or their collective arms; and when the British tried to do both, the Revolution began. The Americans used their individual arms and their collective arms to fight against the confiscation of any arms. Americans fought to

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246. *Id.*

247. *Id.*

248. See COOPER, *supra* note 237, at 11–22.

249. 18 U.S.C. § 1385 (2006).

250. Stephen P. Halbrook, *Military Enforcement of Drug Laws Under the Posse Comitatus Act*, 1 DRUG L. REP. 1 (1984).

251. See generally DAVID B. KOPEL & PAUL H. BLACKMAN, *NO MORE WACOS: WHAT'S WRONG WITH FEDERAL LAW ENFORCEMENT AND HOW TO FIX IT* (1997).

provide themselves a government that would never perpetrate the abuses that had provoked the Revolution.

What are modern versions of such abuses? The reaction against the 1774 import ban for firearms and gunpowder (via a discretionary licensing law) indicates that import restrictions are unconstitutional if their purpose is to make it more difficult for Americans to possess guns. Conversely, the 1789 Tariff Act shows that moderate taxes, such as a protective tariff of ten percent, may be applied to arms or ammunition, and that one legitimate purpose of tariffs is to foster the health of the American firearms industry<sup>252</sup>. The federal Gun Control Act of 1968 prohibits the import of any firearm which is not deemed suitable for “sporting” purposes by federal regulators.<sup>253</sup> That import ban seems difficult to justify based on the historical record of 1774–1776, or on *District of Columbia v. Heller* and *McDonald v. City of Chicago*, both of which hold that, while sporting uses such as hunting are part of the Second Amendment, the “core” and “central component” of the Second Amendment is self-defense.<sup>254</sup>

Laws which attempt to disarm people who have proven themselves to be a particular threat to public safety are not implicated by the 1774–1776 experience. In contrast, laws which aim to disarm the public at large are precisely what turned a political argument into the American Revolution. Sometimes, legislative history will frankly reveal that the purpose of an anti-gun law was to discourage gun ownership in general, or that the law was based on hostility to gun ownership.<sup>255</sup> This is the case for New York City’s pistol licensing fees.<sup>256</sup> Everywhere in New

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252. See 1 Stat. 24 (1789).

253. 18 U.S.C. § 925(d)(3) (2006).

254. *Heller*, 554 U.S. at 599, 628, 630; 561 U.S. \_\_\_, 130 S. Ct. at 3036, 3041, 3044, 3048.

255. See generally Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment, *Kwong v. Bloomberg*, No. 1:11-cv-02356 (S.D.N.Y. June 22, 2011) (explaining that the sponsor of the 1947 law allowing New York City to charge higher license fees explicitly intended to discourage people from owning handguns), available at <http://ia700608.us.archive.org/24/items/gov.uscourts.nysd.377535/gov.uscourts.nysd.377535.docket.htm>.

256. *Id.*

York State, the fee for the issuance or revision of a handgun permit is ten dollars (plus a separate ninety-five dollar fee for a fingerprint check for first-time applications).<sup>257</sup> But in New York City, the fee is over \$340, payable every three years.<sup>258</sup> The explicitly stated purpose of allowing the New York City government to charge extra fees was to discourage handgun ownership in the City.<sup>259</sup>

In Alameda County, California, the five-person county board of supervisors banned gun shows on county property at the behest of a supervisor who complained that her previous efforts to ban gun shows had “gotten the run around from spineless people hiding behind the constitution.”<sup>260</sup> She explained that the county should not “provide a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.”<sup>261</sup> Nevertheless, the Ninth Circuit upheld the ban because the other supervisors who voted for the ordinance might have had legitimate motives. (Supposedly, banning gun shows on county property would prevent violence on county property, although there was and is not a shred of evidence of supporting fears of violence at gun shows.)<sup>262</sup>

Generally speaking, courts tend to be highly sensitive to evidence of illicit motives in cases alleging violation of the Equal Protection Clause’s ban on racial discrimination, but not in other cases.<sup>263</sup> Given that the Constitution does not establish a hierarchy between enumerated rights,<sup>264</sup> it is difficult to see why

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257. *Id.*

258. *Id.*

259. *Id.* at 7–8.

260. *Nordyke v. King*, 563 F.3d 439, 443 (9th Cir. 2009).

261. *Id.*

262. *Id.* at 463.

263. See Alan E. Brownstein, *Illicit Legislative Motive In The Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 5 (1988).

264. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982) (Rejecting the idea that different parts of the Constitution deserve different degrees of judicial protection. Rather, “[e]ach establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution . . . . [W]e know of no principled basis on which to create a hierarchy of constitutional values . . . .”).

a legislator's explicit and illicit purpose to deny constitutional rights—especially the rights whose similar denial led to the American Revolution—should be irrelevant to judicial review. In heightened scrutiny, the actual (not purported, or post-hoc) purpose of the legislation is a fact of the greatest importance.

The most important lesson for today from the Revolution is about militaristic or violent search and seizure in the name of disarmament. As Hurricane Katrina bore down on Louisiana, police officers in St. Charles Parish confiscated firearms from people who were attempting to flee.<sup>265</sup> After the hurricane passed, officers went house-to-house in New Orleans, breaking into homes and confiscating firearms at gunpoint.<sup>266</sup> The firearms seizures were flagrantly illegal; the Louisiana state emergency law at the time had a provision allowing, after a formal declaration by the appropriate official, government action to “prohibit” some items (such as alcohol) and to “control” other items (such as firearms).<sup>267</sup> The emergency powers were never invoked, and even if they had been, they did not authorize gun prohibition.<sup>268</sup> A federal district judge properly issued an order finding the gun confiscation to be illegal.<sup>269</sup> Eventually, local governments accepted a Consent Decree ordering them to return the illegally-taken firearms.<sup>270</sup> St. Charles has complied with the

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265. See generally GORDON HUTCHINSON & TODD MASSON, *THE GREAT NEW ORLEANS GUN GRAB* (2007); Stephen P. Halbrook, *Only Law Enforcement Will be Allowed to Have Guns: Hurricane Katrina and the New Orleans Firearm Confiscations*, 18 GEO. MASON U. C.R. L.J. 339 (2008) [hereinafter Halbrook New Orleans].

266. *Id.*

267. LA. REV. STAT. ANN. § 14:329.6 (2005) (allowing the “regulating and controlling” but not the “prohibiting” of firearms and ammunition in emergencies, following appropriate official notices and declarations, none of which were made); David Kopel, *New Orleans Gun Confiscation is Blatantly Illegal*, THE VOLOKH CONSPIRACY (Sept. 9, 2005, 9:57 PM), [http://www.volokh.com/archives/archive\\_2005\\_09\\_04-2005\\_09\\_10.shtml#1126317466](http://www.volokh.com/archives/archive_2005_09_04-2005_09_10.shtml#1126317466).

268. See Kopel, *supra* note 267.

269. Consent Order, *Nat'l Rifle Ass'n v. Nagin*, No. 05-20,000 A (E.D. La., Sept. 23, 2005) (temporary injunction based on violation of the Second Amendment and other constitutional rights; defendants denied confiscating guns), available at <http://www.stephenhalbrook.com/lawsuits/nagin-order.pdf>.

270. Consent Order Granting Permanent Injunction and Dismissal of Remaining Claims Against Defendants, *C. Ray Nagin and Warren Riley, Nat'l Rifle Ass'n v. Nagin*, No. 05-4234 J (2) (E.D. La., Oct. 9, 2008) (ordering



Decree, while New Orleans continues to defy it.<sup>271</sup>

A vigorously-enforced Fourth Amendment might be sufficient to provide all the necessary protection against such abuses in modern times. But the Fourth Amendment has been one of the casualties in the war on drug users, and police militarization has been one of the war's consequences.<sup>272</sup> Even so, courts should be especially vigilant in policing the use of violence or militarism in the course of searches and seizures relating to items whose possession is a core American freedom. The Bill of Rights provides special protection to two types of manmade tools which the Founders believed that people had a natural right to possess and use: printing presses and firearms.<sup>273</sup> Certainly books, newspapers, other reading materials (including electronic ones), and religious objects, are also within a zone of special constitutional protection.<sup>274</sup>

When there is genuine evidence of potential danger—such as evidence that guns are in the possession of a violent gang—then the Fourth Amendment properly allows no-knock raids, flash-bang grenades, and similar violent tactics to carry out a search.<sup>275</sup> Conversely, if there is no real evidence of danger—for example, if it is believed that a person who has no record of violence owns guns but has not registered them properly—then militaristically violent enforcement of a search warrant should never be allowed. Gun ownership *simpliciter* ought never be a pretext for government violence. The Americans in 1775 fought a

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defendants to return the firearms they had confiscated), available at [http://www.stephenhalbrook.com/lawsuits/Consent\\_Order\\_Final\\_NRA-Nagin.pdf](http://www.stephenhalbrook.com/lawsuits/Consent_Order_Final_NRA-Nagin.pdf).

271. HUTCHINSON & MASSON, *supra* note 265; Halbrook New Orleans, *supra* note 265.

272. See, e.g., Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLES OF THE ARMED FORCES AND THE POLICE (Peter B. Kraska ed., 2001); David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of Law Enforcement*, 30 AKRON L. REV. 619 (1997).

273. Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1048–53 (2009).

274. See U.S. CONST. amend. I.

275. See *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

war because the king did not agree. Americans of the twenty-first century should not squander the heritage of constitutional liberty bequeathed by the Patriots.