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## INEQUALITY, ANTI-REPUBLICANISM, AND OUR UNIQUE SECOND AMENDMENT

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### INTRODUCTION

What is the relationship between the Second Amendment right to bear arms and inequality? Scholarly silence suggests a conventional view that there is no relationship between the two. In this Essay, I argue that the Second Amendment is uniquely derived from the political inequality embedded in the American constitutional framework.

The Second Amendment was not the first constitutional right to bear arms, but it was different from those that came before it. In 1689, King William III and Queen Mary II signed into law the English Declaration of Rights.<sup>1</sup> That Declaration contained in it a right to bear arms that had been excluded from prior constitutional assertions of rights in the thirteenth-century Magna Carta and the seventeenth-century Petition of Rights.<sup>2</sup> The Declaration provided: “That the subjects which are Protestants may have arms for their defence suitable to their condition and as allowed by law.”<sup>3</sup> The English Declaration that the Parliament wrote and presented to the King and Queen limited the power of the Crown to regulate the possession of arms, but it did not limit the regulatory power of the People’s representatives in Parliament.

Nearly eighty years after the English codified the Declaration of Rights, the American colonies declared independence.<sup>4</sup> In the four years after independence, eleven of the thirteen states adopted constitutions

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<sup>1</sup> An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1688, 1 W. & M. c. 2 (Eng.), *reprinted in* 6 STATUTES OF THE REALM 142 (London, John Raithby ed., n. pub. 1819). The codified version of the English Declaration of Rights is also known as the English Bill of Rights. *See* Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 ALA. L. REV. 221, 289 (2021).

<sup>2</sup> An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1688, *supra* note 1; *see* Magna Carta (1215), *reprinted in* G.R.C. DAVIS, MAGNA CARTA 22 (1977); Petition of Right 1628, 3 Car. 1 c. 1 (Eng.), *reprinted in* THE AMERICAN REPUBLIC 98 (Bruce Frohnen ed. 2002); *see also* Lois Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 34 (2000) (finding the ancient English constitutions, the Magna Carta, and the Petition of Right did not include a right to bear arms).

<sup>3</sup> An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, *supra* note 1.

<sup>4</sup> *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

and six of them included declarations of rights.<sup>5</sup> Only three of the declarations (Pennsylvania, North Carolina, and Massachusetts) contained a right to bear arms. Two of the three clearly specified that the right was a qualified one, contingent on the People's defense of the state.<sup>6</sup>

The lone apparent outlier, the Pennsylvania Constitution's Declaration of Rights, granted to the People the right to bear arms for the defense of themselves as well as the state.<sup>7</sup> The apparent outlier has been a focal point of dispute between proponents and opponents of an individual rights interpretation of the Second Amendment right to bear arms.<sup>8</sup> For simplicity's sake, I label the proponents "individualists" and the opponents "collectivists." According to the individualists' view that prevailed in *District of Columbia v. Heller*,<sup>9</sup> the Pennsylvania Declaration of Rights and its descendent, the Second Amendment, protected an unqualified right to bear arms (for reasons including personal self-defense) from infringement by the People's representatives.<sup>10</sup> Collectivists agree that the Pennsylvania Declaration of Rights served as a model for the Second Amendment, but they disagree with the individualists' interpretation of the Declaration.<sup>11</sup> Pointing to historical evidence from the period surrounding the adoption of the Declaration, they

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<sup>5</sup> Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779, 786–803 (2020). The six states that included declarations of rights or their equivalent in their first state constitutions included Massachusetts, *id.* at 791, North Carolina, *id.* at 799, and Pennsylvania, *id.* at 801.

<sup>6</sup> See N.C. CONST. of 1776, art. I, § xvii ("A Declaration of Rights") ("That the people have a right to bear arms, for the defence of the State . . ."); MASS. CONST. of 1780, pt. I, art. XVII ("A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts") ("The people have a right to keep and to bear arms for the common defence.").

<sup>7</sup> PA. CONST. of 1776, ch. I, § XIII ("A Declaration of Rights of the Inhabitants of the Commonwealth of the State of Pennsylvania") ("That the people have a right to bear arms for the defence of themselves and the state . . .").

<sup>8</sup> For individualist interpretations of the Pennsylvania Declaration of Rights, see Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 267–75 (1985); and David B. Kopel & Clayton E. Cramer, *The Keystone of the Second Amendment: The Quakers, the Pennsylvania Constitution, and the Flawed Scholarship of Nathan Kozuskanich*, 19 WIDENER L.J. 277 (2010). For collectivist interpretations of the Pennsylvania Declaration of Rights, see Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearm Regulations, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 578–81 (2006); Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1186–87 (2009); and Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041, 1042–66 (2007).

<sup>9</sup> 554 U.S. 570 (2008).

<sup>10</sup> *Id.* at 584–85.

<sup>11</sup> See, e.g., Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413, 441–46 (2008) (linking the collectivist notion of self-defense in the Pennsylvania Declaration of Rights to the U.S. Constitution's Founders' conception of self-defense); Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1112–13

argue that it, like the Massachusetts and North Carolina Constitutions, extended a qualified right to bear arms for collective self-defense.<sup>12</sup>

Neither side of the debate seems to think that the Second Amendment is unique, distinct from the constitutional rights to bear arms that preceded it. In this Essay, I argue that the Second Amendment is unique in ways that introduce a middle ground between those who contest its meaning. The Second Amendment's uniqueness, I further contend, requires renewed scrutiny of the Supreme Court's resolution of the relatively neglected debate over whether the Amendment limits the authority of state and local governments to regulate guns.<sup>13</sup>

My starting point is that the collectivist reading of the Pennsylvania Declaration of Rights is the right one. Scholars have shown, without much evidence to the contrary, that the Declaration protected a qualified right to bear arms for the collective defense and public safety of the state's frontier, which faced persistent threats from Native Americans and their French allies.<sup>14</sup> However, both the collectivists and their individualist counterparts are wrong in viewing Pennsylvania or the other state constitutional rights to bear arms as models for the Second Amendment. The U.S. Constitution granted authority to Congress to raise and supply an army and navy that would be principally responsible for providing collective defense against external threats.<sup>15</sup> Such authority reduced, if not entirely removed, the need for a right to bear arms to serve that purpose. But it was congressional authority to raise and supply an army along with its broad taxing and regulatory powers that introduced a different type of threat to which the Second Amendment was responsive.<sup>16</sup>

The threat of oppression did not arise merely from the powers that the Constitution delegated to Congress. It also arose from whom the Constitution designed to hold the power in Congress. The Constitution's

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(2009) (drawing the same connection between the Pennsylvania Declaration of Rights and the U.S. Constitution's Second Amendment).

<sup>12</sup> See, e.g., Kozuskanich, *supra* note 11, at 434; Cornell, *supra* note 8, at 578–81.

<sup>13</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (incorporating the Second Amendment into the Fourteenth Amendment Due Process Clause and applying it to a local regulation of guns).

<sup>14</sup> See, e.g., Kozuskanich, *supra* note 8, at 1044–51. The alternative individualist interpretation of the Pennsylvania Declaration of Rights lacks the convincing historical evidentiary support that underlays the collective accounts. See, e.g., Halbrook, *supra* note 8, at 267–75; Kopel & Cramer, *supra* note 8.

<sup>15</sup> U.S. CONST. art. I, § 8, cls. 12 & 13.

<sup>16</sup> See, e.g., *id.* art. I, § 8, cl. 1 (“The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . .”); *id.* art. I, § 8, cl. 3 (“[The Congress shall have the power to] regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”); *id.* art. I, § 8, cl. 18 (“[The Congress shall have the power t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.”).

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proponents, the Federalists, proposed to the states for ratification an anti-republican frame of government that they designed for the aristocratic elite to control and protect their interests.<sup>17</sup> For the Constitution's opponents, the Antifederalists, a Congress dominated by the aristocratic elite that wielded broad authority posed a potentially oppressive threat to the poorer, democratic masses.<sup>18</sup> The Bill of Rights, with its unqualified right to bear arms that Congress could not infringe, emerged as part of the bargain between the Constitution's opponents and proponents.

In that bargain, the Constitution's proponents secured an anti-republican frame of government designed to protect the interests of the wealthy, aristocratic elite. In exchange, the poorer, democratic masses obtained the right to use violence through the Second Amendment to protect themselves from any future aristocratic oppression. The right to bear arms had to be individualized and unqualified because of uncertainty surrounding when the threat of oppression might arise. And congressional authority had to be limited because, as the potential oppressor, it could not be trusted to regulate arms.

There, however, remains residual governing authority to potentially regulate arms. The Antifederalists considered state legislatures to be institutions distinct from Congress in their design (more fairly representative of the white male democratic masses) and in their operation (advancing the interests of the majority poor, sometimes at the expense of the wealthy elite).<sup>19</sup> They therefore did not push for state constitutional rights to bear arms as protection against class-based oppression from state legislatures. The unique Second Amendment should therefore be understood as a specific limit on congressional and later, through the Fourteenth Amendment, state legislative authority only insofar as the governing institutions are designed in ways that pose threats of economic or racial class oppression.

In this Essay, I provide the outline for an argument I will develop more fully in future work. In Part I, I probe the unique features of the Second Amendment, contrasting it with the constitutional protections of the rights to bear arms that came before it. In Part II, I explore the contextual genesis of the unique Second Amendment that included a post-Revolutionary War depression that fueled inequality, class division, and distrust of democratic republicanism from the wealthy classes. In Part III, I focus in on the U.S. Constitution's proponents' motivation to establish a frame of government that favored the aristocratic elite — a frame of government that I label anti-republican. I argue that the U.S. Constitution's anti-republican frame of government engendered distrust from opponents, who sought protection from state power that they associated with a democratic republicanism responsive to the People. The

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<sup>17</sup> See *infra* Part III, pp. 499–503.

<sup>18</sup> See *infra* Part III, pp. 499–503.

<sup>19</sup> See *infra* Part II, pp. 497–99.

right to bear arms, I contend, served as the Constitution's opponents' last-resort means of protecting the People from aristocratic oppression. In the conclusion, I provide a preliminary account of why this history matters for the Supreme Court's Second Amendment jurisprudence.

### I. THE UNIQUE SECOND AMENDMENT RIGHT TO BEAR ARMS

The Second Amendment right to bear arms was distinct from both the English Declaration of Rights and the provision of the right in three state constitutions. Two related aspects of the Second Amendment account for its distinctiveness from the prior constitutional rights to bear arms. First, the Second Amendment deviates from early state constitutions and accords with the English Bill of Rights in its protection of the right to bear arms for uses beyond the defense or safety of the state. The preface to the Second Amendment identifies a relationship between the right to bear arms and the "security of the Free State."<sup>20</sup> But the so-called operative provision excludes constraints on the use of arms laid out in the three state constitutions.<sup>21</sup> Second, the Second Amendment is similar to its state-constitutional counterparts and departs from the English Bill of Rights in limiting the authority of the People's elected representatives to regulate the bearing of arms. Unlike the English Bill of Rights that also extends the right to bear arms to all uses, the Second Amendment does not contain an "as allowed by law" provision providing elected representatives with regulatory authority over the right to bear arms.<sup>22</sup> The U.S. Constitution instead contains the first right to bear arms for uses including, but not limited to, the defense of the state or public safety that also prohibits the People's elected representatives from infringing on that right.

Why does the Second Amendment include that novel combination of features? One place to look for an explanation is the Second Amendment's purposes. Since the legislative history of the Second Amendment is rather scant, scholars have theorized from the amendment's historical context about the motivations underlying it. A conventional account of the Second Amendment is that the right to bear arms was designed to protect the People from tyrannical government

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<sup>20</sup> U.S. CONST. amend. II.

<sup>21</sup> Compare *id.*, with PA. CONST. of 1776, ch. I, § XIII ("[A]s standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; [a]nd that the military should be kept under strict subordination to, and governed by, the civil power."), and N.C. CONST. of 1776, art. I, § xvii (containing similar provisions), and MASS. CONST. of 1780, pt. I, art. XVII (same). See also *District of Columbia v. Heller*, 554 U.S. 570 (2008) (referring to the second clause of the Second Amendment as "its operative clause").

<sup>22</sup> Compare U.S. CONST. amend. II, with An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, *supra* note 1.

and criminal impositions on their life and property.<sup>23</sup> That account, even in its more fleshed-out forms, raises a host of questions that focus attention on the Second Amendment's uniqueness.

Regarding the protection from tyranny, the seventeenth-century English people and the revolutionary-era Americans were very familiar with government tyranny. The English Bill of Rights arose in the aftermath of King James II's tyrannical abuse of authority to force the mostly Protestant nation to tolerate and recognize the Catholic religion.<sup>24</sup> Similarly, several of the revolutionary-era American state constitutions included lists of grievances that they associated with King George III's tyranny.<sup>25</sup> Yet neither the English Bill of Rights nor the American state constitutions included rights to bear arms that both protected all uses of arms and limited elected representatives' authority to infringe on the right. The protection from tyranny argument therefore raises the question of why the Second Amendment's adopters and ratifiers deemed the right to bear arms necessary to protect the People from potential tyrannical actions by their own elected representatives.

The Lockean transition from the state of nature to a society governed by laws was theorized to provide protections for life and property from violent impositions.<sup>26</sup> Even if the many revolutionary-era Americans that possessed guns did not entirely accept the theory, they appeared to trust that their state governments would privilege the People with the means necessary to protect their life and property without a constitutional right to bear arms for personal self-defense. That trust of the state either dissipated over time or did not extend to Congress when the People ratified the Bill of Rights that included a Second Amendment protecting the right to bear arms for self-defense. The argument from criminal imposition on life and property therefore raises the question of why the People ratifying the Bill of Rights did not trust Congress to preserve the privilege of the People to bear arms for purposes of self-defense.

A deeper account of the historical context explaining the Second Amendment's purposes focuses on federalism and the Constitution's ratification debate between the Federalist proponents of the Constitution

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<sup>23</sup> See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 314 (1991) (describing defense against governmental tyranny as a purpose of the Second Amendment); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 89 (1992) (identifying as a purpose of the Second Amendment defense of persons and society against criminal usurpation).

<sup>24</sup> See Ross, *supra* note 1, at 277–89 (providing an historical account of King James II's alleged tyranny and the People's response to it in the Glorious Revolution).

<sup>25</sup> See, e.g., N.J. CONST. pmbl. (1776); N.Y. CONST. pmbl. (1777); PA. CONST. pmbl. (1776).

<sup>26</sup> See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 157–58 (Mark Goldie ed., Everyman 1993) (1690) (theorizing about the political or civil society that arises from the consent of men to enter it in which umpires enforcing the settled rules of the community resolve disputes).

and the Antifederalist opponents of the Constitution. According to a leading Second Amendment historian, Professor Saul Cornell, the Antifederalists advocated for the right to bear arms to protect states from the tyranny of federal government power.<sup>27</sup> That account leads Cornell to the conclusion that the Second Amendment protects the People's civil right "to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia."<sup>28</sup>

Cornell's account of the Second Amendment's purpose of protecting against tyranny is persuasive and comprehensive, but it still leaves questions unanswered. First, why are the Antifederalists so wedded to the state and preserving its authority? The Antifederalists in their promotion of state authority certainly had an attachment to the theory of federalism, but the underlying reasons for this attachment remain unexplored in Second Amendment scholarship. Second, and relatedly, why do the Antifederalists fear tyranny from a federal government that includes a Congress in which the People of the states directly elected members of one house and the state legislators elected members of the other? The U.S. Constitution certainly enhanced the powers of the federal government, but arguably all that really meant was that the Constitution transferred authority from one set of elected officials to another. What made federal elected officials so much more of a tyrannical threat than state elected officials?

There is not yet a comparably deeper historical account of the Second Amendment's personal self-defense purpose. Still unaccounted for are the reasons why the People, who trusted their state legislatures to preserve their privileges to bear arms for purposes of self-defense, did not trust Congress.

## II. THE RISE OF ECONOMIC INEQUALITY AND CLASS DIVISIONS

In this short Essay, I can only provide some preliminary answers to the puzzle laid out in the prior section. This analysis will receive fuller treatment in an article that follows it. As a starting point, we can understand the unique federal constitutional right to bear arms only if we account for the rise of inequality in America and the wealthy elite's capture of the federal government through constitutional design.

The American Revolutionary War sparked capitalistic development like no other prior time in U.S. history.<sup>29</sup> A market economy developed

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<sup>27</sup> SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 46–50 (2006).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> See Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 69, 78 (Richard Beeman et al. eds., 1987) ("No event in the eighteenth century accelerated the capitalistic development of America more than did the Revolutionary war.").

as American producers, including many small farmers, supplied the broader war efforts on both sides. Those producers borrowed money to expand their capacity to provide for the war efforts and, with their returns on investments, they became more active consumers in the market economy.<sup>30</sup> The Peace of 1783 introduced an economic shock with multiple dimensions. First, wartime production led to a peacetime oversupply of goods as demand dried up. As a result, highly leveraged producers turned into an indebted class after the war.<sup>31</sup> Second, a growing trade deficit with Europe after the war contributed to a shortage of the gold and silver specie that creditors demanded as repayment, leaving debtors in an even more economically precarious position.<sup>32</sup> Finally, war expenditures that left state and national governments indebted increased the governments' tax demands on the American people.<sup>33</sup>

The economic depression of the 1780s transformed Americans' revolutionary sense of collective identity as class division emerged between creditors and debtors that came to be identified as a division between the rich and the poor.<sup>34</sup> Class divisions led to democratic contestation as the two sides made irreconcilable demands on state legislatures. Many debtors demanded debt relief through policies such as the issuance of paper money and deferrals on debt repayment, among others.<sup>35</sup> Most creditors opposed those policies and demanded enforcement of their loan contracts through payment in specie or the repossession of land and property from members of the debtor class.<sup>36</sup>

The rather democratic state legislatures were often responsive to the demands of the more populous debtor class.<sup>37</sup> And when they weren't, as in the case of the Massachusetts Legislature, members of the debtor class sometimes rebelled against the state governments.<sup>38</sup> The state eventually suppressed the rebellion.<sup>39</sup> Nonetheless, the combination of

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<sup>30</sup> See *id.* (describing the development of the American market economy during the Revolutionary War period).

<sup>31</sup> *Id.* at 79.

<sup>32</sup> MICHAEL KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 75 (2016).

<sup>33</sup> *Id.*

<sup>34</sup> Americans, in their pursuit of independence developed a collective identity centered around their resistance to tyrannical taxation without representation and their struggle for republican self-government based on equality and consent of the governed. The Declaration of Independence served as the foundational document for this new collective identity. See *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

<sup>35</sup> JACKSON TURNER MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* 60–66 (1972) (describing the political conflict between debtors and creditors over debt relief and paper money).

<sup>36</sup> See *id.*

<sup>37</sup> See WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 23–24 (2007) (describing the states' debt and tax relief measures).

<sup>38</sup> See CORNELL, *supra* note 27, at 30–35 (describing Shays's Rebellion).

<sup>39</sup> *Id.* at 35.

democratic mobilization of indebted sympathizers of the rebels and state legislators' fears of more rebellions led to the passage of debtor-protective laws in states that had initially rejected them.<sup>40</sup>

An American class consciousness was born from the class divisions and democratic contestations of the 1780s.<sup>41</sup> Revolutionary-era professions of republican democracy and equality gave way to class-based re-primination between the rich and the poor.<sup>42</sup> As the indebted class sought means to protect their property and liberty from the repayment demands of their creditors and the tax demands of their government, the wealthy class spread an exaggerated fear of state-sponsored redistribution and advanced schemes to protect themselves from the poor and the democratic governments that enabled them.<sup>43</sup> From one of the wealthy class's schemes emerged a new national constitution.

### III. OUR ANTI-REPUBLICAN CONSTITUTION AS A PREDICATE TO THE SECOND AMENDMENT

The Constitutional Convention of 1787 was comprised almost entirely of members of the wealthy creditor class, many of whom later associated themselves with the Federalist Party.<sup>44</sup> The ostensible purpose of the convening was to strengthen a national government that, under the Articles of Confederation, proved unable to tax the people to pay off its debt, harmonize internal commercial regulations necessary for economic development, or raise forces for the national defense.<sup>45</sup> Many opponents of the Constitution agreed with the project of strengthening the national government, but they would not have acquiesced in the Convention members' more hidden objective.<sup>46</sup> That objective was

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<sup>40</sup> KLARMAN, *supra* note 32, at 99 (noting that after Shays's Rebellion "[e]ven the states with the least populist constitutions — New York and Massachusetts — had capitulated to populist demands for tax and debt relief").

<sup>41</sup> See CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 28 (1913) (describing the emergence among the debtor class of "a strong consciousness of identical interests in the several states").

<sup>42</sup> See, e.g., Letter from Henry Knox to George Washington (Oct. 23, 1786), <https://founders.archives.gov/documents/Washington/04-04-02-0274> [<https://perma.cc/A9NQ-C3LN>] (accusing debtors of being "determined to annihilate all debts public and private" and describing the debtors as men "possessing all the turbulent passions belonging to that animal").

<sup>43</sup> See HOLTON, *supra* note 37, at 19–23.

<sup>44</sup> See BEARD, *supra* note 41, at 149–51.

<sup>45</sup> See Wood, *supra* note 29, at 70 (describing this conventional account of the motivation for the Constitutional Convention).

<sup>46</sup> See Federal Farmer, Letter III (Oct. 10, 1787), in OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT 15, 15 (N.Y.C., Thomas Greenleaf, 1787), *microformed on* Early American Imprints, Ser. 1, no. 20456 (Readex) ("I am fully convinced that we must organize the national government on different principles, and make the part of it more efficient, and secure in it more effectually the different interests in the community.")

to construct a frame of government that deviated from the systems of democratic republican self-government established in many of the states.<sup>47</sup>

In the new anti-republican frame of government, a natural aristocracy of the wealthy would hold considerable power in the federal government and be able to check the influence of the democratic masses in the state legislatures.<sup>48</sup> The Framers carried out their objective through the establishment of a President and Senate that would be only indirectly elected and accountable to the People and who would serve much longer terms than the annual terms of state legislators.<sup>49</sup> They also constructed a judiciary that would be further shielded from the People through lifetime appointment by the indirectly elected President and Senate.<sup>50</sup> Finally, the Framers constructed a House of Representatives that, although directly elected by the People, was originally comprised of a small number of representatives subject to elections in very large districts.<sup>51</sup> The intended effect of this design of the House of Representatives was to advantage those with broad reputation and wealth, members of the natural aristocracy, in elections over members of poor and middling classes.<sup>52</sup>

The Framers' construction of an aristocratic republican form of government with considerable power to tax, regulate commerce, and raise

<sup>47</sup> Historians, including Professor Gordon Wood, have described this as the principal objective of the Constitutional Convention. *E.g.*, Wood, *supra* note 29, at 72.

<sup>48</sup> John Adams advanced one of the clearest arguments in favor of a natural aristocracy of governors:

[A]s Nature has in every other Particular, created a very great inequality among Men, I see not upon what grounds we can found the Supposition, that they ought all to share an equal degree of Power.

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... I still must think inequality absolutely necessary for the Liberties of a People.

... The Man who to the greatest natural and acquired Abilities unites the greatest

Virtues, should certainly not be view'd as on a Par with a vicious Fool . . . .

Diary of John Quincy Adams (Sept. 26, 1786), <https://founders.archives.gov/documents/Adams/03-02-02-0001-0008-0026> [<https://perma.cc/9SH4-ANA2>].

<sup>49</sup> U.S. CONST. art. I, § 3; *id.* art. II, § 1.

<sup>50</sup> *Id.* art. II, § 2; *id.* art. III, § 1.

<sup>51</sup> The first House of Representatives consisted of sixty-five representatives, *Congress Profiles: 1st Congress (1789-1791)*, U.S. HOUSE OF REPRESENTATIVES: HIST. ART & ARCHIVES, <https://history.house.gov/Congressional-Overview/Profiles/1st/> [<https://perma.cc/6FDW-7996>], in a country of four million people, *1790 Fast Facts*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/through\\_the\\_decades/fast\\_facts/1790\\_fast\\_facts.html](https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html) [<https://perma.cc/76NJ-RH8Y>].

In contrast, the parallel English House of Commons consisted of 558 members, *The Constituencies*, in *THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS, 1790-1820*, at 4, 4 (R. Thorne ed., 1986), in a country of approximately seven million people, E.A. WRIGLEY & R.S. SCHOFIELD, *THE POPULATION HISTORY OF ENGLAND, 1541-1871*, at 563-75 (1989).

<sup>52</sup> HOLTON, *supra* note 37, at 25-26 (describing the reasoning behind the large electoral districts for the House of Representatives).

an army gave the Constitution's opponents considerable anxiety.<sup>53</sup> The opponents, labeled the Antifederalists, feared that the Constitution would transform a confederation of states into a consolidated government. Republican theory had taught the Antifederalists that such a government over a wide territory like the United States would inevitably lead to despotism.<sup>54</sup> That fear was exacerbated by the rising tension between the classes and the Antifederalists' perception that the Constitution's delegation of power to the federal government would result in the annihilation of state governments, the only remnants of democratic republicanism in the eyes of the Antifederalists.<sup>55</sup> The aristocracy's supplantation of the state democracies would leave the poor and middling sort vulnerable to economic and other forms of oppression by their wealthy overlords, who under the new Constitution would control the levers of federal power.

The Antifederalists' efforts to stop the ratification through their popularly supported demand for a Bill of Rights was likely motivated by their desire to reopen the Constitutional Convention.<sup>56</sup> The Antifederalists wanted to enhance the powers of state governments and thereby protect the interests of the poor and middling sort that those governments would presumably better represent.<sup>57</sup> But that ulterior

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<sup>53</sup> Brutus, Essay II (Nov. 1, 1787), *reprinted in* LIBERTY AND ORDER 6, 8 (Lance Banning ed., 2004) (arguing for a right to bear arms in the federal Constitution because "the general government will have the sole power to raise and to pay armies, and are under no control in the exercise of it").

<sup>54</sup> See Essay by Montezuma (Oct. 17, 1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 53 (Herbert J. Storing ed., 1981) (criticizing the Federalists for creating a consolidated government that the Antifederalists associated with tyranny).

<sup>55</sup> See, e.g., Brutus, Essay I (Oct. 1787), *reprinted in* THE AMERICAN REPUBLIC 314, 316 (Bruce Frohnen ed., 2002) (contending that the Constitution's Necessary and Proper Clause gives Congress such expansive power that they can entirely "annihilate all the state governments, and reduce this country to one single government"); Excerpt from Pennsylvania Packet (Dec. 6, 1787), *reprinted in* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 301 (Da Capo Press 2012) (John Bach McMaster & Frederick D. Stone eds., 1888) ("The powers given to the Federal body for imposing internal taxation will necessarily destroy the state sovereignties, for there cannot exist two independent sovereign taxing powers in the same community, and the strongest will of course annihilate the weaker.") (describing William Findley's speech at the Pennsylvania Ratifying Convention on the Constitution as a Plan for National Consolidation).

<sup>56</sup> See, e.g., George Mason, Objections to the Federal Constitution (Oct. 7, 1787), *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, at 327, 329 (Brooklyn, Paul L. Ford ed., n. pub. 1888) (raising an objection to the Constitution that "[t]here is no declaration of rights: and the laws of the general government being paramount to the laws and constitutions of the several states, the declaration of rights, in the separate states, are no security").

<sup>57</sup> See, e.g., The Debates in the Convention of the State of New York (June 20, 1788), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 205, 227-29, 245-46 (Phila., Jonathan Elliot ed., J.B. Lippincott & Co. 1863) (statement of Melancton Smith) (advancing the claim that the state legislatures better represent the people than the House of Representatives would due to its small membership and large territories that would need representation).

motive for promoting the Bill of Rights did not mean the rights protections did not serve an important purpose for the Constitution's opponents. The Bill of Rights, and the right to bear arms in particular, provided a means by which the poor and middling sort could protect themselves if the People ratified the Constitution. For the Antifederalists, an unqualified right to bear arms against their own elected representatives was deemed necessary because the anti-republican government did not represent all the people.<sup>58</sup> The Antifederalists rejected the Federalist claim that the natural aristocracy would govern for the public good. Instead, they suspected the wealthy, when controlling the national government, would be guided by the same self-interest as the poor were accused of being guided by when they exercised influence over the state legislatures.<sup>59</sup> The fact that the government would not be comprised of a fair representation of the people, the Antifederalists surmised, meant that the interests of the poor and middling sort were vulnerable to being trampled upon by their wealthy overlords.<sup>60</sup> An unqualified right to bear arms, therefore, served as a means by which the poor and middling sort could defend themselves against any future efforts of the aristocratic-controlled federal government to disarm and oppress them.

The Federalist proponents of the Constitution acquiesced to the Bill of Rights and the unique right to bear arms not merely as the means to the end of securing ratification of the Constitution. Rather, they were also anxious about a future in which rising inequality and a growing population would result in the wealthy class comprising a smaller proportion of the nation.<sup>61</sup> In those circumstances, the natural aristocracy might not be able to maintain the stranglehold on power that they had secured for themselves through the Constitution. In a future in which the middling sort and the poor were elected in greater numbers, laws less protective of property and the property rights of the wealthy could be enacted. A right to bear arms might, in those circumstances, prove

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<sup>58</sup> Federal Farmer, No. 7 (Dec. 31, 1787), reprinted in 1 THE FOUNDERS' CONSTITUTION 401, 401 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[A] fair and equal representation is that in which the interests, feelings, opinions, and views of the people are collected, in such manner as they would be were the people all assembled.").

<sup>59</sup> See Wood, *supra* note 29, at 101 ("The prevalence of interest and the impossibility of disinterestedness inevitably became a central argument of the Antifederalists in the debate over the Constitution.").

<sup>60</sup> Brutus, *supra* note 53 ("[R]ulers have the same propensities as other men; they are as likely to use the power with which they are vested for private purposes and to the injury and oppression of those over whom they are placed, as individuals in a state of nature are to injure and oppress one another.").

<sup>61</sup> See 1 JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1778), reprinted in 4 WORKS OF JOHN ADAMS 271, 278-81 (Bos., Charles Francis Adams ed., Charles C. Little & James Brown 1851) (articulating the wealthy class's fear of majority oppression in a growing country with rising inequality).

crucial to the protection of property against criminal and other elements when the state can no longer be trusted to do that work.

### CONCLUSION

The constitutionalization of the Second Amendment's uniquely unqualified right to bear arms without governmental infringement was part of an implicit bargain that scholars have overlooked. The aristocratic elite secured ratification of an anti-republican constitution designed to give them control over a federal government that had the commercial, regulatory, and military means to protect their property rights and interests. In exchange, they made a concession to the democratic masses in the form of a Bill of Rights that included an unqualified right to bear arms that Congress could not regulate. That right would provide the people with a tool to defend against aristocratic governmental oppression.

This history has several implications, but here I will focus on one relevant to the Supreme Court's current Second Amendment jurisprudence. In the 2010 case of *McDonald v. City of Chicago*,<sup>62</sup> the Court held that the Second Amendment applied to the states and protected the unqualified right of individuals to bear arms from infringement by state and local governments.<sup>63</sup> What the history suggests is that the Court's conclusion in *McDonald* was too facile as it did not recognize the unique attributes of the Second Amendment. If arms were understood to be tools to defend the democratic masses against oppression from a government captured by the aristocratic elite, then the Second Amendment should be understood as providing a more contingent protection of the right to bear them than provided for in *McDonald*. Instead of functioning as a universal limitation on state and local regulation of guns, the Second Amendment's application should depend on whether the government is representative of all the People or only a segment of the People.

At the same time, however, the universal application of the Second Amendment to all state and local governments may be appropriate in the current day context. Multiple empirical studies suggest that government represents only the wealthy at the expense of the middle class and the poor and white people at the expense of people of color.<sup>64</sup>

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<sup>62</sup> 561 U.S. 742 (2010).

<sup>63</sup> *Id.* at 791 ("Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We . . . hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." (citation omitted)).

<sup>64</sup> See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 239–44 (2d ed. 2016) (finding that elected representatives are very responsive to high-income voters, weakly responsive to middle-income voters, and not at all responsive to low-

Insofar as a government is not representative of all the classes, the Second Amendment as applied to state and local governments may be serving the function designed — a deterrent against oppression by a class-captured government. But the cost of this deterrent is extremely high as lethal violence associated with the Second Amendment right has become an everyday component of American life. An apparent and neglected path toward reducing such violence is securing a truly republican form of government.

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income voters); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 84, 86–87 (2012) (finding that elected representatives are responsive almost only to high-income voters); John Griffin et. al., *Political Inequality in America: Who Loses on Spending Policy? When is Policy Less Biased?*, 7 POL. GRPS. & IDENTITIES 367, 368 (2019) (“Blacks are significantly less likely than whites to be policy winners, even after we control for income . . .”).