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## Article I Section 13 Of The Virginia Constitution: Of Militias and an Individual Right to Bear Arms

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# ESSAYS

## ARTICLE I SECTION 13 OF THE VIRGINIA CONSTITUTION: OF MILITIAS AND AN INDIVIDUAL RIGHT TO BEAR ARMS

*The Honorable Stephen R. McCullough \**

### INTRODUCTION

The scope of legislative authority to regulate firearms remains a subject of fierce debate, including in the General Assembly of Virginia. On an annual basis, members of the General Assembly propose a wide range of measures to either restrict or expand the ability of citizens to own, carry, or use firearms.<sup>1</sup> Debates about the right to keep and bear arms ordinarily center on the Second Amendment of the United States Constitution and the United States Supreme Court's landmark *District of Columbia v. Heller* decision.<sup>2</sup> In *Heller*, a bare 5-4 majority of the Court rejected the "collective" right theory and held that the Second Amendment protects an individual right to possess a firearm.<sup>3</sup>

Virginia's own constitution contains a clause analogous to the Second Amendment: article I, section 13 ("the Clause").<sup>4</sup> In the

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1. See, e.g., S.B. 965, Va. Gen. Assembly (Reg. Sess. 2013) (making it a crime to fail to report a stolen gun); H.B. 2207, Va. Gen. Assembly (Reg. Sess. 2013) (prohibiting the sale of "assault firearm[s]"); H.B. 1557, Va. Gen. Assembly (Reg. Sess. 2013) (calling for the establishment of training standards to allow certain persons to bring a concealed handgun into a school).

2. 554 U.S. 570 (2008).

3. *Id.* at 595.

4. VA. CONST. art. I, § 13.

wake of *Heller*, it might be tempting to conclude that article I, section 13 has been relegated to the status of museum piece—an item of interest to historians perhaps, but one that no longer retains any contemporary relevance. Such a characterization would be premature. First, given the narrowness of the *Heller* decision, as well as the United States Supreme Court's current lack of concern for *stare decisis*,<sup>5</sup> it is not clear whether the Supreme Court will continue to adhere to an individual rights interpretation. Second, even if an individual rights interpretation of the Second Amendment survives over the long term, later jurisprudential developments may significantly restrict judicial review of legislation regulating firearms. For example, the United States Supreme Court has yet to resolve the degree of scrutiny the courts should apply when reviewing Second Amendment-based challenges.<sup>6</sup> If the United States Supreme Court adopts a deferential standard, proponents of the right to bear arms may turn to article I, section 13 of the Virginia Constitution to challenge firearm regulations adopted by the General Assembly or the Commonwealth's administrative agencies. Finally, recent tragedies have prompted renewed calls for stricter gun regulation. Although the present composition of the Virginia General Assembly makes it unlikely that our legislature will adopt strict gun control measures in the near term, Virginia's political outlook continues to evolve—as evidenced by the Old Dominion's back-to-back award of its electoral votes to President Obama.

This article endeavors to determine whether, like the Second Amendment, article I, section 13 recognizes an individual right to bear arms and, therefore, restricts the ability of Virginia's lawmakers to regulate firearms. The alternative view, suggested by

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5. See *Michigan v. Bryant*, 562 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting) (criticizing the Court for distorting Confrontation Clause jurisprudence as articulated in *Crawford v. Washington*, 541 U.S. 36 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 654–55 (1990), which had upheld restrictions on independent corporate political expenditures in the face of a First Amendment challenge); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007) (overruling a nearly century-old line of precedent, first articulated in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404–06 (1911), governing vertical price restraints in antitrust law); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (effectively overruling the forgiving pleading standard articulated in *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

6. See *Heller*, 554 U.S. at 628–29 & n.27 (declining to decide which level of scrutiny is appropriate for Second Amendment challenges).

Professor Howard in his treatise on the Virginia Constitution, is that article I, section 13 does not impose any significant constraint on the General Assembly with regard to the regulation of firearms.<sup>7</sup> He suggests that article I, section 13 envisions a collective, rather than an individual, right to bear arms.<sup>8</sup>

In Part I, this article will examine the original public meaning of the Clause. This article concludes that, from its inception, article I, section 13 was intended to, and was readily understood as, protecting an individual right to bear arms. Such a right was inextricably linked in the minds of eighteenth-century Virginians, both as a matter of lived experience and as a matter of political theory, with a militia composed of the entire body of the people who furnished their own arms for militia service. Part II will examine changing conditions in modern Virginia, including the creation of a National Guard funded and equipped by the national government. These changes meant that the militia fell into disuse.<sup>9</sup> This led the General Assembly in 1971 to seek an amendment of the language of article I, section 13 in order to preserve the original understanding of the Clause.<sup>10</sup>

## I. ARTICLE I, SECTION 13 IN COLONIAL TIMES: ORIGINAL PUBLIC MEANING OF THE CLAUSE

Article I, section 13 was adopted in 1776 as part of the Virginia Declaration of Rights.<sup>11</sup> As originally drafted, it provided as follows:

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7. 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 274–77 (1974) [hereinafter COMMENTARIES ON THE CONSTITUTION OF VIRGINIA].

8. *Id.* at 277. It is worth noting that Professor Howard penned his discussion of article I, section 13 before the *Heller* decision, at a time when the collective rights reading of the Second Amendment held broader sway than it does today. Under the collective rights view, “the Second Amendment protects militia-related, not self-defense-related, interests.” *Heller*, 554 U.S. at 681 (Breyer, J., dissenting). Therefore, under a collective rights interpretation, the Second Amendment does not “limit[] any legislature’s authority to regulate private civilian uses of firearms.” *Id.* at 637 (Stevens, J., dissenting).

9. See Michael J. Golden, *The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias*, 21 WM. & MARY BILL RTS. J. 1021, 1068–69 (2013).

10. See PROCEEDINGS AND DEBATES OF THE HOUSE OF DELEGATES PERTAINING TO THE AMENDMENT OF THE CONSTITUTION 775 (1970) (statement of Del. Slaughter); PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION 392 (1969) (statement of Sen. Barnes).

11. VA. DECLARATION OF RIGHTS § XIII (1776); 1 COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, *supra* note 7, at 7.

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.<sup>12</sup>

Surprisingly, despite the passage of nearly two-and-one-half centuries, the Supreme Court of Virginia has never authored an opinion construing this Clause.<sup>13</sup> Moreover, constitutional debates from the time of the adoption of the Clause in 1776 shed little light on the original public meaning of the Clause.<sup>14</sup> Therefore, we must turn to other sources if we are to understand article I, section 13.

#### A. *Bearing Arms and the Colonial Militia*

Virginians have long become accustomed to a professional military that is equipped by the national government. In Virginia's crucial formative years, however, colonial settlements constituted a toehold on the edge of a vast wilderness.<sup>15</sup> The colony faced constant internal threats in the form of Indian raids or full scale war against Indian tribes, as well as external threats from European powers or from pirates.<sup>16</sup>

The colonists were left to face these dangers without any significant assistance from the Crown. "[T]he Virginia Company did not have the financial resources to establish a mercenary army or any other formal, separate military organization. The company expected its employees in America to shoulder the burden of their own defense."<sup>17</sup> British regulars occasionally assisted the militia when outright war broke out, but for most of the seventeenth and

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12. VA. DECLARATION OF RIGHTS § XIII (1776).

13. See generally Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1, 37 (1993).

14. COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, *supra* note 7, at 270–71, 273–74.

15. See WILLIAM L. SHEA, *THE VIRGINIA MILITIA IN THE SEVENTEENTH CENTURY* 7 (1983); see also GEORGE PERCY, *OBSERVATIONS* (1607), reprinted in *NARRATIVES OF EARLY VIRGINIA 1606–1625* 5, 9–10 (Lyon Gardiner Tyler ed., 1907).

16. 2 PHILIP ALEXANDER BRUCE, *INSTITUTIONAL HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY* 71, 190, 203 (1910); see also SHEA, *supra* note 15, at 82–95.

17. SHEA, *supra* note 15, at 6.

eighteenth centuries, the colony depended almost exclusively on the militia for protection.<sup>18</sup>

Although the colony possessed some weapons that could be distributed to the militia in the event of an emergency, a constant and systemic shortage of weapons—mass production of weapons would not begin until after the war for independence—meant that the militia could not function without private arms.<sup>19</sup> “The only practical way to equip militiamen living on scattered farmsteads in hostile country was to ensure that each had his own complement of weapons close at hand.”<sup>20</sup> Fortunately, “the requirements for self-defense and food-gathering had put firearms in the hands of nearly everyone.”<sup>21</sup>

The need for the militia to be self-supplied with arms prompted legislative action at an early date in the colony’s existence. In 1623, the House of Burgesses required “[t]hat no man go or send abroad without a sufficient partie will armed” and, further, “[t]hat men go not to worke in the ground without their arms (and a centinell upon them).”<sup>22</sup> A few years later, in 1631, the colonial legislature specified that “[a]ll men that are fittinge to beare armes, shall bringe their peices to the church upon payne of every effence” and that “the comandrs of all the severall plantations, doe upon holy days exercise the men under his comand.”<sup>23</sup> In 1658–59, the House of Burgesses required that “every man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott.”<sup>24</sup>

The importance of the militia to the colony demanded continued legislative attention even after the colony became more secure. In 1748, every colonist summoned to militia duty was expected to bring with him “his arms and accoutrements,” as well as ammunition.<sup>25</sup> The legislature also specified that persons who

18. BRUCE, *supra* note 16, at 3.

19. SHEA, *supra* note 15, at 40–44.

20. *Id.*

21. DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 353 (1958); see also SHEA, *supra* note 15, at 139 (noting the “extraordinarily widespread distribution of firearms in the colony up to about mid-[seventeenth] century or slightly later”).

22. 1 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 127* (1809) [hereinafter *THE STATUTES AT LARGE*].

23. *Id.* at 174.

24. *Id.* at 525.

25. 6 *THE STATUTES AT LARGE*, *supra* note 22, at 114.

failed to appear with arms in response to a militia summons were subject to a fine.<sup>26</sup> In 1755, the House of Burgesses sought to restructure and improve the militia system in order to increase its effectiveness.<sup>27</sup> Subject to certain exceptions, every citizen aged eighteen to sixty was made a member of the militia.<sup>28</sup> Captains and lieutenants were ordered to drill and muster at regular intervals.<sup>29</sup> Officers and soldiers were expected to appear with specified arms and powder, and were fined if they did not.<sup>30</sup> Finally, arms were exempted from seizure by any legal process.<sup>31</sup> The legislature enacted another comprehensive statute regulating the militia in 1757, again requiring militiamen to purchase their own firearms and ammunition and making provisions for persons too poor to do so.<sup>32</sup>

For the founding generation, therefore, every able-bodied member of the political community, subject to limited exceptions, was expected to serve in the militia, and service in the militia meant owning a firearm and having that firearm at the ready.<sup>33</sup> The militia effectively constituted "an organization that was actually the armed population in institutional form."<sup>34</sup>

Dependence on the militia also entailed significant political consequences:

Government in early Virginia depended on the tacit consent of the governed, for the governed had the means to resist authority. As long as the population was armed and the militia remained the only effective military force in the province, and as long as direct control of the militia remained in the hands of local authorities, rulers had to live with the specter of revolt.<sup>35</sup>

As a practical matter, the militia served as an effective check on potential abuses by royal officials.

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26. *Id.* at 114, 116.

27. *Id.* at 530–44.

28. *Id.* at 531.

29. *Id.* at 534.

30. *Id.* at 537–38.

31. *Id.* at 538.

32. 7 THE STATUTES AT LARGE, *supra* note 22, at 93–95.

33. See 6 THE STATUTES AT LARGE, *supra* note 22, at 530–32.

34. SHEA, *supra* note 15, at 54.

35. *Id.* at 55–56.

## B. *Political Theory*

Bearing personal arms for service in the militia and for self-protection was more than a practical reality for colonial Virginians. The dominant political theory of eighteenth-century America also ascribed a key role to the militia and to the right of a citizen to bear arms for individual and collective self-defense.<sup>36</sup>

The Virginia Declaration of Rights unambiguously reflects a theory of popular sovereignty and natural law. With respect to popular sovereignty, clause 2 of the Virginia Declaration of Rights, currently article I, section 2 of the Virginia Constitution, states that “all power is vested in, and consequently derived from, the people . . . .”<sup>37</sup> As Professor Akhil Amar has pointed out, the idea of popular sovereignty is connected with the right to keep and bear arms.<sup>38</sup> He notes, “In Locke’s influential *Second Treatise of Government*, the people’s right to alter or abolish tyrannous government invariably required a popular appeal to arms. To Americans in 1789, this was not merely speculative theory. It was the lived experience of their age.”<sup>39</sup> That was no less true in 1776, when Virginia declared its independence from England and crafted the Declaration of Rights, including article I, section 13.<sup>40</sup>

As for natural law, the first clause of our Declaration of Rights provides:

That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.<sup>41</sup>

Eighteenth-century theorists of natural law posited an inherent right of self-defense. William Blackstone explained that the

36. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 46–47 (1998).

37. VA. DECLARATION OF RIGHTS § II (1776); VA. CONST. art. I, § 2.

38. AMAR, *supra* note 36, at 46–49.

39. *Id.* at 47.

40. See VA. DECLARATION OF RIGHTS § XIII (1776); see also AMAR, *supra* note 36, at 47.

41. VA. DECLARATION OF RIGHTS § I (1776); VA. CONST. art. I, § 1. Remarkably, the text of this clause has remained unchanged from 1776 through the present time. See, e.g., Hon. Stephen R. McCullough, *A Vanishing Virginia Constitution?*, 46 U. RICH. L. REV. 347, 348 & n.5 (2011).



people of England possessed three "primary" rights.<sup>42</sup> Those were "the right of personal security, the right of personal liberty, and the right of private property."<sup>43</sup> These three primary rights were protected by five "auxiliary subordinate rights of the subject."<sup>44</sup> By auxiliary rights, he meant rights whose function it was to "protect and maintain" an Englishman's primary rights.<sup>45</sup> One of these auxiliary rights was the right "of having and using arms for self-preservation and defence."<sup>46</sup>

The principle at the foundation of Blackstone's theory of natural rights was his contention that "the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature."<sup>47</sup> The primary right an individual possessed was that of "personal security."<sup>48</sup> Self-defense, in his view, was "the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society."<sup>49</sup> Similarly, Montesquieu wrote, "The life of governments is like that of men. The latter has a right to kill in case of natural defence; the former have a right to wage war for their own preservation."<sup>50</sup>

These views found widespread acceptance in the United States. John Adams, for example, wrote that "Resistance to sudden violence, for the preservation not only of my person, my limbs and life, but of my property, is an indisputable right of nature which I have never surrendered to the public by the compact of society, and which, perhaps, I could not surrender if I would."<sup>51</sup> Similarly, Elbridge Gerry observed that "Self defence is a primary law of nature, which no subsequent law of society can abolish."<sup>52</sup> Samuel Adams echoed these views, writing that

42. 1 WILLIAM BLACKSTONE, COMMENTARIES \*125.

43. *Id.*

44. *Id.* at \*136.

45. *Id.*

46. *Id.* at \*140.

47. *Id.* at \*120.

48. *Id.* at \*125.

49. 3 COMMENTARIES, *supra* note 42, at \*4.

50. 1 CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS, bk. X, ch. 2, at 135 (Thomas Nugent trans., 6th ed. 1792) (1748).

51. John Adams, *On Private Revenge*, BOS. GAZETTE, Sept. 5, 1763, reprinted in 3 THE WORKS OF JOHN ADAMS 438 (Charles F. Adams ed., 1851).

52. Elbridge Gerry, *Observations on the New Constitution, and on Federal and State Conventions*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 4 (Paul Leicester Ford ed., 1888).

[a]mong the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature.<sup>53</sup>

A natural right of self-defense was thought to exist not only for individuals; it applied to society as well.<sup>54</sup> Both sides of the debate on the ratification of the United States Constitution made this point.<sup>55</sup> Thus, in Federalist No. 28, Alexander Hamilton wrote that “[i]f the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government.”<sup>56</sup> The dissent authored by the minority of the Pennsylvania Convention that was convened to ratify the United States Constitution embraced an inherent right of societal self-defense, writing that “the people have a right to bear arms for the defence of themselves and their own state, or the United States . . . and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.”<sup>57</sup>

Significantly, George Mason, the drafter of the Virginia Declaration of Rights,<sup>58</sup> embraced this view. Mason articulated his natural law view of self-defense in the context of arguments about the proposed congressional power over the state militia:

I consider and fear the natural propensity of rulers to oppress the people. I wish only to prevent them from doing evil. By these amendments, I would give necessary powers, but no unnecessary power. If the clause stands as it is now, it will take from the State Legislatures what Divine Providence has given to every individual;—the means of self-defence.<sup>59</sup>

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53. Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting, Nov. 20, 1772*, in OLD SOUTH LEAFLETS NO. 173, at 417 (Directors of the Old South Work ed. 1906), available at <http://history.hanover.edu/texts/adamss.html>.

54. Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1106–07 (2000).

55. See *infra* notes 56–57.

56. THE FEDERALIST NO. 28, at 176 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

57. *Dissent of the Minority of the Pennsylvania Convention*, in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 533 (Library of America ed. 1993).

58. 1 COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, *supra* note 7, at 7.

59. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION OF

So pervasive was the view of an inherent natural right of individual and collective self-defense that the leading constitutional law treatises continued to advance this view long after the ratification of the United States Constitution. Virginia jurist St. George Tucker placed the Second Amendment in its Blackstonian framework and noted that it stood

as the true palladium of liberty . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.<sup>60</sup>

In another chapter, while criticizing game preservation laws that had served as a pretext for disarming the populace of England, Tucker added that “[i]n America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty.”<sup>61</sup>

The militia constituted the instrument by which the people would exert their right of self-defense. Thomas Cooley captures this idea in his famous Commentaries:

It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. . . . [I]f the right were limited to those enrolled, the purpose of the guaranty might be defeated altogether by the action or the neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to

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VIRGINIA 1272 (1993) (statement of George Mason (June 14, 1788)).

60. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 300 (The Lawbook Exchange, Ltd. 1996) (1803) [hereinafter TUCKER, BLACKSTONE'S COMMENTARIES].

61. 3 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 61, at 414 n.3.

meet for voluntary discipline in arms, observing in so doing the laws of public order.<sup>62</sup>

Likewise, Justice Story observed:

The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. . . . The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally . . . enable the people to resist and triumph over them.<sup>63</sup>

In fact, article I, section 3 of the Virginia Constitution expressly recognizes that “whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”<sup>64</sup> This provision is conceptually linked to the provisions of article I, section 13.

As a matter of political theory, then, in the minds of late eighteenth-century Virginians, the right to bear arms was grounded in a natural law right of self-defense. Moreover, self-defense meant not only protection of the individual from danger; it also meant protection of popular sovereignty from tyrannical encroachment, and the vehicle for that protection was the citizen militia. The framers of article I, section 13 championed a natural right of individual and collective self-defense, and, for eighteenth-century Virginians, the right to bear arms was an inescapable precondition of that right.

### C. *Virginia's Ratification of the United States Constitution*

Virginia's ratification of the United States Constitution also yields some clues concerning the original public meaning of article I, section 13. Virginia's ratification was hardly a foregone conclusion. One author describes Virginia's ratification as a “cliff-

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62. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 282 (Alexis C. Angell ed., Boston, Little, Brown, & Co. 2d ed. 1891).

63. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1890 (DeCapo Press 1970) (1833).

64. VA. CONST. art. I, § 3.

hanger.”<sup>65</sup> Opponents of the national Constitution like Patrick Henry fought vigorously to defeat it.<sup>66</sup>

The debate ranged widely, but of particular importance for our purposes is the danger opponents of the national Constitution perceived from the prospect of a standing army controlled by the national government, combined with the subordination of the state militia to federal control.<sup>67</sup> The influential George Mason reminded his audience of the danger of turning control of the militia over to the national government:

An instance within the memory of some of this House, will shew us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great-Britain, the British Parliament was advised by an artful man, [Sir William Keith,] who was Governor of Pennsylvania, to disarm the people.—That it was the best and most effectual way to enslave them.—But that they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia.<sup>68</sup>

Mason warned that Congress might employ the same approach if given the opportunity: “The militia may be here destroyed by that method which has been practised in other parts of the world before. That is, by rendering them useless, by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia.”<sup>69</sup> Likewise, Patrick Henry denounced the power of Congress over the state militias, arguing, “The militia, Sir, is our ultimate safety. We can have no security without it.”<sup>70</sup> Henry articulated the prevailing understanding that

[t]he great object is, that every man be armed. . . . Every one who is able may have a gun. . . . When this power [to arm the militia] is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for sure I am, that that nation which shall trust its liberties in other hands, cannot long exist.<sup>71</sup>

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65. RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 395 (2009).

66. *Id.* at 396.

67. See 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 59, at 1271 (statement of George Mason (June 13, 1788)).

68. *Id.*

69. *Id.* at 1270.

70. *Id.* at 1276 (statement of Patrick Henry (June 14, 1788)).

71. *Id.*

Thanks in large part to the efforts of James Madison, the Virginia convention narrowly voted in favor of ratification.<sup>72</sup> Virginia, however, also urged Congress to adopt a Bill of Rights.<sup>73</sup> Among the rights Virginia asked Congress to enshrine in a Bill of Rights was the following:

That the people have a right to keep and bear arms: that a well regulated militia composed of the body of the people trained to arms, is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to and governed by the civil power.<sup>74</sup>

Although the amendment proposed by Virginia is very similar to the original draft of article I, section 13, as a reaction to Patrick Henry and George Mason's warnings, the Virginia convention added the phrase, "the people have a right to keep and bear arms."<sup>75</sup> That insertion should not come as a surprise. For more than a century, militia service for all classes of Virginians was synonymous with and inseparable from an individual right to keep and bear a firearm.<sup>76</sup>

By 1776, for more than a century and for a broad swath of Virginia's male population, militia service had meant reporting for duty with one's own firearm. This historical understanding, combined with the dominant political theory of the time, leads to the firm conclusion that article I, section 13 was included in the Virginia Declaration of Rights for two overlapping purposes: (1) to protect an individual's natural right to self-defense, and (2) by doing so, to enable society to engage in its inalienable right of collective self-defense against tyrannical encroachment via an armed militia.

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72. BEEMAN, *supra* note 66, at 395–96, 400.

73. *Id.* at 399.

74. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 59, at 1553.

75. *Id.*

76. The Militia Act of 1792 enacted by the United States Congress also reflects a link that would have existed in the minds of the founding generation between militia service and an armed citizenry. That statute enrolled every "able-bodied white male citizen," between the ages of eighteen and forty-five, in the militia, and directed members of the militia to equip themselves with, among other things, "a good musket or firelock" for service in the militia. *See* Militia Act of 1792, ch. 33, 1 Stat. 271 (1792) (repealed 1903).

## II. ARTICLE I, SECTION 13 IN MODERN VIRGINIA: CHANGING CONDITIONS AND PRESERVING ORIGINAL INTENT

Over time, several factors combined to eclipse the military function of the colonial militia and to erase the firm link that would have existed in the minds of eighteenth-century Virginians between militia service and an individual right to bear arms. These factors include congressional reform of the National Guard system, which resulted in a National Guard equipped and funded by the national government,<sup>77</sup> the unsuitability of a traditional militia to deal with the types of internal and external threats faced by the nation, and, not least, the institution of a republican form of government which is accountable to the people.

### A. *Calling up the Militia*

The use of the militia during World War II illustrates the fundamental change that had occurred between the militia of colonial times and modern application of the concept. Following the mobilization of the National Guard during World War II, Virginia Governor James H. Price invoked his statutory authority, rooted in article I, section 13, to organize a new militia force that became known as the Virginia Protective Force.<sup>78</sup> This force supported the war effort by, among other things, protecting industrial and military facilities and standing by to assist the population in the event of an emergency.<sup>79</sup> A large number of Virginians—over 400,000—enrolled in the Virginia Protective Force, freely giving their time to help protect Virginia.<sup>80</sup> Weapons for this force, however, were provided by the War Department.<sup>81</sup>

A creative invocation of article I, section 13 came in the winter of 1946, when Governor William M. Tuck invoked the Clause in a labor dispute between Virginia Electric and Power Company (“VEPCO”) and the International Brotherhood of Electrical Work-

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77. See generally *Perpich v. Dep't of Def.*, 496 U.S. 334, 340–46 (1990) (describing congressional reform of the National Guard).

78. MARVIN WILSON SCHLEGEL, *VIRGINIA ON GUARD: CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR* 35–36 (1949).

79. *Id.* at 35.

80. *Id.* at 249–51.

81. *Id.* at 38.

ers.<sup>82</sup> At that time, VEPCO served more than half of the Virginia population.<sup>83</sup> Initially, the strike threat did not attract much notice.<sup>84</sup> With no resolution in sight and the threatened strike a mere ten days away, Governor Tuck faced the prospect of shuttered schools and hospitals, as well as catastrophic loss to Virginia's economy.<sup>85</sup>

To address the looming crisis, Governor Tuck announced a bold plan rooted in three sources of authority: first, a state law required VEPCO to provide continuous service to its customers; second, his authority to call the unorganized militia into service; and third, the longstanding statute that made all able-bodied males between the ages of sixteen and sixty-five members of the unorganized militia.<sup>86</sup> Tuck ordered uniformed members of the Virginia State Guard, still in service following the end of World War II, to distribute the following notice to employees of VEPCO.<sup>87</sup>

You are hereby notified that you have been drafted by the commander-in-chief of the land and naval forces of Virginia, the Honorable William M. Tuck, Governor of Virginia, into the service of the Commonwealth to execute the law which requires the Virginia Electric and Power Company to provide electric service to the people of Virginia.<sup>88</sup>

The newly drafted militiamen were informed in a second order issued by the Governor that they would be "granted a temporary suspension of . . . active military duties so long as the Virginia Electric and Power Company is conducting operations without interruption by strike."<sup>89</sup> In the event of a strike, the inactive status of VEPCO workers would be revoked and they would be ordered to continue operating the power plants as members of the state militia.<sup>90</sup> If they refused to do so, the VEPCO employee/militia members would be "subject to the military law of Virginia, and

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82. *Id.* at 247–48.

83. William Bryan Crawley, Jr., *The Governorship of William M. Tuck, 1946–1950: Virginia Politics in the "Golden Age" of the Byrd Organization 217–18* (1974) (unpublished Ph.D. dissertation, University of Virginia) (on file at the Library of Virginia).

84. *Id.* at 219.

85. *Id.* at 219–21.

86. *Id.* at 229–30.

87. *Id.* at 227–28.

88. *Id.* at 228.

89. *Id.*

90. *Id.*



for disobedience to orders or other offenses against said law . . . are subject to such lawful punishment as a court martial may direct."<sup>91</sup> Happily, VEPCO and the union reached an agreement and, therefore, the "militiamen" were never actually pressed into active duty—and the legality of Governor Tuck's plan was never tested.<sup>92</sup> This invocation of the militia power bore little resemblance to the use of the colonial militia.

These two examples show how far the modern uses of the militia had evolved from the self-equipped militiaman of colonial times. In the popular mind, the indispensable link, so obvious to the founding generation, between militia service and a right to bear arms had become lost.

### B. *The Constitutional Revision of 1971*

Article I, section 13 was amended in 1971 as part of a comprehensive revision of the Virginia Constitution.<sup>93</sup> The committee established to revise the constitution did not propose any changes to article I, section 13.<sup>94</sup> The House of Delegates, however, suggested additional language.<sup>95</sup> Specifically, the House of Delegates proposed that the phrase "therefore, the right of the people to keep and bear arms shall not be infringed" be added to the Constitution, as follows:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, *therefore, the right of the people to keep and bear arms shall not be infringed*; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.<sup>96</sup>

The purpose of this change, constitutional debates reveal, was to align the Virginia Constitution with an individual rights read-

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91. *Id.* at 228–29.

92. *Id.* at 238. The Attorney General, however, issued an official opinion upholding the legality of the governor's actions. 1946 Op. Va. Att'y Gen. 144, 146.

93. See generally THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION (1969).

94. *Id.* at 98.

95. PROCEEDINGS AND DEBATES OF THE HOUSE OF DELEGATES, *supra* note 10, at 818–19.

96. *Id.* at 819 (emphasis added).

ing of the Second Amendment.<sup>97</sup> The Senate debate specifically referenced a 1964 joint legislative resolution embracing an individual right to bear arms.<sup>98</sup> The key passage of this resolution provides:

[T]he right to keep and bear arms guaranteed by the second amendment to the Constitution of the United States and which right is an inalienable part of our citizens' heritage in this State shall not be infringed; that any action taken by the General Assembly of Virginia to interfere with this right would strike at the basic liberty of our citizens; that no agency of this State or of any political subdivision should be given any power or seek any power which would prohibit the purchase or possession of firearms by any citizen of good standing for the purpose of personal defense, sport, recreation or other non-criminal activities; and that registration of arms, for which registration is not presently required, not be required, by legislative action of this body.<sup>99</sup>

Opposition to the amendment advanced a collective rights theory of the Clause. Senator Howell argued that article I, section 13 represents

a military guarantee in our Constitution, a guarantee that we shall have hometown soldiers that can be rendezvoused under a system of command that I think is adequate. No one thinks there is anything wrong with the Guardsmen . . . .

. . . .  
The militia is happy, the soldiers are happy, we are at peace with the soldiers, the soldiers are at peace with us. And what I want to see on page 98 of the revisors' report, that the source of Section 13 is the present Section 13; "Comment: No change."<sup>100</sup>

The amendment to add the language "therefore, the right of the people to keep and bear arms shall not be infringed" was adopted in the Senate by a vote of thirty-one in favor to one opposed—a decisive rejection of the collective rights theory by the Senate of Virginia.<sup>101</sup>

During both the House and the Senate debates on the amendment to article I, section 13, legislators questioning this change

97. *Id.* at 775 (statement of Del. Slaughter); PROCEEDINGS AND DEBATES OF THE SENATE, *supra* note 10, at 392 (statement of Sens. Barnes & Bateman).

98. PROCEEDINGS AND DEBATES OF THE SENATE, *supra* note 10, at 391–92 (statement of Sen. Barnes).

99. H.J. Res. 21, Va. Gen. Assembly (Reg. Sess. 1964).

100. PROCEEDINGS AND DEBATES OF THE SENATE, *supra* note 10, at 394 (statement of Sen. Howell).

101. *Id.* (statement of Pres. Pollard).

received assurances by proponents of the change that the added language would not impede the ability of the General Assembly to enact "reasonable" legislation with regard to firearms, and further, that the change would not threaten then existing gun legislation.<sup>102</sup>

The 1971 amendment to the language of article I, section 13 represents a reaffirmation of the original conception of the Clause as protecting an individual right to bear arms.

### C. *A Further Amendment Strengthens the Individual Rights Interpretation*

Article XI, section 4, adopted in 2001, protects a right to hunt, "subject to such regulations and restrictions as the General Assembly may prescribe by general law."<sup>103</sup> From the earliest days of the Virginia Colony, hunting has been associated with firearms.<sup>104</sup> Although article XI, section 4 expressly grants the General Assembly latitude to regulate and restrict hunting, a right to hunt without being able to possess and transport firearms outside the home would be largely devoid of meaning. Therefore, while article XI, section 4 does not serve as the principal rationale for an individual right to bear arms, it does strengthen the existing individual right, recognized by article I, section 13, to keep and bear arms.

## III. THE MILITIA LIVES ON

Virginians—men and women—may be surprised to learn that, with limited exceptions, they are, as a matter of law, members of the unorganized militia. Consistent with article I, section 13, which provides that the militia is "composed of the body of the people," current Virginia Code section 44-1 provides that

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102. PROCEEDINGS AND DEBATES OF THE HOUSE OF DELEGATES, *supra* note 10, at 473 (statement of Dels. Galland & Harrell); PROCEEDINGS AND DEBATES OF THE SENATE, *supra* note 10, at 392–94 (statements of Sens. Barnes, Bateman, & Long).

103. VA. CONST. art. XI, § 4.

104. BRUCE, *supra* note 16, at 62 (noting that "from the time [a colonial Virginian in the seventeenth century] could shoulder a fowling piece he had been in the habit of using firearms" and would have acquired "at an early age . . . all the skill of a practised marksman.").

[t]he militia of the Commonwealth of Virginia shall consist of all able-bodied residents of the Commonwealth who are citizens of the United States and all other able-bodied persons resident in the Commonwealth who have declared their intention to become citizens of the United States, who are at least 16 years of age and, except as hereinafter provided, not more than 55 years of age.<sup>105</sup>

The same Virginia Code section divides the militia into four classes: the National Guard, the Virginia State Defense Force, the naval militia, and the unorganized militia.<sup>106</sup> The “unorganized militia” consists of “all able-bodied persons as set out in section 44-1” except those serving in the National Guard, the naval militia and others who are exempt.<sup>107</sup>

The Governor has express statutory authority to call out the militia, in whole or in part, “at any time, in order to execute the law, suppress riots or insurrections, or repel invasion, or aid in any form of disaster wherein the lives or property of citizens are imperiled or may be imperiled.”<sup>108</sup> These statutes, which presently rest in tranquil hibernation in the Virginia Code, represent a direct historical legacy from the turbulent early days of our Commonwealth.

## CONCLUSION

Virginia no longer calls upon her citizens to muster for militia duty. Nevertheless, article I, section 13 remains significant because it enshrines in the Virginia Constitution an individual right to keep and bear firearms. That article I, section 13 was designed to protect an individual right rather than a collective right is manifest from the historical context of its adoption and the original public meaning that the founding generation would have attributed to the Clause. The debate surrounding the amendment to the Clause in 1971 only strengthens the conclusion that the Clause protects an individual right to keep and bear arms. Although the General Assembly can enact sensible gun control measures, the individual right to keep and bear a gun embodied in article I, section 13 imposes meaningful constraints on the power of the General Assembly to restrict the right of law-abiding citizens to keep and bear firearms.

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105. VA. CODE ANN. § 44-1 (Repl. Vol. 2013).

106. *Id.*

107. *Id.* § 44-4 (Repl. Vol. 2013). For a list of persons exempt from militia service, see *id.* § 44-5 (Repl. Vol. 2013).

108. *Id.* § 44-86 (Repl. Vol. 2013).

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