

# THE RIGHT TO CARRY YOUR GUN OUTSIDE: A SNAPSHOT HISTORY

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*There is a distant country, once united to this, where every inhabitant has in his house, as a part of his furniture, a book on law and government, to enable him to understand his colonial rights; a musket to enable him to defend those rights; and a Bible to understand and practice religion. What can hurt such a country?*

Sermon, Rev. Dr. Price, England Feb. 10, 1778<sup>1</sup>

*I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.*

Justice Thomas dissenting from refusal to grant certiorari in *Peruta v. California*, 2017<sup>2</sup>

## I

### INTRODUCTION

Two landmark Supreme Court rulings affirming the right of the people “to keep and bear arms” have failed to halt the effort to thwart that Second Amendment guarantee.<sup>3</sup> The Amendment refers to both keeping and bearing weapons.<sup>4</sup> Before *District of Columbia v. Heller* struck down the District of Columbia’s (D.C.’s) ban on handguns in the home, those who insisted the right was limited to members of a state militia contrived to sidestep that pesky word “keep.” Their ploy was to simply omit “to keep[,]” referring instead to the “bear arms” clause, which they insisted had an exclusively military meaning.<sup>5</sup> Indeed, Justice Stevens, in his dissent in *Heller*, denied that “keep” is synonymous with

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1. JOURNAL AND LETTERS OF THE LATE SAMUEL CURWEN, JUDGE OF ADMIRALTY, ETC., AN AMERICAN REFUGEE IN ENGLAND FROM 1775-1784, COMPRISING REMARKS ON THE PROMINENT MEN AND MEASURES OF THAT PERIOD. TO WHICH ARE ADDED, BIOGRAPHICAL NOTICES OF MANY AMERICAN LOYALISTS AND OTHER EMINENT PERSONS 192 (George Atkinson Ward ed., New York, C.S. Francis & Co. 1842).

2. 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting).

3. *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

4. U.S. CONST. amend. II.

5. See, e.g., *infra* note 6 and accompanying text (discussing Justice Steven’s ’dissent in *Heller*). See also generally the works of Saul Cornell, Jack Rakov, Michael Waldman.

the word “have,” claiming it is part of the idiom “keep and bear,” and concluded therefore the word has no independent significance.<sup>6</sup>

After *Heller* overturned the D.C. ban on residents keeping a gun in their home, those opposed to the individual right to keep and bear arms were forced to concede a constitutional right to “keep” a gun. Now they are intent on denying the right to bear that gun outside the home, abandoning all reference to the “bear arms” clause.<sup>7</sup> Because the D.C. ban was confined to keeping a gun in the home, they now deny “the right to bear” a gun outside the home.

At the core of the right of individuals to be armed was the understanding of the Framers that self-defense was mankind’s *most basic right*, a primary law of nature. John Locke and William Blackstone, whose legal thinking greatly influenced our Founders, were both adamant on the subject. On self-defense, Locke wrote:

Thus a thief, whom I cannot harm, but by appeal to the [civil] law, for having Stolen all that I am worth, I may kill, when he sets on me to rob me both of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable.<sup>8</sup>

William Blackstone, whose international best-seller *Commentaries on the Laws of England* was published ten years before the American Revolution, agreed:

[T]he law in this case respects the passions of the human mind; and . . . makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.<sup>9</sup>

The right of self-defense does not stop at the domestic doorstep. Nevertheless there are those who argue that Locke, Blackstone, and the American Founders circumscribed the right of self-defense in just that way. This Article addresses this latest iteration in a string of denials of a clear constitutional right: denying the right to bear a gun outside the home. In order to discredit this position, back we

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6. See *Heller*, 554 U.S. at 644–49 (Stevens, J., dissenting).

7. One example is D.C.’s attempt to prohibit carrying a gun within city limits by making virtually the entire city a gun free zone. See D.C. CODE § 22-4504 (2013). The code defines gun free zones, which enhance the penalty for illegal carry within them, as “[a]ll areas within, 1000 feet of an appropriately identified public or private day care center, elementary school, vocational school, secondary school, college, junior college, or university, or any public swimming pool, playground, video arcade, youth center, or public library, or in and around public housing . . . or in or around housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority, or an event sponsored by any of the above entities . . . .” *Id.* § 22-4502.01(a).

8. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 12 (Richard Cox ed., Harlan Davidson, Inc. 1982) (1689).

9. 3 WILLIAM BLACKSTONE, COMMENTARIES \*4.

must go through the history of firearms use and regulation in England, its transition to colonial America, and the intent of the Framers when they drafted the Second Amendment.

This Article focuses on the duty and the right to carry a gun outside the home, mindful that the right to keep and bear arms, like other rights, evolved over the centuries and included some practical restrictions. Part II examines the early English duty to be armed outside of the home. Part III focuses on the adoption of the English Bill of Rights, which codified the right of citizens to be armed outside of the home as an essential liberty. Part IV traces the rights of Americans to be armed under colonial British rule. Finally, Part V considers the drafting and adoption of the Second Amendment, which is the crucial time for understanding the scope of rights that the Amendment protects.

## II

### THE EARLY HISTORY OF THE ENGLISH DUTY TO BE ARMED OUTSIDE THE HOME

#### A. Early History and the Statute of Northampton

Maintenance of an armed population for defense of hearth, home, and realm was a long-standing English tradition. It began before the Norman Conquest and afterwards, despite the danger to the French conquerors of permitting the vanquished population to be armed, was soon reinstated, even for serfs.<sup>10</sup> As Pollack and Maitland found, “the state in its exactions pays little heed to the line between free and bond; it expects all men, not merely all freemen, to have arms; so soon as it begins to levy taxes on movables, the serfs, if they have chattels enough, must pay for [the weapons].”<sup>11</sup>

England’s reliance on an armed population was necessary for the security of its citizens. England did not have a standing army until late in the seventeenth century or a professional police force until the nineteenth century. An Englishman, therefore, had a host of peacekeeping duties. First came self-defense, regarded as *the* primary law of nature and a duty.<sup>12</sup> An Englishman was expected to defend himself and to protect his family, neighbors, and property, and was held blameless for harm done to his assailants.<sup>13</sup> In doing so, he helped

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10. See 1 SIR FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 405 (Cambridge Univ. Press 1895) (“The original Assizes of Arms (1181) contemplates only the arming of freemen; but the writ of 1252 requires that the *villani*, if rich enough, shall be armed.”).

11. *Id.*

12. English law on the right to self-defense changed during the Tudor era. While subjects were obliged to take all reasonable means to stop a crime committed in their presence or when summoned to assist a sheriff, the law had made those killing in self-defense liable to have their property confiscated until the case was settled when those found to have killed in self-defense received what became a routine pardon. This liability was changed by a statute of Henry VIII in 1532 that extended the category of justifiable homicide to include killing in self-defense. See 24 Hen. VIII c. 4.

13. See MICHAEL DALTON, *THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS* 308, 356 (London, W. Rawlins & S. Roycroft 1697).

keep the King's Peace. As a popular seventeenth-century guidebook for justices of the peace explained:

If Thieves shall come to a Man's House, to rob or murder him, he may lawfully assemble company to defend his House by force; and if he or any of his company shall kill any of them in defence of Himself, his Family, his Goods or House, This is no Felony, neither shall they forfeit any thing therefore.<sup>14</sup>

The defenders were not confined to using their weapons indoors, however.

When a serious crime occurred, villagers "ready appareled" were to raise a "hue and cry" and, under the supervision of the local constable or sheriff, pursue the culprit "from town to town, and from county to county" on "pain of grievous fine."<sup>15</sup> To protect their village, they also were required to take turns standing watch at night and ward during the day.<sup>16</sup> The watch was to be carried out by men "able of body, and sufficiently weaponed."<sup>17</sup> The use of firearms made the duty to pursue culprits more dangerous, but a bill in parliament to modify the responsibility failed and the obligation remained.

Able-bodied men of suitable age—originally sixteen to sixty, later eighteen to forty-five—also owed service in the militia to help put down riots and stop invasions.<sup>18</sup> Members of the militia needed to be armed and trained to use their weapons. Englishmen liked to boast that they were "the freest subjects under Heaven"<sup>19</sup> because, among other things, they had the right "to be guarded and defended from all violence and Force, by their own Arms, kept in their own hands, and used at their own charge under their Prince's Conduct."<sup>20</sup>

There were safety restrictions on carrying a loaded weapon in public to terrorize the king's subjects. In 1328, a period of plague and dynastic chaos, the cautionary Statute of Northampton was passed. The statute forbid anyone but the king's servants to come into his presence, or that of his justices or any other of the king's ministers doing their office, "with force and arms, nor bring no force in affray of the peace, nor to go or ride armed by night nor by day, in Fairs, Markets, . . . nor in no part elsewhere."<sup>21</sup> The aim was to forbid a firearm or other

14. *Id.* at 308.

15. JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 2–3 (1994).

16. The requirement that householders stand watch can be traced to an ordinance of 1253. The system was consolidated in the 1285 Statute of Winchester. See 1 FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 565–56 (2d ed.1968). For evidence of its enforcement beyond the seventeenth century, see RICHARD BURN, 2 *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 512 (London, Henry Lintot 1755).

17. RICHARD BURN & WILLIAM WOODFALL, 4 *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 668 (20th ed., London, A. Strahan 1805)

18. Joyce Lee Malcolm, *The Creation of a "True, Ancient, and Indubitable" Right: The English Bill of Rights and the Right to Be Armed*, 32 J. BRIT. STUD., no. 3, July 1993, at 226, 229; see also LINDSAY BOYNTON, *THE ELIZABETHAN MILITIA* 16, 91 (1967).

19. GRIFFITH WILLIAMS, *VINDICIAE REGUM; OR, THE GRAND REBELLION* 82–83 (Oxford, Henry Hall 1643).

20. *STATE TRACTS: BEING A FARTHER COLLECTION OF SEVERAL CHOICE TREATISES RELATING TO GOVERNMENT FROM THE YEAR 1660 TO 1689*, at 225 (Richard Baldwin, 1693).

21. Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.).

weapon being carried *in affray of the peace*.<sup>22</sup> The language in this nearly 700-year-old act, now resurrected by those who challenge the ability and right of English subjects to ever go about armed, has focused not on the central prohibition about brandishing weapons to terrify people, or coming before the king or his officials armed, but the phrase riding armed in “no part elsewhere.”<sup>23</sup> Although individuals occasionally were indicted for carrying arms to terrorize their neighbors, I have found no evidence that this emergency measure was ever enforced over the centuries to prevent simply carrying a weapon.<sup>24</sup> An indictment would need to assert not simply that the individual was carrying a weapon, but was doing so *in affray of the peace*, or, as William Hawkins wrote in his 1716 *Treatise of the Pleas of the Crown*, “accompanied with such circumstances as are apt to terrify the people.”<sup>25</sup>

A seventeenth-century Crown prosecution against Sir John Knight of Bristol for going armed provides a clearer view of how judges understood the Statute of Northampton. In the late seventeenth century, King James II—a Catholic—resorted to this already antique law to curtail the activities of Sir John Knight—a Bristol merchant, militant Anglican, and former sheriff—who was keen to enforce the anti-Catholic laws of the time.<sup>26</sup> In 1686, the president of the King’s Council wrote to the Bristol magistrates complaining of their attempt to enforce the laws against Catholic worship, citing Knight as “not only the informer but a busy actor in the matter by going himself to search.”<sup>27</sup> To curtail Knight’s lawful activities, the Crown hit upon the idea of charging him with wrongful use of a firearm by “creating and encouraging fears in the hearts of his Majesty’s subjects.”<sup>28</sup> Note that this charge was not for merely carrying a weapon but for terrorizing the King’s subjects. Knight was tried before the King’s Bench on the

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22. *Id.* (emphasis added). For an excellent discussion of the meaning and interpretation of the Statute of Northampton, see Stephen P. Halbrook, *Going Armed: How Common Law Distinguishes the Peaceable Bearing of Arms from Carrying Weapons to Terrorize Others*, in *A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 192, 192–93 (Jennifer Tucker et al. eds., 2019) [hereinafter *A RIGHT TO BEAR ARMS?*].

23. See, e.g., Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 *YALE L.J.F.* 120, 130 (2015).

24. See MALCOLM, *supra* note 15, at 104–05. Charles II tried to enforce this act early during the Restoration when the parliamentary army that had overturned the monarchy was being disbanded and Charles II feared riots, but no proclamations seem to have been issued to take the disbanded army’s weapons. See *id.* at 40–43.

25. See 1 WILLIAM HAWKINS, *TREATISE OF THE PLEAS OF THE CROWN; OR, A SYSTEM OF THE PRINCIPLE MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS*, ch. 28, § 9 (London, E. & R. Nutt 1716); Halbrook, *supra* note 22, at 192–93 (“[I]t was an offense under the Statute of Northampton to go or ride armed in a manner that creates an affray or terror to the subjects. It was not an offense to simply carry arms in a peaceable manner. One cannot snip off what were elements of the offense in support of a current agenda to represent the Statue of Northampton as demonstrating a historical tradition of banning all peaceable carrying of arms.”).

26. Halbrook, *supra* note 22, at 192–93.

27. The Earl of Sunderland to the Duke of Beaufort (May 1, 1686), in 2 *CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF JAMES II*, at 118 (E. K. Timings ed., 1964).

28. See Newsletter to John Fenwich, the *Swan*, Newcastle (June 10, 1686), in 2 *CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF JAMES II*, *supra* note 27, at 164.

charge that he “did walk about the streets armed with guns and that he went into the Church of St. Michael in Bristol in the time of Divine Service with a Gun to terrify the King’s Subjects.”<sup>29</sup> The Chief Justice found that “tho’ this statute be almost gone in desuetudinem [disuse], yet where the crime shall appear to be malo animo [with evil intent], it will come within the Act (tho’ now there be a general connivance to gentlemen to ride armed for their security).”<sup>30</sup> After due deliberation, the jury acquitted Knight: while Knight had gone into a church service with a gun, he was not guilty of going armed with evil intent to terrify the King’s subjects, which was a key element in the statute.<sup>31</sup> The King’s Bench was not prepared to approve the use of this statute to disarm law-abiding citizens, even those who displeased the King by enforcing laws against Catholics. Further, the judge noted that prosecution under the Statute of Northampton was, by the seventeenth century, almost unheard of.<sup>32</sup>

## B. Ownership Restrictions from the Tudor Monarchs to the English Bill of Rights

Until the English Civil War in 1642, the restrictions on ownership of weapons were few and not especially onerous. An act of Henry VIII in 1541 had aimed to limit ownership and use of two concealable weapons frequently employed in crime: the handgun and the crossbow.<sup>33</sup> The Act’s preamble complained of the use of handguns and crossbows by robbers and noted with regret that enthusiasm for firearms had led “divers gentlemen, yeomen and servingmen . . . [to] have laid apart the good and laudable exercise of the long-bow, which always heretofore hath been the surety, safeguard and continual defence of this realm of England, and an inestimable dread and terror to the enemies of the same.”<sup>34</sup> The law restricted the use of crossbows and handguns to persons with a yearly income from land of at least 100 pounds, except in a time of war or in going to and from musters.<sup>35</sup> Despite Henry’s preference for the long bow, firearms had become the weapon of choice of other royal armies and laymen. Bowing to reality, Henry encouraged practice with the new weapons, although no gun was to be shot within a quarter mile of a city, borough, or market-town unless at a target or in defense of one’s house or person.<sup>36</sup>

These restrictions on handguns and crossbows have been mischaracterized as limiting firearms to the wealthy.<sup>37</sup> Not so; the law was careful to specify that not only gentlemen, but yeomen, servingmen, the inhabitants of cities, boroughs, market-towns, and those living outside of towns could “have and keep in every

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29. See *Rex v. Knight* (1686) 87 Eng. Rep. 75, 76 (KB) (Eng.); Halbrook, *supra* note 22, at 192.

30. Halbrook, *supra* note 22, at 192.

31. See *id.*

32. *Id.*

33. An Act Concerning Crossbows and Handguns 1541, 33 Hen. 8, c. 6, § 1 (Eng.).

34. *Id.*

35. *Id.*

36. See *id.*

37. See, e.g., LOIS G. SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND 171 (2016).

of their houses any such handgun or handguns, of the length of one whole yard” for target shooting.<sup>38</sup> Henry’s aim was to ensure that shooting practice would enable all gun owners “to better aid and assist to the defence of this realm, when need shall require.”<sup>39</sup> Need it be said that target shooting or traveling with what would today be considered a long gun was not an indoor activity. Of course, in addition to target shooting, it was necessary to go outside to participate in a hue and cry, militia musters, keeping watch on the road, or for personal protection and other business.

In the reign of Henry’s heir, Edward VI, a law banned the use of small pellets in guns—then referred to as “hail shot”—as dangerous to life and limb and destructive of wildlife.<sup>40</sup> The crimes of possessing a handgun when not qualified to do so or of using hail shot were misdemeanors usually punished by loss of the weapon in question or a fine. In some instances, as in the 1621 case of a Nottinghamshire laborer found guilty of using hail shot, the defendant was fined twenty shilling and bound “not to shoot again for seven years.”<sup>41</sup>

The Tudor monarchs were uneasy about the widespread availability of firearms and there were at least two attempts to monitor or control them. In 1553, Edward VI ordered “all persons who shoot guns” to register their names with the local justice of the peace.<sup>42</sup> By the early seventeenth century though, a popular guide for justices of the peace took note of the 1553 requirement to “quaere if this be now in use.”<sup>43</sup> The judge seriously doubted whether that law was still in force. In 1569, Elizabeth’s Privy Council proposed that the government, rather than the members of the militia, store militia firearms.<sup>44</sup> The idea aroused widespread opposition from local officials and was withdrawn.<sup>45</sup> When guns for the militia were in short supply, the officials of Kent suggested less, not more, government control, and advocated unlimited use of guns for hunting.<sup>46</sup>

The public was free to have and use weapons, but there was no *right* to have them until passage of the English Bill of Rights in 1688–89.<sup>47</sup> Until then, the government always had the power to disarm an individual or class of individuals it considered dangerous to the peace of the realm. Since the English Reformation of the sixteenth century, Catholics were regarded as potential subversives and suffered a variety of civil liabilities because the Pope had urged them to

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38. 33 Hen. 8 c. 6.

39. *Id.*

40. 2 & 3 Edw. 6 c. 14.

41. NOTTINGHAM COUNTY RECORDS, NOTES AND EXTRACTS FROM THE NOTTINGHAMSHIRE COUNTRY RECORDS OF THE SEVENTEENTH CENTURY 92 (Henry Hampton Copnall ed., 1915).

42. C. G. CRUICKSHANK, *ELIZABETH’S ARMY* 111 (2d ed., Oxford Univ. Press 1966) (1946).

43. *Id.*

44. *Id.*

45. *See id.* at 111.

46. *See* Order of June 19, 1569, in 14 *CALENDAR OF STATE PAPERS, DOMESTIC SERIES, ELIZABETH, ADDENDA, 1566-1579*, at 78–81 (Mary Anne Everett Green ed., London, 1871); *see generally* CRUICKSHANK, *supra* note 42, at 110–13.

47. Malcolm, *supra* note 18, at 229.

overthrow the Protestant monarchy. They were assessed for militia weapons but not always permitted to keep them in their homes although, like other subjects, they were presumed to have weapons for their self-defense.<sup>48</sup> It was stockpiling arms, not guns for personal defense, that aroused suspicion.<sup>49</sup>

### C. The Privilege to Keep Arms and Game Laws

A game law passed in 1671 was the first law in English history that took the privilege of having firearms from Englishmen.<sup>50</sup> This law was ostensibly to guard the hunting prerogative of the landed class against poachers by imposing a property qualification upon items used in hunting, which for the first time included guns.<sup>51</sup> While limitations of space preclude a detailed discussion of the history of the game acts here, the 1671 act was enforced by private gamekeepers, not justices, and, in practice, prosecutions occurred only when there was evidence of poaching.<sup>52</sup> However, guns were omitted from the game act passed in the reign of Queen Anne and all subsequent game laws. Joseph Chitty, an expert on game law, wrote of the omission: “We find that guns which were expressly mentioned in the former acts were purposely omitted . . . because it might be attended with great inconvenience to render the mere possession of a gun *prima facie* evidence of its being kept for an unlawful purpose.”<sup>53</sup>

A case before the King’s Bench in 1739, *Rex v. Gardner*, clarifies not only the omission of guns from the list of proscribed items in the game acts but also acknowledges that ordinary people needed guns for purposes both inside and outside their homes.<sup>54</sup> The defendant had been convicted by a justice of the peace of keeping a gun contrary to the 1706 act.<sup>55</sup> There was no evidence that the gun in question had been wrongfully used. But it was argued that, because the term

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48. MALCOLM, *supra* note 15, at 11; *see also* J.R. JONES, *THE REVOLUTION OF 1688 IN ENGLAND (REVOLUTIONS IN THE MODERN WORLD)* 77 (1973). Much has been made of the restrictions on Catholics, but by the mid-seventeenth century, members of the faith constituted a relatively small portion of the English population, probably no more than one in fifty.

49. *See id.*

50. *See* An Act for the better Preservation of the Game, and for Securing Warrens not Inclosed, and for the several Fishings of this Realm, 22 & 23 Car. II, c. 25 (1671).

51. For a full discussion of the game laws and the elimination of guns from the list of prohibited items, *see* MALCOLM, *supra* note 15, at 11–15, 86–92, 126–29.

52. *See* BURN & WOODFALL, *supra* note 17, at 443 (recounting a case in which a conviction for unlawful possession of a firearm, as merely possessing a gun did not show an intent to use the gun for poaching).

53. JOSEPH CHITTY, *A TREATISE ON THE GAME LAWS, AND ON FISHERIES; WITH AN APPENDIX CONTAINING ALL THE STATUTES, AND A COPIOUS COLLECTION OF PRECEDENTS* 83 (2d ed., London, S. Brooke 1826) (1812).

54. *See* BURN & WOODFALL, *supra* note 17, at 442–43 (“And tho’ a gun may be used in destroying game, and when it is so, doth then fall with the words of the act; yet as it is an instrument proper, and frequently necessary to be kept and used for other purposes . . . it is not the having a gun, without applying it to the destruction of game that is prohibited by the act.”).

55. JOHN STRANGE, *2 REPORTS OF ADJUDGED CASES IN THE COURTS OF CHANCER, KING’S BENCH, COMMON PLEAS AND EXECHEQUER, FROM TRINITY TERM IN THE SECOND YEAR OF KING GEORGE I. TO TRINITY TERM IN THE TWENTY-FIRST YEAR OF KING GEORGE II.*, at 1098 (London, H. Lintot 1755).

“gun” was mentioned and considered to be an “engine” in the earlier game act of 1671, the term “other engines” in the act of 1706 should be taken to include a gun.<sup>56</sup> The defense objected:

[T]hat a gun is not mentioned in the statute [of 1706], and though there may be many things for the bare keeping of which a man may be convicted, [] they are only such as can only be used for destruction of the game, whereas a gun is necessary for defence of a house, or for a farmer to shoot crows.<sup>57</sup>

The court agreed with the defense.<sup>58</sup> When a similar case arose a few years later, the court was not only adamant that guns were not illegal per se but also amazed that anyone should think that they were, writing: “It is not to be imagined, that it was the Intention of the Legislature, in making the [1706 game act] to disarm all the people.”<sup>59</sup> These decisions demonstrate that ordinary people could lawfully keep guns for their private use. The courts mentioned no bans on carrying them or laws limiting their possession to the militia. If a gun was carried without threatening others, it was legal to carry it.

In following this chronology, we have gotten ahead of ourselves. From 1641 through 1646, the English Crown and Parliament were engaged in a violent civil war during which the King, Charles I, periodically summoned the local militia only to disarm its members.<sup>60</sup> Charles lost the war and was executed in 1649, after which those members of Parliament still sitting governed the country. In 1653, Oliver Cromwell, a leading general, ejected the governing Parliament members and made himself the Lord Protector. After this republic of sorts collapsed in 1660, the monarchy was restored. Charles II, son of Charles I, was understandably careful to monitor and disarm his father’s political opponents.<sup>61</sup> When his brother and successor James II, a Catholic, disarmed large numbers of the justices of the peace and other country leaders, dismissed hundreds of town burgesses from their posts, and relied upon a standing army instead of the citizen militia, his popularity plummeted. As we have seen, James’s efforts to resurrect ancient gun laws to disarm opponents failed.

In 1688, James’s son-in-law, William of Orange, and his daughter, Mary, were invited by a group of nobles to come to England and rescue the Protestant religion and the rights of the people.<sup>62</sup> James fled after his army deserted him, while William was acclaimed and summoned a convention parliament. Only a king could summon a regular parliament. Its members were keen to protect their rights and proceeded to draft a Declaration of Rights to secure those liberties

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56. *Id.*

57. *Id.*

58. *See id.*

59. JOSEPH SAYER, REPORTS OF CASES ADJUDGED IN THE COURT OF KING’S BENCH, BEGINNING MICHAELMAS TERM, 25 GEO. 2, ENDING TRINITY TERM, 29 & 30 GEO. 2. 15–17 (London, W. Strahan & M. Woodfall 1775).

60. JOYCE LEE MALCOLM, CAESAR’S DUE: LOYALTY AND KING CHARLES, 1642–1646, at 45, 48, 50, 68, 86–87 (1983); *see* MALCOLM, *supra* note 15, at 19.

61. *See* MALCOLM, *supra* note 15, at 44–52.

62. *See* LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 11 (1981).

James had particularly threatened.<sup>63</sup> All of the liberties secured were described as “true, ancient, and indubitable” although some were not so indubitable.<sup>64</sup> Among them was the right to be armed: “That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.”<sup>65</sup> This right became part of the English Bill of Rights in 1689 as William and Mary ascended to the throne.

### III

#### THE ENGLISH *RIGHT* TO BE ARMED

While the language of the English right to be armed states that Protestant subjects—then about ninety percent of the population—could have arms for their defense, the final cautionary clauses read “according to their Conditions” and “as allowed by law.”<sup>66</sup> Their “Conditions” referred to the firearm holder’s social class—which meant that upper class individuals who kept large numbers of firearms would avoid arousing suspicion, while poorer individuals who amassed a sizeable arsenal would be suspected of plotting an insurrection. After the passage of the Bill of Rights, most justices of the peace seem to have shied away from using the Game Act of 1671 to disarm poachers and, as noted above, subsequent game acts removed guns from the list of prohibited devices.<sup>67</sup>

As the eighteenth century progressed, the general right of Protestants and other subjects to have and carry weapons became increasingly explicit, and the view that armed citizens were a check on tyranny became orthodox opinion. In 1765, William Blackstone, in his classic work *Commentaries on the Laws of England*, a best-seller frequently cited by the Founders, set the stamp of approval upon the need for citizens to be armed for self-defense and liberty.<sup>68</sup> After listing the rights of Englishmen in the first of four volumes, Blackstone wrote:

But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.<sup>69</sup>

Blackstone also wrote that “[t]o vindicate these rights, when actually violated or attacked,” English subjects were entitled “in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the

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63. *See id.* at 16–17.

64. *Id.*

65. The English Bill of Rights 1689, 1 W. & M., c. 2, § 7.

66. *Id.*

67. *See supra* Part II.

68. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES \*136–40.

69. *Id.* at \*136.

right of having and using arms for self-preservation and defence.”<sup>70</sup> This last right, he explained:

[I]s that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law . . . and is, indeed, a publick allowance under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.<sup>71</sup>

The right to be armed was to ensure the individual’s “self-preservation” and “defence” against the violence of oppression, whether that oppression came from a personal assault or governmental tyranny.

Late eighteenth and early nineteenth century legal opinions clarify the right of individuals to be armed for private and public purposes and demonstrate how the right was understood at the time of the American founding. Twenty years after Blackstone pointed out the purpose of the right, the Recorder of London, the city’s legal advisor, was asked about the legitimacy of armed volunteer groups. He responded:

The right of his majesty’s Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses, *individually*, may, and in many cases *must* be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and the ancient acts of parliament, as well as by reason and common sense.<sup>72</sup>

Further clarity came in the case of *Rex v. Dewhurst*, which dealt with a group protesting the recent Peterloo Massacre of 1819, when a large peaceful crowd demonstrating against the corn laws and demanding parliamentary reform was attacked and fired upon after they refused to disperse.<sup>73</sup> Justice Bayley heard the case of the leaders of this second protest, which included George Dewhurst. In his summation, the Justice addressed the meaning of the vague final clauses of the arms article in the English Bill of Rights: “But are arms suitable to the condition of people in the ordinary class of life,” he asked, “and are they allowed by law?”<sup>74</sup> He answered: “[A] man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business.”<sup>75</sup> Justice Bayley explained weapons could even be carried to a public meeting, with one exception: “You have no right to carry arms to a

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70. *See id.* at \*140.

71. *Id.* at \*139.

72. WILLIAM BLIZARD, *DESULTORY REFLECTION ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS* 59–60 (London, Dilly 1785) (emphasis added for “to have arms for their own defence”).

73. *See generally* *Rex. V. Dewhurst*, 1 State Trials, N.S. 529 (1820) (Eng.).

74. *Id.* at 601.

75. *Id.* at 601–02.

public meeting, if the number of arms which are so carried are calculated to produce terror and alarm.”<sup>76</sup>

In sum, the right to carry a gun outside the home was clear as long as the intent was not to terrorize others. When you protected yourself, you were helping to preserve the King’s Peace. Justice Bayley’s understanding of the right to carry a weapon, as well as that of the Recorder of London, is in direct conflict with sweeping assertions by other historians, such as Saul Cornell, that “[t]here was no traditional right of peaceable armed travel under Anglo-American law.”<sup>77</sup> The Recorder of London was writing six years before the ratification of our Bill of Rights and Justice Bayley some thirty years afterward. Both legal experts had no doubt of the right for ordinary people to be armed for their defense including “peaceable armed travel.”

#### IV

#### CARRYING GUNS IN EARLY AMERICA

Why does the English right matter to Americans? It is key to our right because every colonial charter promised settlers to the New World that they and their descendants would have all the rights of Englishmen, as if born and abiding in England. It was these rights that the Revolutionary War was fought to preserve. After 1689, these rights included the rights incorporated in the English Bill of Rights.

The dangers of life in the American wilderness made the English practice of an armed citizenry essential. In many colonies, all householders were ordered to be armed.<sup>78</sup> A 1625 law of Plymouth colony, for example, stipulated that:

[I]n regard of our dispersion so far asunder and the inconvenience that may befall, it is further ordered that every freeman or other inhabitant of this colony provide for himself and each under him able to beare armes a sufficient musket and other serviceable peece for war . . . with what speede may be.<sup>79</sup>

A similar 1640 Virginia statute required “all masters of families” to furnish themselves and “all those of their families which shall be capable of arms (excepting negroes) with arms both offensive and defensive.”<sup>80</sup> Some colonial laws actually required residents to carry their guns. A Newport law of 1639

76. *Id.* at 602.

77. Saul Cornell, *Limits on Armed Travel under Anglo-American Law: Change and Continuity Over the Constitutional Longue Dureé, 1688–1868*, in *A RIGHT TO BEAR ARMS?*, *supra* note 22, at 85.

78. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 215 (1983) (describing the militia system and stating “[w]ith slight variations, the different colonies imposed a duty to keep arms and to muster for drill upon virtually every able-bodied white man” between the ages of 16 to 60).

79. THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH: TOGETHER WITH THE CHARTER OF THE COUNCIL AT PLYMOUTH, AND AN APPENDIX, CONTAINING THE ARTICLES OF CONFEDERATION AND OTHER VALUABLE DOCUMENTS 31 (Boston, Dutton & Wentworth 1836).

80. THE OLD DOMINION IN THE SEVENTEENTH CENTURY: A DOCUMENTARY HISTORY OF VIRGINIA, 1606-1700, at 172 (Warren M. Billings ed., Univ. of N.C. Press 2007) (1975). This was the first act to distinguish enslaved individuals.

provided that “noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon.”<sup>81</sup> Virginia laws required “that no man go or send abroad without a sufficient partie well armed,” and “that men go not to worke in the ground without their arms (and a centinell upon them).”<sup>82</sup> They further specified that “all men that are fittinge to beare armes, shall bring their pieces to the church upon payne of every offence, if the mayster allow not thereof to pay 2lb of tobacco.”<sup>83</sup>

These early laws were needed in a dangerous new land, but even after these dangers had largely abated, laws requiring firearm ownership continued to be passed. For instance, Connecticut’s revised militia act, which was enacted a century after the previously discussed laws, still ordered *all* citizens, both “listed” soldiers of the militia and every other householder, to “always be provided with and have in continual readiness, a well-fixed firelock . . . or other good fire-arms . . . one pound of good powder, four pounds of bullets fit for his gun, and twelve flints.”<sup>84</sup> In 1770, five years before the American Revolution, Georgia felt it necessary “for the better security of the inhabitants” to require every white male resident “to carry firearms to places of public worship,” to defend themselves “from internal dangers and insurrections.”<sup>85</sup> Whether the threat came from slaves, foreigners, or Native Americans, the means of defense was an armed citizenry. There was *never* a ban on taking a gun outside; on the contrary, in many instances (as discussed above), taking a gun outside was mandatory. Ordinary precautions that limited storage of gunpowder, shooting guns in crowded areas, or carrying a weapon to terrify others were put in place, but the emphasis was on the duty to be armed and a freer use of private firearms than existed in England.<sup>86</sup> This was true even in the aftermath of insurrection. For example, an act passed in 1676, after Bacon’s Rebellion against the colonial administration in Virginia, forbade five or more armed persons to assemble without authorization, but was careful to affirm that “liberty [was] granted to all persons to carry their arms wheresoever they go.”<sup>87</sup>

The story of the increasing tensions between George III, the British Parliament, and the American colonies is well known, but two points are worth mentioning. First, the militia acts of 1757 and 1763 permitted British lords,

81. 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 94 (John Russell Bartlett ed., Providence, A. Crawford Greene & Bros. 1856).

82. 1 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 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823).

83. *Id.* at 174.

84. 8 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM OCTOBER, 1735, TO OCTOBER, 1743, INCLUSIVE 380 (Charles J. Hoadly ed., Hartford, Lockwood & Brainard Co. 1874).

85. 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137–39 (Allen D. Candler ed., Atlanta, Chas. P. Byrd 1911).

86. The Statute of Northampton was invoked in America only when the firearm or other weapon was used to terrify the public, not for peacefully carrying a gun. *See* Halbrook, *supra* note 22, at 193–95.

87. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 59 (1984).

lieutenants, and their deputies to seize and remove the weapons, clothes, and accoutrements of the colonial militia whenever those officers “adjudge[d] it necessary to the Peace of the Kingdom,” and permitted the Crown to mobilize the American colonial militia “in case of actual invasion . . . or in case of rebellion” and place it under the officers of the British army.<sup>88</sup> In short, the commander of the British Army in America, General Thomas Gage, was entitled to vast powers over the colonial militia, including the power to disarm it at his discretion.

Colonists, upset at the idea of being governed by a professional army, began to look to their own defenses. By 1769, citizens of Boston were “calling upon one another to [be] provided with arms.”<sup>89</sup> In response to charges that this was seditious behavior, the *Boston Evening Post*, a newspaper widely printed throughout the colonies, replied:

For it is certainly beyond human art and sophistry to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law required them to be equip’d with Arms, etc. are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs.<sup>90</sup>

A subsequent newspaper article cited the English Bill of Rights, natural law, and William Blackstone as proof of the individual’s right to have firearms:

It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.<sup>91</sup>

During the trial of the soldiers who shot Boston civilians hurling various missiles at them and shouting death threats—the so-called Boston Massacre—both John Adams, who was defending the soldiers, and the Crown prosecutors referred to the right of Bostonians to arm themselves in their defense.<sup>92</sup>

After the Declaration of Independence required the states to draft their own constitutions, nine included the right of citizens to bear arms in defense of themselves and the state.<sup>93</sup> There is no record during this period and during the drafting and ratification of the Second Amendment of anyone denying the right of individuals to be armed for their self-defense or forbidding them to carry

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88. See 7 THE STATUTES AT LARGE, FROM MAGNA CHARTA TO THE TWENTY-FIFTH YEAR OF THE REIGN OF KING GEORGE THE THIRD, INCLUSIVE 171, 383–403, 467–69 (Owen Ruffhead & Charles Runnington eds., London, C. Eyre & A. Strahan 1786); 2 CHARLES MATTHEW CLODE, THE MILITARY FORCES OF THE CROWN: THEIR ADMINISTRATION AND GOVERNMENT 42 (London, J. Murray 1869).

89. BOSTON UNDER MILITARY RULE, 1768–1769, AS REVEALED IN A JOURNAL OF THE TIMES 61 (Oliver Morton Dickerson ed., 1936).

90. *Id.*

91. *Id.* at 42.

92. See STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 24–25 (2008) (detailing how the prosecution, defense, and the press all stated that Bostonians had the right to arm themselves for self-defense).

93. See *id.* at 25.

weapons to protect themselves outside the home.<sup>94</sup> Nor did anyone suggest the government, whether state or national, should have exclusive control of weapons. Quite the contrary. *The Federal Gazette, and Philadelphia Evening Post* of Thursday, June 18, 1789, in a report which was also reprinted in New York and Boston, explained the purpose of the newly drafted article that became the Second Amendment:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed . . . in their right to keep and bear their private arms.<sup>95</sup>

In 1790, while amendments in the Bill of Rights awaited ratification, Washington sent Congress a proposal that would authorize the government to arm all those enrolled in the militia.<sup>96</sup> Instead, Congress crafted its own bill requiring each male citizen to arm himself and participate in the militia.<sup>97</sup> Congress even rejected a proposed amendment that the government arm those who could not afford to arm themselves. One Congress member was fearful of “giving the general government a power of disarming part of the militia, by ordering the arms and accoutrements by them lent, to be returned.”<sup>98</sup> Another member was anxious the government “would then have the power of disarming the militia[,]” composed of the male population.<sup>99</sup>

## V

### CONCLUSION

The Second Amendment language became the center of a heated debate in the mid-twentieth century with claims being made that it only protected a collective right of militia members, not individuals. The core meaning was not addressed by the Supreme Court until *District of Columbia v. Heller* in 2008.<sup>100</sup> In this landmark decision, the Court affirmed the individual right to keep and bear those weapons in common use for self-defense and other lawful purposes.<sup>101</sup> That right was not dependent on service in the militia.<sup>102</sup> Two years later, in *McDonald v. City of Chicago*, the Court incorporated the Second Amendment throughout

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94. Note that when any state prosecuted someone with the Statute of Northampton, it was not for simply carrying a weapon but for carrying it to terrorize the public. *See generally* *State v. Huntly*, 25 N.C. 418 (1843) (stating that the defendant was accused of carrying weapons with a declared purpose and intent to “beat, wound, kill and murder” endangering the peace of the State “to the terror of the people”).

95. A Pennsylvanian, *Remarks on the first part of the Amendments to the Federal Constitution, moved on the 8th instant in the House of Representatives*, FED. GAZETTE & PHILA. EVENING POST, Jun. 18, 1789, at 2, reprinted in N.Y. PACKET, June 23, 1789, at 2 cols. 1–2, and BOS. CENTENNIAL, July 4, 1789 at 2 col. 1.

96. *See* HALBROOK, *supra* note 92, at 300.

97. *See id.* at 301.

98. *Id.* at 303.

99. *Id.*

100. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

101. *See id.* at 635.

102. *See id.* at 622.

the country.<sup>103</sup> Although those who continue to argue that there is no right to bear arms act as if the Court neglected that topic,<sup>104</sup> the Justices in *Heller* carefully parsed every word in the Amendment, including the meaning and scope of “to bear.”<sup>105</sup>

Justice Stevens argued that, because the word “to” in the Second Amendment is not included before “bear” but is used in the First Amendment before “petition,” the Second Amendment establishes a unitary—that is military—meaning of “to keep and bear.”<sup>106</sup> Justice Scalia, in response, scoffed:

We have never heard of the proposition that omitting repetition of the “to” causes two verbs with different meanings to become one. A promise “to support and to defend the Constitution of the United States” is not a whit different from a promise “to support and defend the Constitution of the United States.”<sup>107</sup>

As for “to bear arms,” Scalia pointed out it merely means “to carry,” as the Court found in *Muscarello v. United States*.<sup>108</sup> Justice Ginsburg wrote in that opinion:

Surely a most familiar meaning is, as the Constitution’s Second Amendment . . . indicate[s]: “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”<sup>109</sup>

Justice Ginsburg apparently found it expedient to revise her interpretation of the meaning of “to bear” when joining Stevens’ dissent in *Heller*.<sup>110</sup>

A wealth of historical evidence for the individual right to keep and bear arms is cited in *Heller*.<sup>111</sup> While Scalia, writing for the majority, did not include evidence from the Second Amendment’s drafting, it would have supported that conclusion.<sup>112</sup>

103. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

104. Examples of such actions are those taken in the District of Columbia and Chicago after their gun control laws were found unconstitutional in *Heller* and *McDonald*, respectively. See Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 456 (2015); *Chicago’s New Gun Law Goes into Effect Today*, CHI. TRIB. (July 12, 2010), <https://www.chicagotribune.com/news/ct-bn-xpm-2010-07-12-28515317-story.html> [<https://perma.cc/F45K-LMF2>]; Joyce Lee Malcolm, *Will the Right to Bear Arms become a “Constitutional Orphan”?*, LAW & LIBERTY ONLINE (Feb. 5, 2019), <https://lawliberty.org/will-the-right-to-bear-arms-become-a-constitutional-orphan/> [<https://perma.cc/3PKP-9WN3>].

105. See *Heller*, 554 U.S. at 576–620.

106. See *id.* at 646–52.

107. *Id.* at 591 n.141 (Stevens, J., dissenting).

108. *Id.* at 584.

109. *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J. dissenting) (quoting BLACK’S LAW DICTIONARY 214 (6th ed. 1990)). The question before the Court was whether the fact that guns were found in a locked glove compartment, or the trunk of a car, precluded the application of 18 U.S.C. § 924(c)(1) (2006), which imposed a five-year mandatory prison term upon a person who “use[d] or carrie[d] a firearm” during and in relation to a “drug trafficking crime.” *Heller*, 554 U.S. at 584.

110. See *Heller*, 554 U.S. at 636–80 (Stevens, J., dissenting).

111. See, e.g., *id.* at 583 n.7.

112. For details of the evidence from the drafting of the Second Amendment, see MALCOLM, *supra* note 15, at 159–64; Joyce Lee Malcolm, *The Supreme Court and the Uses of History: District of Columbia v. Heller*, 56 UCLA L. REV. 1377, 1391–93 (2009).

In *McDonald v. City of Chicago*, the Supreme Court struck down a Chicago ban on residents owning and keeping guns in their homes, a statute virtually identical to the D.C. ban at issue in *Heller*, and incorporated the Second Amendment throughout the country.<sup>113</sup> In both cities, the homicide rates increased after imposition of those bans. Alito, writing for the majority, pointed out that the standard for incorporation of the Second Amendment is “whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.”<sup>114</sup> “Our decision in *Heller*,” he stressed, “points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the *central component*’ of the Second Amendment right” and that the right “is most acute” in the home.<sup>115</sup> Justice Alito, examining the background to the Second Amendment, pointed out that both Antifederalists and Federalists “alike agreed that the right to bear arms was fundamental to the newly formed system of government.”<sup>116</sup>

State constitutional provisions enacted immediately following both the passage of the Second Amendment and federal legislative actions after the Civil War support this fundamental understanding of the right to bear arms outside the home. Between 1789 and 1820, thirteen states adopted state constitutional provisions protecting an individual right to keep and bear arms;<sup>117</sup> a right St. George Tucker described as “the true palladium of liberty” such that “prohibitions on the right would place liberty ‘on the brink of destruction.’”<sup>118</sup> After the Civil War, Congress discussed the need to ensure freed slaves their rights as citizens. The Freedmen’s Bureau Act of 1866 declared that freed slaves would have “full and equal benefit of all laws and proceedings concerning personal liberty . . . including the constitutional right to bear arms” which “shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery.”<sup>119</sup> Section 14 of that statute “explicitly guaranteed that ‘all the citizens,’ black and white, would have ‘the constitutional right to bear arms.’”<sup>120</sup> The Civil Rights Act of 1866, considered at the same time as the Freedmen’s Bureau Act, also sought to protect the right of “all citizens to keep and bear arms.”<sup>121</sup> In a speech addressing the disarmament of freedmen, Representative Stevens warned: “Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away

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113. 561 U.S. 742, 791 (2010).

114. *Id.* at 764.

115. *Id.* at 767.

116. *Id.* at 769.

117. *See id.*

118. *Id.* (quoting 1 BLACKSTONE’S COMMENTARIES \*300 (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803)).

119. *Id.* at 773 (quoting The Freedmen’s Bureau Act of 1866, ch. 200, 14 Stat. 173, 176–77 (1866)).

120. *Id.* (quoting The Freedmen’s Bureau Act of 1866, ch. 200, 14 Stat. 173, 176–77 (1866)).

121. *Id.*

the inalienable right to defending liberty.”<sup>122</sup> Sadly, historians such as Saul Cornell, who ignore all the evidence they find inconvenient, have forgotten that, while historians are entitled to their own opinions, they are not entitled to their own facts.<sup>123</sup> It is long past time for opponents to accept that verdict of the Supreme Court and move on.

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122. *Id.* at 776.

123. *See, e.g.*, MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 58 (2015); Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688–1868*, 83 *LAW & CONTEMP. PROBS.*, no. 3, 2020, at 73.