

# THE RIGHT TO KEEP AND CARRY ARMS IN ANGLO-AMERICAN LAW: PRESERVING LIBERTY AND KEEPING THE PEACE

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## I INTRODUCTION

On the final day of its 2008 term, a sharply divided United States Supreme Court issued a five to four decision in *District of Columbia v. Heller*.<sup>1</sup> Reversing almost seventy years of settled precedent that linked the meaning of the “right of the people to keep and bear arms” with the preservation of a “well-regulated militia,”<sup>2</sup> *Heller* interpreted the Second Amendment as an individual right to possess a weapon for self-defense outside of the context of service in a well-regulated militia.<sup>3</sup> Justice Scalia’s majority opinion surveyed a broad range of historical materials,<sup>4</sup> but it approached the past as if it were static, when in fact Anglo-American history in this period was not only dynamic, but many areas of law underwent profound transformation.<sup>5</sup> Prior to *Heller*, there had been relatively little scholarship on the scope of this pre-existing right. Most of the

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

2. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); Cass Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

3. *Heller*, 554 U.S. at 635.

4. *See id.* at 582–615 (referring to sources from the 1700s to post–Civil War legislation).

5. The Court had last dealt with the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939), in which it ruled that because shotguns with barrels less than eighteen inches in length had no relationship to a well-regulated militia, the Second Amendment did not guarantee a right to keep and bear such firearms. For examples of scholarly reactions to *Heller*, see THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER (Saul Cornell & Nathan Kozuskanich eds., 2013) (providing a series of academic responses to the decision). On the transformation of Anglo-American law in this period, see JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION (2011).

legal scholarship on the Second Amendment prior to *Heller* simply ignored the problem of historical change entirely.<sup>6</sup> Yet, during the interval between 1688 and the next century and a half, Anglo-American law underwent profound transformation, which had far reaching consequences for law, including the meaning of the right to keep and bear arms.<sup>7</sup> Recognizing the importance of change over time, the essence of any truly historical account, is not simply important to correct the historical record, *Heller's* holding makes history central to the future of Second Amendment jurisprudence. “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment,” the majority wrote “nothing in our opinion should be taken to cast doubt on longstanding prohibitions.”<sup>8</sup> Thus, according to *Heller*, establishing a legitimate historical pedigree for gun regulation has become one key to determining if a restriction is presumptively lawful under *Heller's* framework. This article analyzes a neglected area of Second Amendment scholarship: the role of common law restrictions on the scope of keeping and bearing arms in the period between the Glorious Revolution (1688) and the Early American Republic (1800–1835).

## II

### *HELLER'S HISTORICAL PARADOX*

Although *Heller* posited a static pre-existing English right that had become fixed by the time of the Glorious Revolution, the half century following the Glorious Revolution witnessed a number of important changes in the way the law addressed arms. At the dawn of the eighteenth century the scope of the right to have arms and the meaning of self-defense under English law was quite narrow. Indeed, it would be more accurate to describe the right of self-defense as an exemption from prosecution, not a positive rights claim in the modern sense.<sup>9</sup> The English Declaration of Rights affirmed the right of Protestants to have arms suitable to their condition, as the law allowed, but it did not sanction the use of deadly force in most circumstances and did not even imply a right to own a gun in most situations.<sup>10</sup> What the law did do was acknowledge that one could not be prosecuted for homicide in self-defense. To effectuate this claim, one might use whatever weapons one was legally entitled to possess. The right to keep and use arms was limited by class and religion and subject to extensive Parliamentary

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6. See Sanford Levinson, *United States: Assessing Heller*, 7 INT'L J. CONST. L. 316 (2009) at 326; Sunstein, *supra* note 2.

7. *Heller*, 554 U.S. 570. *Heller* relied on the work of English historian Joyce Lee Malcolm, JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1996). For critiques of Malcolm's history, see LOIS SCHWOERER, *GUN CULTURE IN EARLY MODERN ENGLAND* 169 (2016); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why it Matters*, 64 CLEV. ST. L. REV. 373 (2016).

8. *Heller*, 554 U.S. at 592, 626.

9. Daryl A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 89–90.

10. *Infra* Part III.

regulation. Over the course of the next half century, English courts used common law methods of legal interpretation and expanded the scope of this right, eventually recognizing that ownership of a gun in the home for reasons of self-defense was legal. Although *Heller* mistakenly attributed this legal proposition to the English Declaration of Rights of 1688,<sup>11</sup> the right of self-defense had evolved under common law in the half century following the Glorious Revolution.

The scope of the right to carry arms in public, by contrast, remained narrowly defined and limited to a range of specific situations defined by common law and statute. In particular, the right to travel armed for reasons of self-defense was always balanced against the need to preserve the King's Peace. The preservation of the peace trumped the right to have arms in most circumstances.<sup>12</sup>

The American Revolution may have republicanized this legal tradition, but it did not break with it immediately in a number of key areas. Even after the adoption of new state constitutions, some of which affirmed the right to keep and bear arms, the scope of the right was still shaped by the common law tradition, including the necessity of preserving the peace. In the decades after the American Revolution, what had been a single English common law tradition splintered, producing different regional regulatory regimes. By the middle of the antebellum era in parts of the slave South a permissive regime regarding the open carry of arms gained traction. In other parts of the South, civic republican ideas continued to constrain the scope of the right. Finally, starting in New England and spreading across the nation a more restrictive view of public carry evolved.

The primary bodies of sources consulted for this study are the popular legal guidebooks written for justices of the peace that proliferated in the 150 years following the Glorious Revolution.<sup>13</sup> These texts provide some of the best accounts of popular understandings of Anglo-American legal principles in this period.<sup>14</sup> Written for justices of the peace, constables, and coroners, these guides were addressed to an audience with no formal legal training.<sup>15</sup> Their authors summarized the common understanding of the law and often included boilerplate examples of common legal writs and other useful documents.<sup>16</sup> In many parts of the Anglo-American world, including rural England and the settler societies of the Atlantic world, there were relatively few persons formally trained in the law, so it is hardly surprising that this genre of legal texts became extremely popular.<sup>17</sup>

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11. *Heller*, 554 U.S. at 593.

12. *Infra* Part VI.

13. See Larry M. Boyer, *The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History*, 34 Q.J. LIBR. CONG. 315 (1977) (discussing the importance of popular guide books in England and America).

14. *Id.*

15. *Id.*

16. *Id.*

17. See John A. Conley, *Doing it by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257 (1985). For an illustration of how these texts shaped legal culture in the colonies, see Alfred Brophy, "For the Preservation of the King's Peace and Justice":

The popularity of these texts also reflects the important role that justices of the peace played in keeping the peace in Anglo-American communities on both sides of the Atlantic. Many of these texts went through multiple editions over the course of the next century and a half, making them an excellent source for tracking the changing meaning of legal concepts over time.<sup>18</sup> The proliferation of these books did not cease after the American Revolution. Indeed, the need for them multiplied because each state in the new American Republic had to grapple with its own unique relationship to the evolution of the common law. By the middle of the antebellum era, the common English legal heritage had become differentiated into distinctive regional legal cultures.<sup>19</sup> Although popular legal guidebooks have occasionally been cited in recent Second Amendment scholarship, the use of these texts has been highly selective and impressionistic.<sup>20</sup> Looking at these sources in a more systematic fashion reveals a process of change far more complex than previous accounts have suggested.<sup>21</sup>

An understanding of the evolving nature of the right to keep and carry arms is not only essential to implementing *Heller's* historical framework, but it may also offer insight into how to resolve some of the contradictions and jurisprudential problems created by the opinion.<sup>22</sup> In his dissent, Justice Breyer suggested a balancing model that Justice Scalia dismissed as incompatible with the original understanding of the right to keep and bear arms. But it turns out that Breyer and Scalia's divergent approaches may not have been legally incompatible in the Founding era.<sup>23</sup> Something analogous to a balancing exercise was fundamental to the way Anglo-American law dealt with arms throughout this period.<sup>24</sup> The liberty interest associated with the right to arms was always balanced against the concept of the peace.<sup>25</sup> If an individual's exercise of this right threatened the peace, individuals could be disarmed, imprisoned, and forced to provide a peace bond.<sup>26</sup> The American Revolution republicanized the concept of the King's Peace by transmuting it into the people's peace, but the Revolution

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*Community and English Law in Sussex County, Pennsylvania, 1682–1696*, 40 AM. J. LEGAL HIST. 167 (1996).

18. See *infra* Parts IV–VII.

19. *Infra* Part IX.

20. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009). See also David Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y (2016) (using justice of the peace manuals in an impressionistic manner and reading them anachronistically by failing to recognize that early modern English criminal law had no modern mens rea requirement for establishing criminal intent); cf. GUYORA BINDER, CRIMINAL LAW 139–42 (2016).

21. See *infra* Bibliography (listing the texts consulted for this essay).

22. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012) (explaining that lower courts have been applying a form of intermediate scrutiny that entails some aspects of balancing).

23. See *District of Columbia v. Heller*, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting) (calling for use of a balancing test and arguing that “there simply is no untouchable constitutional right to keep loaded handguns in the house in crime-ridden urban areas.”).

24. *Infra* Part VI.

25. *Infra* Part VI.

26. *Infra* Part VI.

did not repudiate the centrality of the balancing process used to determine if armed travel violated the peace.<sup>27</sup>

### III

#### ARMS SUITABLE TO THEIR CONDITION AND AS ALLOWED BY LAW

The English Declaration of Rights (1688) affirmed: “[t]hat the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.”<sup>28</sup> Although Blackstone described this as the fifth auxiliary right, a protection of English liberty, his discussion underscores the limited nature of this claim, which he described as “a public 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>29</sup> Blackstone’s elaboration of the right makes it clear that its inclusion in the Declaration of Rights did not limit Parliament’s authority over arms in any way.<sup>30</sup> In fact, the formulation of the right reasserted Parliament’s plenary power to legislate on matters pertaining to arms and, when necessary, restrict this right in a manner consistent with its nearly unlimited powers to protect the peace and promote public safety.<sup>31</sup> Perhaps the best illustration of how the scope of this right was understood in the period immediately after the Glorious Revolution is Parliament’s debate over a revision to the Game Laws in 1692. The game laws, which regulated hunting, had imposed stiff penalties on the possession of guns for those who failed to meet the property requirements imposed by the acts. The House of Commons considered and rejected by a two to one majority a rider to the act that would have allowed “any Protestant to keep a Musquet in his House, notwithstanding this or any other act.”<sup>32</sup> The reaction of the House of Lords was no less negative, it quashed the idea as too radical because it tended to “arm the mob.”<sup>33</sup>

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27. See LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009) (examining the evolution of post-Revolution judicial systems and their focus on maintaining peace).

28. 1 W. & M. 2, ch. 2 (1689).

29. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*139. Blackstone describes such rights as follows: “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 barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.”

30. *Id.*

31. On Parliamentary power in this period, see DAVID J. LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* (1989).

32. 10 H.C. JOUR., 1688-93, at 823-24 (1802); BRITISH HISTORY ONLINE, <http://www.british-history.ac.uk/commons-jrnl/vol10/pp823-824> [https://perma.cc/TPF9-3X97] (last accessed Oct. 17, 2016).

33. See Patrick J. Charles, “*Arms for Their Defence*”? *An Historical, Legal and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351, 403 (2009) (noting the lack of a pre-existing right to “having arms”); Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI. KENT L. REV. 27, 35 (2000) (discussing the failed effort to amend the game laws to allow subjects to keep

The game laws not only limited who might keep arms, they also placed limits on who could travel armed and in what manner.<sup>34</sup> As the game laws make clear, the pre-existing English Right embodied in the Declaration of Rights did not encompass a claim to possess guns if one failed to meet the property requirements imposed by the game acts.<sup>35</sup> Instead, the Declaration of Rights assumed that the scope of the right of self-defense was extremely narrow, amounting to little more than an exemption from prosecution should one need to defend oneself against a deadly assault.<sup>36</sup> Thus, one might use any weapon legally possessed but not demand any particular weapon to exercise this right.<sup>37</sup>

One of the most prolific popularizers of the law in the period after the Glorious Revolution was Giles Jacob, who authored a popular legal dictionary and several general guides to the law.<sup>38</sup> Jacob helped expand popular legal writing as a genre. He summarized the general rule for self-defense concisely: “there must be an unavoidable Necessity for Self-preservation to making killing justifiable.”<sup>39</sup> Individuals were obliged to retreat, not stand their ground.<sup>40</sup> William Blackstone endorsed this view later in the century, when he wrote:

[T]his right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible means of escaping from his assailant.<sup>41</sup>

William Hawkins, another influential English legal commentator in the first half of the eighteenth-century, underscored the way in which the exercise of this right was exceedingly sensitive to the time and place in which an assault occurred.

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arms).

34. For examples of the various game acts, *THE GAME LAW: OR, A COLLECTION OF THE LAWS AND STATUTES MADE FOR THE PRESERVATION OF THE GAME OF THIS KINGDOM* 13, 36 (5th ed. 1714).

35. See WILLIAM NELSON, *THE LAWS OF ENGLAND CONCERNING THE GAME OF HUNTING, HAWKING, FISHING, AND FOWLING*, 167–77 (2d ed. 1727),

36. For an elaboration of this point, see Miller, *supra* note 9, at 89–90.

37. Although the maxim that “when the law doth give anything to any man, it giveth also, impliedly, whatsoever is necessary for the taking and enjoying of the same” might seem to apply to specific arms, this rule must be read against the Declaration of Rights’ affirmation that subjects were only entitled to “arms suitable to their condition” and the game laws property requirements for owning firearms. For this and other relevant maxims, see *THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY* 321 (1749).

38. On its role in expanding the genre of popular legal writing, see Julia Rudolph, *That “Blunderbuss of Law”*: Giles Jacob, *Abridgement, and Print Culture*, 37 *STUD. EIGHTEENTH CENTURY CULTURE* 197 (2008).

39. On the limited scope of self-defense under English law at this moment in history, see GILES JACOB, *THE LAWS OF APPEALS AND MURDER* 46 (1719). See also MATHEW HALE, *PLEAS TO THE CROWN* (1707); WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* (1716).

40. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*184. See also GILES JACOB, *A LAW GRAMMAR; OR RUDIMENTS OF THE LAW: COMPILED FROM THE GROUNDS, PRINCIPLES, MAXIMS, TERMS, WORDS OF ART, RULES, AND MOOT-POINTS OF OUR LAW* 22 (1744) (explaining that deadly force was justified in the case of sudden attack where there was no opportunity to retreat).

41. 4 BLACKSTONE, *supra* note 40, at \*184.

In his influential treatise, *Pleas to the Crown*, he wrote:

[I]n all these Cases, there ought to be a Distinction between an Assault in the Highway and an Assault in a Town; for in the first Case it is said, That the Person assaulted may justify killing the other without giving back at all: But that in the second Case, he ought to retreat as far as he can without apparently hazarding his Life, in respect of the Probability of getting Assistance.<sup>42</sup>

Modern rights claims are typically not context dependent, even if they may be subject to reasonable time, place, and manner restrictions.<sup>43</sup> Self-defense under English common law was almost the opposite of a modern rights claim. The right could only be claimed under specific circumstances that were determined by the time, place, and manner of the threat.<sup>44</sup> The burden of proof was on the subject, not the crown, to show that deadly force had been justified because retreat and the opportunity to seek assistance were impossible. Violent confrontation did not justify the use of deadly force. Subjects were required to retreat rather than stand their ground in most circumstances<sup>45</sup>

A different set of rules applied to confrontations in the home where there was no duty to retreat. It was a well-established maxim under common law that there was no duty to retreat from an attack in the home.<sup>46</sup> Yet, even this cherished principle of common law, the castle doctrine, was bounded and context sensitive. Deadly force was not justified in every case of trespass; a mere trespass at night might justify deadly force while a similar act in the day would not.<sup>47</sup>

One of the most important changes in English law regarding self-defense was a slow and gradual recognition that keeping a gun in the home enjoyed some measure of legal protection.<sup>48</sup> At the end of the seventeenth century there was no right to own firearms under English law. The English Declaration of Rights acknowledged that access to firearms could be limited by class and religion. The various game acts specified with great precision the amount of property required to make owning a firearm legal. Gradually, over the course of the eighteenth century, English courts began reinterpreting the game laws using common law methods of interpretation, eventually concluding that that the mere presence of

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42. HAWKINS, *supra* note 39, at 73.

43. For a discussion of time, place, and manner restrictions in the context of modern First Amendment doctrine, see *Cox v. New Hampshire*, 312 U.S. 569 (1941).

44. JACOB, *supra* note 40, at 21–22.

45. HAWKINS, *supra* note 39, at 73.

46. JACOB, *supra* note 39, at 46–48.

47. *Id.*

48. See *Rex v. Gardner*, 93 Eng. Rep. 1056 (K.B. 1739) (holding that simply possessing a gun is permissible because “a gun is necessary for defence of a house, or for a farmer to shoot crows”); *Wingfield v. Stratford*, 96 Eng. Rep. 787 (K.B. 1752) (reinterpreting the game laws, the King’s Bench concluded that they were not supposed “to disarm all the people of England”). Joyce Lee Malcolm erroneously accepts the court’s historical conclusion at face value and reads the new conception of gun rights backwards in time to 1688. See MALCOLM, *supra* note 7. The court’s conclusion is better interpreted as an example of a style of common law legal reasoning that historian John Reid dubs forensic history. See John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193 (1993). English lawyers essentially constructed a new version of the past to justify legal change, preserving the appearance that the law was fixed.

a gun in a home was no longer per se evidence of an attempt to illegally take game.<sup>49</sup> Further, courts finally acknowledged that there might be other legitimate and legal uses for guns, most notably pest control and home defense.<sup>50</sup> Although English courts articulated this legal doctrine by the end of the 1730s, this new, more robust understanding of the law took some time to permeate English legal culture. Popular guides to the law did not start to reflect the new understanding until the 1750s.<sup>51</sup>

#### IV

#### NO MAN, GREAT OR SMALL, SHALL GO OR RIDE ARMED: THE STATUTE OF NORTHAMPTON

One of the most significant constraints on armed travel was the Statute of Northampton (1328) enacted during the reign of Edward III. The act declared that all individuals, regardless of their station, were bound to “bring no force in affray of the peace, nor to go nor ride armed by night nor by day.”<sup>52</sup> The statute also provided a means of enforcement. Agents of the King could arrest violators who would be obliged “to forfeit their armour to the King, and their bodies to prison at the King’s pleasure.” The language of the Statute of Northampton was often included, or paraphrased in the texts of the various Royal Peace Commissions issued by Edward III enjoining localities to keep the peace of the realm. In 1361 Parliament created the office of justice of the peace, and endowed it with broad powers to enforce law and order.<sup>53</sup>

The legal authority to enforce the Statute of Northampton became one of the many powers associated with the office of the justice of the peace. Writing over two hundred years after the office of the justice of the peace was created, the influential Elizabethan lawyer William Lambarde underscored this point in his popular legal text *Eirenarcha*. Lambarde’s gloss on the Statute of Northampton was also copied nearly verbatim into another legal text he authored, *The Duties of Constables*: “[I]f any person whatsoever shall be so bold, as to go, or ride armed, by night, or by day, in Faires, Markets, or any other places: then any Constable, or any other of the saide Officers, may take such Armour from him,

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49. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

50. *See Rex*, 93 Eng. Rep. at 1056.

51. The evidence also suggests that changes in case law did not immediately translate into new treatments in the standard guides to the law. *See* RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 468 (2d ed. 1756) (demonstrating that there was a lag time between the cases and their incorporation in popular legal guidebooks).

52. Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.); 20 Rich. 2, c. 1 (1396-97) (Eng.).

53. On the historical origins of the Statute of Northampton, see A. MUSSON & W. M. ORMROD, *THE EVOLUTION OF ENGLISH JUSTICE: LAW, POLITICS AND SOCIETY IN THE FOURTEENTH CENTURY* (1998) and Anthony Verduyn, *The Politics of Law and Order during the Early Years of Edward III*, 108 ENG. HIST. REV. 842 (1993). On the role of justices of the peace in the maintenance of law in order in early modern England, see STEVE HINDLE, *THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, 1550-1640* 66-93 (2000) and A.J. MUSSON, *Sub-Keepers and Constables: The Role of Local Officials in Keeping the Peace in Fourteenth-Century England*, 117 ENG. HIST. REV. 1 (2002).



for the Queenes use, & may also commit him to the Gaole.”<sup>54</sup> The text of the Statute of Northampton and glosses on its main provisions were frequently reprinted in both elite and popular legal guides over the next century.<sup>55</sup> Another measure of its pervasiveness may be found in the writings of Whig theorist James Tyrell, who cited it in his influential defense of the Glorious Revolution *Bibliotheca Politica*.<sup>56</sup> A conservative Whig, Tyrell sought to defend the Glorious Revolution, but also aimed to blunt the most radical and potentially destabilizing arguments about the right of revolution being bandied about in public debate.<sup>57</sup> Although Tyrell conceded that there was a limited right “to take up Arms” in response to “illegal Violence,” he was emphatic that this did not sanction traveling armed under normal circumstances.<sup>58</sup> To substantiate this claim, Tyrell cited the Statute of Northampton, reading it as imposing a broad general prohibition on armed travel. Thus, Tyrell wrote it was a crime “so much as to ride or go arm’d as may appear in the Statute of *Northampton*.”<sup>59</sup>

The City of London enacted its own local ordinance limiting armed travel that drew on the language of the Statute of Northampton. London’s prohibition was equally sweeping: “no one, of whatever condition he be, go armed in the said city or in the suburbs, or carry arms by day or night.”<sup>60</sup> A decade after the adoption of the English Declaration, the force of this restriction was evidenced by a complaint published in a London paper that reported “that several Persons not Qualified by the Laws of this Realm, to carry Arms, have nevertheless in contempt and Violation of the Law, taken on them to Ride and Go Armed.”<sup>61</sup>

Legal commentators, both in popular justice of the peace manuals and learned treatises, treated the Statute of Northampton as a foundational principle for enforcing the peace.<sup>62</sup> Writing at the close of the eighteenth century, the

54. WILLIAM LAMBARDE, *THE DUTIES OF CONSTABLES, BORSHOLDERS, TYTHINGMEN, AND SUCH OTHER LOW AND LAY MINISTERS OF THE PEACE* 6–14 (1602). On Lambarde’s influence, see Wilfrid Prest, *William Lambarde, Elizabethan Law Reform, and Early Stuart Politics*, 34 J. BRIT. STUD. 464 (1995). Lambarde copied this passage verbatim into *THE DUTIES OF CONSTABLES* (1602). Gun rights scholar Joyce Lee Malcolm erroneously claims that the statute fell into desuetude, see MALCOLM, *supra* note 7. For arguments showing that this was not the case, see Charles, *supra* note 7, at 393.

55. See MALCOLM, *supra* note 7, at 104.

56. JAMES TYRELL, *BIBLIOTHECA POLITICA: OR AN ENQUIRY INTO THE ANCIENT CONSTITUTION OF THE ENGLISH GOVERNMENT BOTH IN RESPECT TO THE JUST EXTENT OF REGAL POWER, AND THE RIGHTS AND LIBERTIES OF THE SUBJECT* 639 (1694).

57. According to historian Martyn Thompson, Tyrell played a key role in popularizing Locke’s ideas in the 1690s. Martyn Thompson, *The Reception of Locke’s Two Treatises of Government 1690–1705*, 24 POL. STUD. 184 (1976). For a brief but lucid discussion of Tyrell’s relevance to early Whig political theory, see Tim Harris, *James II, the Glorious Revolution, and the Destiny of Britain*, 51 HIST. J. 763, 768 (2008).

58. See TYRELL, *supra* note 56, at 639.

59. *Id.*

60. JOHN CARPENTER & RICHARD WHITINGTON, *LIBER ALBUS: THE WHITE BOOK OF THE CITY OF LONDON* 335 (Henry Thomas Riley trans., 1862).

61. *THE POST BOY* (London), Dec. 21, 1699, at 1; see also SAMUEL BLACKERBY, *THE JUSTICE OF PEACE HIS COMPANION* 4 (1715).

62. For a sample of texts making this argument, see JACOB, *supra* note 40, at 426 (citing Hawkins and Blackstone for authority on this proposition and treating the prohibition on traveling armed embodied in the Statute of Northampton separately from the related common law crime of affray);

author of *The Grammar of English Law*, echoed this account by confidently asserting that “no man, great or small, shall go or ride armed, by night or by day, with dangerous or unusual weapons, terrifying the good people of the land.”<sup>63</sup> J.P. Gent’s *A New Guide for Constables* (1705) averred that the Statute of Northampton prohibited riding or going “armed offensively” before the “King’s Justices” or in “Fairs or Markets.”<sup>64</sup> Additionally, Joseph Keble, author of another popular guide to the law, warned that if anyone was so “bold as to go or ride Armed, by night or day, in Fairs, Markets, or any other places,” constables could disarm him and “commit him to the Goal.”<sup>65</sup>

Another formulation of the prohibition on armed travel described it in terms of traveling with “offensive arms,” a category that encompassed but was not restricted to firearms. Although a firearm was always an offensive weapon under English law, other items in certain circumstances could fit this legal definition.<sup>66</sup> The infamous Black Act (1723), which punished poachers, and several of the acts passed against smuggling in the eighteenth-century referred to “firearms and other offensive weapons.”<sup>67</sup> *The Complete Dictionary of Arts and Sciences* (1764) defined firearms as the quintessential offensive weapons in the eyes of the law: “GUN, fire-arm, a weapon of offense. . . .”<sup>68</sup> Defensive weapons were understood in traditional terms, such as shields and armor.<sup>69</sup> Under English law, a gun was always an offensive weapon.<sup>70</sup>

Another common formulation of the prohibition on armed travel described the crime in terms of traveling with “dangerous or unusual weapons.”<sup>71</sup> Hawkins, in his influential *Pleas to the Crown*, chose a slightly different way to describe the same principle. He noted that the prohibition extended to arming with “dangerous and unusual weapons.”<sup>72</sup> All of these legal formulations aimed to

LAMBARDE, *supra* note 54, at 6–14.

63. JACOB, *supra* note 40, at 426; *see also* MICHAEL DALTON, THE COUNTRY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 30 (1618) (providing a similar account).

64. J.P. GENT, A NEW GUIDE FOR CONSTABLES, HEAD-BOROUGHES, TYTHINGMEN, CHURCHWARDENS 13 (1705) (clearly distinguished between being offensively armed and the crime of affray). *See also*, BURN, *supra* note 51.

65. JOSEPH KEBLE, AN ASSISTANCE TO JUSTICES OF THE PEACE, FOR THE EASIER PERFORMANCE OF THEIR DUTY 147, 224 (1683).

66. JELLINGER SYMONS, EXCISE LAWS ABRIDGED, AND DIGESTED UNDER THEIR PROPER HEADS, IN ALPHABETICAL ORDER (2d ed. 1775); *see also*, E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975) (describing Parliament’s effort to punish poachers).

67. THOMPSON, *supra* note 66 (describing Parliament’s effort to punish poachers).

68. THE COMPLETE DICTIONARY OF ARTS AND SCIENCES (1764); THOMAS WALTER WILLIAMS, THE WHOLE LAW RELATIVE TO THE DUTY AND OFFICE OF A JUSTICE OF THE PEACE: COMPRISING ALSO THE AUTHORITY OF PARISH OFFICERS (1793). *See also* HAWKINS, *supra* note 39.

69. CHARLES JAMES, A NEW AND ENLARGED MILITARY DICTIONARY (1805).

70. For evidence of the way English law treated guns, *see* the sources cited *supra* notes 61–67.

71. ROBERT GARDINER, THE COMPLETE CONSTABLE 9 (1724).

72. 4 BLACKSTONE, *supra* note 40, at \*148–49 (1803).

achieve the same goal: limit armed travel in public, particularly in populous areas.<sup>73</sup>

Concealable weapons posed a different set of problems from the Statute of Northampton as this Elizabethan era statute makes clear:

Actes of Parliament remaining of force, which included the tenets of the Statute of Northampton to prohibit the carrying of Dagges, Pistolles, and such like, not only in Cities and Townes, [but] in all partes of the Realme in common high[ways], whereby her Majesties good qu[i]et people, desirous to live in peaceable manner, are in feare and danger of their lives.<sup>74</sup>

Given that concealable weapons were culturally associated with furtive motives, it was only natural that English law categorically prohibited travel with them. Joseph Keble, author of the influential 1689 *Justice of the Peace Manual*, reiterated this prohibition on “Dag[ge]s and Pistols,” instructing peace officers to arrest any who traveled armed with these types of weapons.<sup>75</sup> Localities, most notably the city of London, enacted their own specific bans on traveling armed with concealed weapons. London law prohibited traveling “by Night or by Day” with a “Hand-Gun, having therewith Powder and Match.”<sup>76</sup>

## V

### EXEMPTIONS TO THE STATUTE OF NORTHAMPTON’S PROHIBITION ON ARMED TRAVEL

The Statute of Northampton had three distinctive components: the common law crime of affray, a ban on coming armed before the King’s representatives, and a prohibition on armed travel in populous areas.<sup>77</sup> Determining if one’s actions constituted an affray was context dependent. The ban on appearing armed before the King’s representatives and armed travel in populous areas were categorical prohibitions. A number of interpretive canons were also associated

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73. Modern gun rights advocates and libertarians have interpreted this text anachronistically, arguing that weapons had to be both unusual and dangerous to trigger the prohibition. *See* discussion *supra* note 20. This interpretation is flawed on many levels. Early modern English often used “hendiadys,” a grammatical form in which a single idea is expressed by the use of two nouns linked by the conjunction “and.” For a brief discussion, see CHRIS BALDICK, *THE OXFORD DICTIONARY OF LITERARY TERMS* 151 (3d ed., 2008); GENT, *supra* note 64 (arming offensively was a crime, making the act of carrying arms dangerous and therefore unusual); Samuel L. Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys In The Constitution* 102 VA. L. REV. 687 (2016) (arguing for interpreting “necessary and proper” and “cruel and unusual” each as expressing a singular idea despite their conjunction of two terms).

74. BY THE QUEENNE ELIZABETH I: A PROCLAMATION AGAINST THE COMMON USE OF DAGGES, HANDGUNNES, HARQUEBUZES, CALLIUERS, AND COTES OF DEFENCE 1 (Christopher Barker, London 1579) (internal quotations omitted).

75. *Id.* *See also* GENT, *supra* note 64 (describing the Statute of Northampton’s prohibition of going “armed offensively” before the “King’s Justices” or in “Fairs or Markets”).

76. WILLIAM BOHUN, *PRIVILEGIA LONDINI: OR, THE LAWS, CUSTOMS, AND PRIVILEGES OF THE CITY OF LONDON* 110 (1702).

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

with the Statute of Northampton and these were frequently included in popular legal guides and learned commentaries.<sup>78</sup>

Charles James, author of *A New and Enlarged Military Dictionary*, summarized the common law crime of affray as follows: “By the common law, it is an offence for persons to go or ride armed with dangerous weapons.”<sup>79</sup> Sir Edward Coke’s formulation of this crime was widely copied by the compilers of popular legal guidebooks in the eighteenth century.<sup>80</sup> “*Effrayer*, which signifieth to terrifie, or bring fear; and which the Law understandeth to be a common wrong.”<sup>81</sup> As with most crimes in this period of English history, proof of actual intent to do harm was not required. Instead, the intent could be inferred from the illegal act itself.<sup>82</sup> In the 1689 edition of his *Justice of the Peace* manual, Joseph Keble offered a lucid account of why armed travel violated the King’s peace irrespective of any specific malicious intent:

Yet may an Affray be, without word or blow given; as if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike a fear upon others that be not armed as he is; and therefore both the Statutes of Northampton made against wearing Armour, do speak of it. . . .<sup>83</sup>

Another *Justice of the Peace* manual written in 1769 echoed Keble’s view that the mere act of arming oneself created an asymmetry of power between the individual armed and those unarmed, a situation that caused terror to the people.<sup>84</sup> Like previous commentators on the Statute of Northampton, the author noted that the act of riding armed was the crime that created a terror to the people, not a specific intent to terrorize.<sup>85</sup>

78. BURN, *supra* note 51, at 13.

79. CHARLES JAMES, *A NEW AND ENLARGED MILITARY DICTIONARY* (1805); *see also* Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.). On the common law crime of affray, *see* 4 BLACKSTONE, *supra* note 40, at \*148–49 (1803); HAWKINS, *supra* note 39, at 135–36.

80. In his account of the Statute of Northampton, gun rights activist David Kopel casts Tyrell as a modern libertarian who defended an expansive right to travel armed, a characterization that is almost the mirror image of what Tyrell actually argues in the text. Kopel, *supra* note 20. *Contra* Charles, *supra* note 33 (providing an extensive critique of Kopel’s interpretation).

81. MICHAEL DALTON, *THE COUNTRY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS* 30 (1618) (providing a similar account).

82. As Simon Stern notes regarding Blackstone’s treatment of the concept of *mens rea* “Hence a modern reader might expect to find, in Blackstone’s account, some discussion of acts versus intentions, attempts versus completed offenses, and civil versus criminal proof standards, among other topics. That Blackstone pursues these subjects only tangentially and intermittently may be explained by the relatively scant attention devoted to them in the treatises and cases he had at his disposal. It was only in the nineteenth century, in a body of theoretical literature (and with the aid of an analytical method) facilitated to some extent by Blackstone’s model, that many of these distinctions came into visibility.” Simon Stern, *Blackstone’s Criminal Law: Common-Law Harmonization and Legislative Reform*, in *FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW* 61 (Markus D. Dubber ed., 2014).

83. KEBLE, *supra* note 65, at 147. *See also* Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.), 20 Rich. 2, c. 1 (1396-97) (Eng.) (explaining why the mere act of traveling with an arm triggered an affray irrespective of any particular threatening act or intent to commit a crime).

84. JOHN WARD, *THE LAW OF A JUSTICE OF PEACE AND PARISH OFFICER* 6–7 (1769) (Describing that when a man furnishes “weapons not usually worn, it may strike a fear into others unarmed”).

85. Keble and Ward each articulated the standard view that there was no legal requirement need to demonstrate a specific intent to cause terror because of asymmetrical nature of the encounter between

All of the English legal guides enumerated a clear list of exemptions from the general prohibition on traveling armed imposed by the Statute of Northampton.<sup>86</sup> It would hardly have been necessary for legal guidebooks to set out such a list if there had been a broad general right to travel armed in public. Among the most important exceptions were cases in which subjects assisted in the lawful suppression of violence, crime, riot, or revolt.<sup>87</sup> Hawkins' *Pleas to the Crown* made it clear that, arming to "suppress rioters, rebels, and enemies" or assist officers of the crown, was not subject to the restrictions imposed by the Statute of Northampton.<sup>88</sup> Indeed, in this situation arming oneself was as much a civic obligation as it was a right. During the 1780 Gordon Riots in London, the Recorder of London, the city's chief lawyer, described this hybrid right-obligation in forceful terms:

It seems, indeed, to be considered, by the ancient laws of this kingdom, not only 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.<sup>89</sup>

The duty to assist agents of the Crown did not by itself justify owning a gun.<sup>90</sup> The obligation merely meant one had to assist with whatever weapons one was legally entitled to possess.<sup>91</sup> Although in extraordinary circumstances individuals might respond on their own to deal with one of these violations of the King's peace, contemporary guidebooks underscored the fact that it was always better to await a summons by representative of the law before unilaterally arming oneself and traveling to provide assistance to restore the King's peace.<sup>92</sup> If there had been a broad and well-recognized right to travel armed in public, the advice

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an individual armed and one unarmed.

86. See DALTON, *supra* note 63, at 30; GILES JACOB, A NEW LAW-DICTIONARY (1729); KEBLE, *supra* note 65, at 147, 224; JOHN MILTON NILES, THE CONNECTICUT CIVIL OFFICER 12 (1823) (demonstrating the continuity in English legal views on the limited nature of the right to travel armed in the period between the Glorious Revolution and the American Revolution); WARD, *supra* note 84, at 6–7.

87. WILLIAM HAWKINS, A SUMMARY OF THE CROWN-LAW BY WAY OF ABRIDGMENT OF SERJEANT HAWKINS'S PLEAS OF THE CROWN 155–63 (1728).

88. *Id.*

89. WILLIAM BLIZARD, DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS 59–60 (1785). Joyce Lee Malcolm erroneously interprets this passage as asserting a broad individual right to have arms for personal protection, see MALCOLM, *supra* note 7. Malcolm takes this well-known exception to the general prohibition to be the norm under English law, one of many errors in her analysis. The Gordon Riots do not demonstrate a broad right to have arms or travel armed public, but quite the opposite. For an opposing view, see SCHWOERER, *supra* note 7.

90. Until the middle of the eighteenth century, the restrictions of the game laws would have prohibited firearms ownership to those who failed to meet the property requirement. Those individuals who failed to meet this requirement would have been expected to show up with appropriate weapons to the station, either edged weapons or clubs.

91. Statute of Winchester, 1 Statutes of the Realm 26 1235–1377 (1275). "The needs of home defence were met by the enforcement of obligations under the Statute of Winchester (1285) which required all able-bodied males to carry arms in accordance with their station in life." Ian W. Archer, *The Burden of Taxation on Sixteenth-Century London* 44 HIST. J. 599, 620 (2001).

92. JOSEPH SHAW, THE PRACTICAL JUSTICE OF THE PEACE 81 (1728).

proffered by this guidebook would have made little sense. As one legal text put it: “the safest Way is to be armed in Assistance of the King’s Officers or Ministers of Justice.”<sup>93</sup>

English law expressly forbid arming oneself in response to a specific impending threat.<sup>94</sup> There was broad agreement on this rule. “A Man cannot excuse the wearing of such Armour in Publick, by alleging that such a one threatened him, and that he wears it for the Safety of his Person from Assault.”<sup>95</sup> The appropriate legal response was not to arm oneself. Instead one was required to ensure that a representative of the law, typically a justice of the peace, enforce the peace.

Timothy Dalton’s discussion of this important common law method of enforcing the peace, *Surety of the Peace*, explained how representatives of the King’s peace and ordinary citizens might seek out a peace bond to prevent or punish individuals who might violate the Statute of Northampton:

All such as shall go or ride armed (offensively) in Fairs, Markets, or elsewhere; or shall wear or carry any guns, dags or pistols charged . . . any Constable, seeing this, may arrest them, and may carry them before the Justice of the Peace, and the Justice may bind them to the peace. . . .<sup>96</sup>

Further, Dalton echoed the view that one might not justify arming oneself because one had been threatened. “[Y]ea, though those Persons were so armed or weaponed for their defense upon any private quarrel,” did not excuse arming oneself which “strikeeth a fear and terror into the King’s subjects.”<sup>97</sup> Rather than encourage individuals to arm themselves in response to such threats, English law required individuals to seek out a magistrate, justice of the peace, or constable and have the aggressor disarmed and placed under a peace bond. If one had reason to fear violence, the correct response was to seek out a representative of the King’s justice.<sup>98</sup>

## VI

### ARMED TRAVEL AS A REBUKE TO THE KING’S PEACE AND MAJESTY

It is also important to recognize that affray was a crime against the King’s peace. Justices of the peace, constables, and sheriffs, had broad discretion and latitude to arrest, disarm, or require a peace bond for those who threatened the King’s peace. Indeed, any individual within a community might approach a justice of the peace with evidence that a particular person posed a threat to public safety and impose a peace bond or even have the person disarmed and jailed.<sup>99</sup> Dalton’s *Country Justice* confidently asserted that any who “shall go or ride

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93. *Id.*

94. HAWKINS, *supra* note 87, at 155–63 (1728).

95. *Id.*

96. DALTON, *supra* note 63, at 264.

97. *Id.*

98. SHAW, *supra* note 92, at 81 (1728).

99. SAMUEL BLACKERBY, *THE JUSTICE OF THE PEACE: HIS COMPANION* 4 (1723).

armed offensively” were “accounted to be an Affray,” and causing a “Fear of the People” created a “breach of the peace.”<sup>100</sup>

The paradigmatic exception to this general rule is itself instructive. Aristocrats enjoyed a class-based privilege to travel armed or travel with armed retainers in certain circumstances. Thus, there was a broad consensus that members of the aristocracy did not violate the provision of the statute when they armed themselves because such actions were not viewed as likely to provoke a terror.<sup>101</sup> Theodore Barlow, another author of a popular legal guide, described this class-based privilege in lucid terms. “Wearing Arms, if not accompanied with Circumstances of Terror, is not within this Statute; therefore People of Rank and Distinction do not offend by wearing common Weapons.”<sup>102</sup> Timothy Cunningham, author of several legal texts including a legal dictionary, echoed this account by commenting that men of “quality or fashion,” and their “attendants” were not subject to the general restrictions on armed travel.<sup>103</sup>

The fact that some members of the elite classes enjoyed a limited exemption from prosecution for affray for mere possession of arms in public underscores the limited scope of this right. Noting the existence of such an exemption only made sense in the context of the broad prohibition on traveling armed in public. The right of English aristocrats to arms does not support the notion that there was a broad right of peaceable armed travel. Under English law, there was no general right to travel armed.<sup>104</sup>

The notion that a broad right to peaceable armed travel existed in early modern England would have been legally incoherent given concepts such as the King’s peace and the King’s majesty. “The common law,” Blackstone observed, “hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society.”<sup>105</sup> Under English law “all offenses are either against the King’s Peace or his crown and dignity.”<sup>106</sup> In addition, any “affront to that power, and breaches of those rights, are immediate

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100. DALTON, *supra* note 63, at 30. Cf. KEBLE, *supra* note 65; WARD, *supra* note 84 (providing a similar account of the cause of the terror at the root of the crime of affray).

101. BURN, *supra* note 51, at 13.

102. THEODORE BARLOW, *THE JUSTICE OF PEACE: A TREATISE CONTAINING THE POWER AND DUTY OF THAT MAGISTRATE* 12 (1745).

103. GILES JACOB, *A NEW LAW DICTIONARY* (6th ed. 1750) (entry under “Armour and Arms,” no pagination in original).

104. On rank in English Society, see KEITH WRIGHTSON, *ENGLISH SOCIETY: 1580–1680* (1982). Eugene Volokh argues that, “only public carrying ‘accompanied with such circumstances as are apt to terrify the people’ was thus seen as prohibited; but ‘wearing common weapons’ in ‘the common fashion’ was legal.” Volokh, *supra* note 20, at 101. Volokh imputes a modern style mens rea requirement instead of applying the standards for criminal intent appropriate to early modern English law. For a discussion of the history of the mens rea requirement, see BINDER, *supra* note 20, at 8, 96, 113, 137–46. The references to common weapons carried in the common fashion is also read anachronistically. The exemption he notes was not general but was class specific and limited to aristocrats and the arms of their retainers, see the discussion in DALTON, *supra* note 63. HAWKINS, *supra* note 87.

105. 1 BLACKSTONE, *supra* note 29, at \*349.

106. *Id.* at \*258.

offenses against him.”<sup>107</sup> Merely traveling with arms impugned the majesty of the crown and implied that the King and his representatives were incapable of keeping the peace.<sup>108</sup> Thus, to arm oneself, apart from the specific exemptions or the context-dependent exceptions recognized by the common law, was by its very nature a rebuke of the King’s peace and majesty.<sup>109</sup>

*Sir John Knight’s Case* illustrates the way the Statute of Northampton should be set against a web of larger English principles, including the concept of the King’s Peace.<sup>110</sup> Gun rights scholars have consistently misread the case, arguing that it helped establish a right of peaceable open carry. In fact, the case stood for the opposite principle. It revealed that even aristocrats, the one group expressly exempted from the Statute of Northampton, were not completely immune from prosecution for traveling with arms.<sup>111</sup>

The case can only properly be understood within the historical context of the tense period between the Exclusion Crisis and the Glorious Revolution: a time when partisan and religious struggles divided the English nation.<sup>112</sup> Rumors of conspiracies circulated widely.<sup>113</sup> Issues of religious tolerance, the problem of monarchical succession, and the continuing battle between Parliament and the King were among the most important political and legal issues dividing England.<sup>114</sup> The key figure in the case, Sir John Knight, was a militant Protestant, who opposed tolerance for Catholics and Dissenters. He was charged with violating the Statute of Northampton by walking armed about the streets of Bristol.<sup>115</sup> Sir John burst into a Catholic religious service to arrest a priest. These actions prompted his own arrest, and he was charged with affray and violating the Statute of Northampton. The jury, composed of other militant Protestants drawn from Knight’s community, was sympathetic to his anti-Catholicism and acquitted him.<sup>116</sup> Although Knight escaped punishment thanks to a sympathetic jury, the government still imposed a peace bond on him as a surety of good behavior in the future.<sup>117</sup> Thus, Knight was still punished for his actions.

107. *Id.*

108. Peter Lake & Steve Pincus, *Rethinking the Public Sphere in Early Modern England*, 45 J. BR. STUD. 270, 277 (2006).

109. See discussion *supra* note 104.

110. See 87 Eng. Rep. 75 (1686).

111. *But cf.* David Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL’Y (2016) (misinterpreting *Sir John Knight’s Case* by concluding that “Everyone in the case agreed that the Statute of Northampton outlawed only carrying in a terrifying manner.”). Malcolm also misreads the case, see MALCOLM, *supra* note 7, at 104–05.

112. See J.G.A. Pocock & Gordon J. Schocket, *Interregnum and Restoration*, in THE VARIETIES OF BRITISH POLITICAL THOUGHT 146 (J.G.A. Pocock et al. eds., 1993) (providing a useful overview of the topic).

113. See STEVEN C.A. PINCUS, ENGLAND’S GLORIOUS REVOLUTION 1688–1689: A BRIEF HISTORY WITH DOCUMENTS (2005).

114. *Id.*

115. NARCISSUS LUTTRELL, 1 A BRIEF HISTORICAL RELATION OF STATE AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714 389 (1857).

116. *Id.*

117. 87 Eng. Rep. 75 (1686) (The militantly Protestant jury had essentially nullified the charge by



Far from proving that a permissive attitude towards firearms had emerged by the end of the seventeenth century, the case shows that even members of the aristocracy, the one group expressly exempted from the prohibition on armed travel, were not entirely free to exercise this right in public with impunity. Further, the case gives no indication that the English Courts had abandoned the principles embedded in the Statute of Northampton or that it had fallen into desuetude. It was the jury, not the judges, who reached the verdict in this highly politicized setting. Finally, rather than demonstrate that the Statute of Northampton had ceased to have any meaning under English law, the judges and subsequent legal commentators on *Sir John Knight's Case* offered a very different gloss on the meaning of the case. The case reporter itself reminded readers that the common law offense of affray was not simply a crime against a specific individual or even the local community but a crime against the public and hence a direct challenge to the legal authority of the King.<sup>118</sup> The private act of arming oneself was an inherent affront to the King because it implied that the “King w[as] not able or willing to protect his subjects.”<sup>119</sup>

## VII

### COLONIAL TEXTS, THE ENGLISH LEGACY, AND THE AMERICANIZATION OF THE COMMON LAW

Popular legal guidebooks published in the colonies repeated the standard interpretations of the Statute of Northampton that had appeared in English legal texts. George Webb's *Virginian Justice of Peace* (1736) was the first text published in Virginia.<sup>120</sup> Four decades later another popular guide appeared in North Carolina and it framed these issues in language drawn directly from English authority: “Justices of the Peace, upon their own View, or upon Complaint, may apprehend any Person who shall go or ride armed with unusual and offensive weapons, in an Affray, or among any great Concourse of People. . . .”<sup>121</sup> Both texts recognized the continuing relevance of earlier categorical prohibitions, such as not coming armed before the King's representatives. These new American texts generally tracked earlier English texts closely in most regards. The legal consequences of slavery figured in these texts to different degrees, but the general framework applied to armed travel in public remained largely, but not entirely, consistent with earlier English law in this area.<sup>122</sup> One of

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finding in favor of Knight so the Court's only legal option was a peace bond. The case does not demonstrate that the traveling armed in public had been normalized or decriminalized, but the exact opposite.)

118. See Charles, *supra* note 33.

119. 87 Eng. Rep. 75 (1686).

120. GEORGE WEBB, *VIRGINIAN JUSTICE OF PEACE* (1736).

121. See JAMES DAVIS, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* 13 (1774) (citing MICHAEL DALTON, *THE COUNTRY JUSTICE CONTAINING THE PRACTICE, DUTY AND POWER OF THE JUSTICES OF THE PEACE AS WELL IN AS OUT OF THEIR SESSIONS* 37 (1705)). Webb expressly framed the prohibition in general terms of traveling armed in populous areas.

122. See *id.*

the most pronounced differences between colonial law and English law was the expansion of the number of situations in which individuals were required to carry arms to enforce the peace. Under the common law, subjects could be required to assist agents of the crown in preserving the peace.<sup>123</sup> The raising of the “hue and cry” was one of the most important examples of an exception to the prohibition on armed travel.<sup>124</sup> Constables and other representatives of the King’s justice were empowered to raise the hue and cry and enlist subjects to apprehend felons. Once the hue and cry was raised, individuals were allowed to arm themselves with whatever weapons they were legally entitled to possess.<sup>125</sup>

In some colonies, most notably southern colonies, those eligible to bear arms might also be required to travel armed on occasions not related to musters, such as going to church.<sup>126</sup> These laws were another adaptation to the realities of colonial life, especially the ongoing hostile relationship with Native Americans and the omnipresent danger of slave uprisings in the South. Relations between Virginians and their Indian neighbors were exceedingly tense in 1619. This helps account for Virginia’s passage of a law expanding the scope of normal militia duties and requiring colonists liable to bear arms<sup>127</sup> to travel armed to church.<sup>128</sup>

ALL men that are fittinge to beare armes, shall bringe their peices to the church uppon payne for every effence, if the default be in the master, to pay 2lb. of tobacco, to be disposed by the church-wardens, who shall levy it by distresse, and the servants shall be punished commander.<sup>129</sup>

When read in context, the law demonstrates the extraordinary power early colonial governments exercised over inhabitants. Further, it does not vindicate a strong liberty interest that might be claimed against government authority. A similar act was passed by the Georgia legislature in 1770, that required “every white male inhabitant of this province . . . who is or shall be liable to bear arms in the militia” to bring arms to church.<sup>130</sup> The preamble of the Statute made clear that the purpose of the law was to promote the “necessary . . . security and defense of this province from internal dangers and insurrections. . . .”<sup>131</sup>

The militia played a far more significant role in the colonies than it did in England. It served as a first line of defense against external and internal threats

123. HAWKINS, *supra* note 87, at 155–63.

124. SIR JOHN COMYNS, A DIGEST OF THE LAW OF ENGLAND 358 (4th ed. 1793).

125. *See also* Statute of Winchester, *supra* note 91.

126. *See* WILLIAM WALLER HENING, THE STATUTES AT LARGE 198 (1823).

127. This requirement only applied to individuals who were already able to bear arms, a subset of the white male population.

128. *See* HENING, *supra* note 126. Early Virginia imposed a variety of obligations on its residents, especially regarding religion. Parents could be penalized for not properly instructing children and apprentices in the catechism endorsed by the Church of England. *Id.* at 181–82. It also taxed colonists to support the established church and penalized those who failed to attend church. *Id.* at 184. In short, modern style rights were in short supply in early Virginia.

129. *Id.* at 174.

130. Act of Feb. 27, 1770, No. 191 (Judiciary Act of Georgia of 1770), *in* ROBERT WATKINS & GEORGE WATKINS, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 157 (1800).

131. *Id.*

and was one of the most important local institutions in many communities.<sup>132</sup> Most colonies, with Quaker Pennsylvania being a notable exception, typically required adult white men between the ages of sixteen and forty-five, who were not infirm or exempt because of their occupation, to equip themselves with a musket or rifle and participate in the militia.<sup>133</sup> The notion that the militia was literally the people was a potent rhetorical form, but largely a fiction. Although a substantial portion of the adult free male population was required to participate in the militia, equating the militia with the people is a mistake.<sup>134</sup>

One of the clearest expositions of the way the constitutional ideal of the militia had been transformed by the colonial experience occurs in a remarkable series of essays published by Samuel Adams in the midst of the worsening relations with Britain prior to the American Revolution. Adams defended the Boston Town meeting's decision to call on residents to arms themselves, invoking English and local legal authority.

For it is certainly beyond human art and sophistry to prove that British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip'd with arms, &c. are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs.<sup>135</sup>

How little do those persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to *provide themselves with arms for their defence* at any time; but more especially, when they had reason to fear, there would be a necessity of the means of self preservation against the *violence of oppression*. — Every one knows that the exercise of the military power is forever *dangerous* to civil rights. . . .<sup>136</sup>

Adams did not rest his claim entirely on British sources alone, but also invoked American law, specifically the militia law of the colony. The right Adams described does not easily fit into the simple dichotomies that have defined Second Amendment debate in the modern era. The right was one exercised by individuals, but it was one effectuated by the Boston town meeting acting collectively under legal authority it possessed. Individuals did not act on their own accord, but acted in concert for a collective public purpose—the protection of constitutional liberty. Nor was the right claimed by Adams and other colonists a pure expression of natural rights. Boston had not entered the state of nature. The appeal was to law, not to extra-legal authority. This particular right was an expression of ordered liberty and only made sense within the context of the rule of law. Bostonians were not simply asserting a common law right of self-defense. The right they claimed was distinctly American, it fused together

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132. Kevin Sweeney, *Firearms, Militias, and the Second Amendment*, in *THE SECOND AMENDMENT ON TRIAL*, *supra* note 5, at 310 (discussing the role of the militia in early American society).

133. *See id.*

134. *Id.*

135. SAMUEL ADAMS, *THE WRITINGS OF SAMUEL ADAMS* 299 (Harry Alonzo Cushing ed., 1904). For more on Adams, see SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006).

136. ADAMS, *supra* note 135, at 318.

several different traditional English rights claims and merged them with American legal practices, effectively recasting them in a new distinctly American constitutional framework.<sup>137</sup>

## VIII

### THE ABSORPTION OF THE COMMON LAW IN POST-REVOLUTIONARY AMERICA

Samuel Adams and the Boston town meeting were engaging in a creative process of constitutional theorizing and they were hardly unique in Revolutionary America. Towns and communities across the nation had been swept up in the political and constitutional ferment triggered by the imperial crisis. These developments were accelerated when the Continental Congress instructed the states to draft new constitutions a month before Independence was officially declared.<sup>138</sup> These first state constitutions typically included a written declaration of rights. These new documents radically transformed many aspects of American law, but they did not represent a complete break with pre-existing English law, particularly regarding arms. Although a majority of the new constitutions included prohibitions on standing armies, most did not single out the right to bear arms for express protection. Pennsylvania was the first state to do so, but it also included a right not to be forced to bear arms, a concession to religious pacifists such as Quakers, Moravians, and Mennonites. Typically arms bearing provisions also included express language about the need for civilian control of the military. The pairing of the right to bear arms with a right not to bear arms, and the close textual connection between the affirmation of civilian control of the military and the right to bear arms only heightens the strong military focus of these early provisions.

The American Revolution's impact on the common law, including the right to keep arms and restrictions on armed travel, was even more complicated. Rather than speak of the common law's Americanization, it might be accurate to discuss its creolization in the colonial era and early Republic. Although there were some important areas in which English law remained stable, there were also many examples in which the law had evolved to reflect the different social and legal realities of different colonies.<sup>139</sup>

Stressing the pervasive localism and evolutionary character of the absorption of the common law, the distinguished Virginia jurist St. George Tucker believed that:

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137. See CORNELL, *supra* note 135; Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451 (2012).

138. G. EDWARD WHITE, *LAW IN AMERICAN HISTORY* 143 (2012).

139. WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA* (2008); Lauren Benton & Kathryn Walker, *Law for the Empire: The Common Law In Colonial America and the Problem of Legal Diversity*, 89 CHI. KENT. L. REV. 937 (2014) (discussing the way different regional legal cultures emerged and transformed the common law).

the adoption of the laws of England, we see was confined to such as had been theretofore adopted, used, and approved, *within* the colony, and usually practiced on, in the courts of law; with an exception as to such parts as were repugnant to the rights and liberties contained in the constitution.<sup>140</sup>

Moreover, Tucker noted that one might have recourse to “every law treatise from Bracton, and Glanville, to Coke, Hale, Hawkins, and Blackstone; or in every reporter from the year-books to the days of Lord Mansfield,” but such authority mattered little if the law was not consistent with the new state constitutions.<sup>141</sup> If that were the case, a law contrary to the text of the Constitution would “have no more force in Massachusetts, than an edict of the emperor of China.”<sup>142</sup>

Some states absorbed the common law by constitutional means. Thus, Maryland’s Declaration of Rights affirmed:

The Common Law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity.<sup>143</sup>

Some states passed reception statutes, incorporating parts of the common law. Pennsylvania’s statute affirmed that:

[E]ach and every one of the laws or acts of general assembly that were in force and binding on the inhabitants of the said province on the fourteenth day of May last shall be in force and binding on the inhabitants of this state from and after the tenth day of February next . . . and the common law and such of the statute laws of England as have heretofore been in force in the said province, except as is hereafter excepted.<sup>144</sup>

The primary function of the justice of the peace in the new American Republic remained unchanged: to preserve the peace.<sup>145</sup> The transformation of the English legal concept of the King’s peace into a post-Revolutionary legal concept consistent with republicanism did have implications for understanding the limits on armed travel in public. In particular, the notion of traveling armed as rebuke to the King’s majesty and authority no longer had any legal significance. In a society in which the people were sovereign, the notion of the peace was effectively republicanized. As a Connecticut guide for justices of the peace observed, “the term peace, denotes the condition of the body politic in

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140. ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE* 214 (1803).

141. *Id.*

142. *Id.*

143. MD. CONST. art. III, § 1 (1776). *See also* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968) (describing how the American Colonies adopted the common law as the basis for judicial decisions).

144. 9 STATUTES AT LARGE OF PENNSYLVANIA 29–30 (Mitchell & Flanders eds., 1903).

145. As Laura Edwards demonstrates, the traditional English practice of using private prosecutions for assault and similar crimes gradually gave way to a focus on public prosecution as an affront to the people’s peace in the South. *See* LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009).

which no person suffers, or has just cause to fear any injury.”<sup>146</sup> The offense was now one that harmed the body politic, not the King’s Majesty. Disturbing the peace remained a serious legal matter, and Justices of the Peace continued to exercise considerable power and authority, including a power to preempt violence by imposing peace bonds, disarmament, or incarceration.

A number of states, including North Carolina, Virginia, and Massachusetts expressly adopted their own versions of the Statute of Northampton.<sup>147</sup> North Carolina’s formulation of the prohibition followed closely on its English predecessor. It declared that no person may “go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the King’s Justices, or other ministers, nor in no part elsewhere.”<sup>148</sup> Virginia’s statute also drew on the original English text, with one important change, noted by William Henig, a leading lawyer in the state, who remarked that the legislature introduced additional due process protections for those accused of violating the law. “The act of assembly of Virginia materially differs from the act of parliament” he wrote, “being more favorable to liberty.”<sup>149</sup> In Virginia, a justice of the peace could not seize arms and imprison an individual for more than a month. To impose a stiffer penalty required a jury verdict, a higher due process standard, and hence a greater safeguard for liberty.<sup>150</sup>

In 1795, Massachusetts enacted its own version of the Statute of Northampton drawn from prior English commentators. The law forbade anyone who “shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth.”<sup>151</sup> This was a common gloss on the Statute of Northampton used in many of the popular English Justice of the Peace manuals of the previous century. It framed the prohibition in terms of traveling with offensive weapons. The criminal conduct did not require the demonstration of a modern style *mens rea*; the mere act of traveling armed with offensive weapons demonstrated the evil intent required by law.<sup>152</sup>

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146. JOSEPH BACKUS, *THE JUSTICE OF THE PEACE* 23 (1816).

147. See *A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE* 33 (1794) (prohibiting individuals from “go[ing] or ride[ing] armed by night or day”); FRANCOIS XAVIER MARTIN, *A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA* 60–61 (1792) (prohibiting conduct by individuals who “go nor ride armed by night nor by day”); FRANCOIS XAVIER MARTIN, *A TREATISE ON THE POWER AND DUTIES OF A CONSTABLE ACCORDING TO THE LAW OF NORTH CAROLINA* 9 (1806).

148. FRANÇOIS X. MARTIN, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, AND OF SHERIFFS, CORONERS, &C. ACCORDING TO THE LAW OF THE STATE OF NORTH CAROLINA* 84 (1804).

149. WILLIAM WALLER HENIG, *THE NEW VIRGINIA JUSTICE* 50 (1810).

150. *Id.*

151. ASAHIEL STEARNS & LEMUEL SHAW, *THE GENERAL LAWS OF MASSACHUSETTS* 454 (Theron Metcalf ed., 1823).

152. See BINDER, *supra* note 20.

## IX

## THE EMERGENCE OF OPPOSING MODELS OF THE RIGHT TO CARRY IN THE EARLY REPUBLIC

In the preface to his edition of Blackstone, St. George Tucker explained that his project was inspired by the need to educate Americans about how the common law had evolved in America. Tucker conceded that it would have been an even more monumental undertaking to try to explicate how this process differed from state to state, so he focused most of attention on his home state of Virginia.<sup>153</sup> Although it is tempting for modern scholars to treat Tucker as if his writings were some type of proxy for an American legal mind, such an approach distorts the fact that Tucker's vision of law was not simply rooted in his experiences as a Virginian, but also in his growing opposition to Federalist constitutionalism. Tucker was an ardent Jeffersonian and any interpretation of his thought that fails to acknowledge this fact is likely to distort his influence and significance.<sup>154</sup> Consider Tucker's often quoted observation, written in response to the prosecution of Fries's Rebellion in Pennsylvania.<sup>155</sup>

But ought that circumstances of itself to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself. In many parts of the United State, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.<sup>156</sup>

Tucker was commenting on a federal case that he believed had been decided incorrectly, so it is odd that modern lawyers would treat his comment, and not the federal court decision, as the legally authoritative source. Secondly, Tucker did not claim that the situation in Virginia was universally recognized in all parts of America, but was only true in some areas. Finally, Tucker was talking about a musket, the standard weapon of the militia, and not about concealable weapons. Justice Samuel Chase certainly did not share Tucker's views and the successful prosecution of the rebels in both the Whiskey Rebellion and Fries Rebellion later in the decade suggests that Chase's narrow Federalist view, not the more expansive Jeffersonian view espoused by Tucker, was the legally dominant view of federal courts at this moment in time.<sup>157</sup> Tucker took exception to Federalist

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153. TUCKER, *supra* note 140, at 1–9.

154. See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721 (2013) (discussing the problem of taking a single complex thinker such as Tucker and treating him as proxy for a monolithic American Mind); Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 *WM. & MARY L. REV.* 1123 (2006) (explaining the need to root Tucker's constitutional thought, including his views of the Second Amendment, in the growing rift between Federalists and Jeffersonians in the 1790s).

155. For gun rights misinterpretations of Tucker, see Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty"*, 3 *TENN. J.L. & POL'Y* 120 (2006); James Lindgren, *Forward: The Past and Future of Guns*, 104 *J. CRIM. L. & CRIMINOLOGY* 705 (2015).

156. TUCKER, *supra* note 140, at Appendix B.

157. PAUL DOUGLAS NEWMAN, *FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION* (2004).

Chase's reliance on traditional English legal authorities, which was particularly disturbing, given his fears that Federalists intended to use the common methods and principles to expand federal power.<sup>158</sup> In contrast to Chase and other Federalists, Tucker believed that American law had not absorbed English common law's broad view of treason. Under English law, a group of armed men traveling was at the very least a riotous assembly and depending on the circumstance a potentially treasonous one. Tucker did not believe that this was the case in Virginia and his often quoted comment about Virginian's traveling with their muskets should be placed in that broader context.

The fact that Tucker discerned a clear difference between Virginia and Pennsylvania on this important point of law as early as the 1790s serves as a reminder that the meaning of arms bearing was not static in the early American republic, but evolving.<sup>159</sup> Indeed, as the market revolution made cheap and reliable hand guns more plentiful, the practice of carrying these weapons in public grew at an alarming rate. It was this new practice of traveling with concealed weapons that prompted the first wave of modern style gun control measures in the South.<sup>160</sup> Kentucky's law was challenged and declared unconstitutional in *Bliss v. Commonwealth* (1822).<sup>161</sup> The court in *Bliss* took an almost absolutist view of the right to bear arms, viewing any regulation as tantamount to a destruction of the right.<sup>162</sup> Elsewhere in the South, a permissive, but less absolutist view took hold. A Richmond Grand Jury (1820) captured this strain of southern thought when it published a statement attacking the dastardly practice of concealed carry, but reiterated that open carry of arms was perfectly legal and honorable. Although the Grand Jury opposed "any legislative interference with what they conceive to be one of the most essential privileges of freemen, the right of carrying arms" they were equally adamant about expressing their "abhorrence of a practice which it becomes all good citizens to frown upon with contempt, and to endeavor to suppress." The cowardly "practice of carrying

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158. The Jeffersonian opposition in the 1790s feared Federalists were attempting to use English legal methods to expand the power of the Constitution by importing common law ideas, including those about treason, see Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic* 4 LAW & HIST. REV. 223 (1986).

159. See CORNELL, *supra* note 135.

160. Cf. ACTS PASSED AT THE FIRST SESSION OF THE TWENTY-FIRST GENERAL ASSEMBLY FOR THE COMMONWEALTH OF KENTUCKY 100-01 (1813) ("An Act to prevent persons in this Commonwealth from wearing concealed Arms, except in certain cases" approved in 1813); ACTS PASSED AT THE SECOND SESSION OF THE FIRST LEGISLATURE OF THE STATE OF LOUISIANA 172-75 (1813) ("An Act against carrying concealed weapons, and going armed in public places in an unnecessary manner" approved in 1813); THE REVISED LAWS OF INDIANA, ADOPTED AND ENACTED BY THE GENERAL ASSEMBLY AT THEIR EIGHTH SESSION 79 (1824) ("An Act to prohibit the wearing of Concealed Weapons" approved in 1820); ARK. REV. STAT. div. VIII, ch. 44 (1838); Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Pub. Acts 15. Early Indiana was settled by southerners which makes its situation similar to that of other southern states. Nicole Etcheson, *Manliness and the Political Culture of the Old Northwest, 1790-1860*, 15 J. EARLY REP. 59, 60 n.2 (1995).

161. *Bliss v. Commonwealth*, 12 Ky. 90 (1822).

162. *Id.*



arms secreted, in cases where no personal attack can reasonably be apprehended.”<sup>163</sup>

One of the most thoughtful discussions of how the common law tradition had evolved in the South was Charles Humphreys’ *Compendium of the Common Law in force in Kentucky*, which attempted to do for Kentucky what Tucker had done for Virginia: analyze the way English law had been modified and adapted to circumstances in Kentucky.<sup>164</sup> Humphreys specifically took up the question of how the state’s constitutional provisions on the right to bear arms, as interpreted by the courts, had modified common law restrictions on “riding or going armed with dangerous or unusual weapons.” Although Kentucky had not abandoned this ancient concept, it had modified it to reflect the radically altered context and legal situation in the American South. Determining whether one had violated the peace meant one had to acknowledge that if “in this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.”<sup>165</sup> Interestingly, Humphreys implicitly acknowledged the traditional standard that armed travel was a terror to the people, but he noted that in Kentucky that legal bar had been raised, a heightened standard that he described as terrifying “the people unnecessarily.”<sup>166</sup> Yet, even Kentucky eventually backed away from this extreme libertarian interpretation which was eventually rejected when Kentucky revised its constitution in 1849; the new constitution included an express provision that “the General Assembly may pass laws to prevent persons from carrying concealed arms.”<sup>167</sup>

The distinctive Southern interpretation of the English common law crime of affray was elaborated in *State v. Huntley* (1843).<sup>168</sup> North Carolina’s highest Court noted that “no man amongst us carries it [a gun] about with him, as one of his every day accoutrements—as a part of his dress.” Yet, echoing the views of Humphreys and other southern commentators, the court went on to observe that it “is to be remembered that the carrying of a gun per se constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun.”<sup>169</sup> Striking a note similar to Humphrey, the court noted: “It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.”<sup>170</sup> *State v. Huntley* broke with traditional English common law in two important respects. First, it implicitly recognized that in North Carolina,

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163. *On Wearing Concealed Arms*, DAILY NAT’L INTELLIGENCER (Sept. 9, 1820).

164. CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY (1822).

165. *Id.*

166. *Id.*

167. KY. CONST. art. III, § 25 (1850).

168. *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843).

169. *Id.*

170. *Id.*

the range of legitimate uses of firearms was considerably broader than it had been under common law, encompassing both “business or amusement.” The law still required a legitimate purpose to carry arms, noting that one did not sport arms daily in public, but it acknowledged by its choice of terms a considerable range of legitimate activities. The case also reflected a more profound change in the nature of criminal law. Under the traditional English common law view, the necessary evil intent for a criminal act could be inferred from the prohibited act itself. *Huntley* represents a more modern conception, one in which subjective intent was necessary to establish the mens rea requirement which was an essential element of a crime. Gun rights scholars, most notably David Kopel and Eugene Volokh, have read *Huntley*’s modern-style mens rea requirement back into English legal history, assuming that this requirement existed centuries before it became a part of the law. Their failure to grasp their error follows from a more basic flaw that historian David Hackett Fischer describes as the fallacy of tunnel history.<sup>171</sup> Writing about the history of the crime of affray without consulting any of the standard accounts of the history of Anglo-American criminal law led Kopel and Volokh to ignore the differences between early modern and modern criminal law.<sup>172</sup>

The line of cases that led to *Huntley* represented one of two Southern jurisprudential traditions regarding firearms. A different, more limited conception of the right to keep and bear arms, one more consistent with the traditional eighteenth century militia-based understanding of the right also gained judicial notice in other parts of the South. This alternative vision was elaborated in two cases, *Aymette v. State* and *State v. Buzzard*.<sup>173</sup> In both of these cases the meaning of the right to bear arms was shaped by the traditional civic republican understanding of the militia. Such a conception was neither an individual right in the modern sense, nor was it as narrowly framed as a right of the states—the essence of the modern collective rights theory of the right to bear arms.<sup>174</sup> Laws that inhibited the ability of citizens to keep and bear those arms needed to fulfill their militia obligation would have been unconstitutional. Firearms with little or no value to the preservation of the militia, easily concealed pocket pistols being a notable example, were treated as ordinary property and subject to the full range of the state’s police powers, including in the case of some especially dangerous weapons, prohibition. In *Aymette*, the court wrote: “The legislature, therefore, have a right to prohibit the wearing, or keeping weapons

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171. See DAVID HACKETT FISCHER, HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 142 (1970).

172. See Volokh, *supra* note 20, at 101 (erroneously asserting that “the Statute was understood by the Framers as covering only those circumstances where carrying of arms was unusual and therefore terrifying.”); David Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL’Y (2016) (confusing the jury’s act of nullification of the statute with the judge’s views and ignoring the fact that the judges imposed a peace bond for a violation of the Statute of Northampton).

173. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840); *State v. Buzzard*, 4 Ark. 18 (1842).

174. For an overview of the modern individual rights and collective rights theories of the Second Amendment, see THE SECOND AMENDMENT ON TRIAL, *supra* note 5.

dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defence.”<sup>175</sup>

Given that modern law is dominated by the discourse of rights, it has been difficult for gun rights scholars to make the imaginative leap of faith necessary to understand how the right to bear arms could be anything other than an individual right of self-defense.<sup>176</sup> To understand the Second Amendment one must grasp the fears that animated it: the disarmament of the militia. Although modern Americans fear “black helicopters” and government agents coming to take their guns away, the Founding generation recognized that indifference and debt posed at least as great a danger to militia armament as direct government action. In particular, debt was a pervasive feature of economic life in the agricultural communities of early America. Farmers were dependent on borrowing money until crops were sold at market and loans might be repaid.<sup>177</sup> Protecting privately owned militia weapons from seizure in lawsuits was of paramount importance in making sure that the militia would not simply disarm itself as citizens sold off muskets to pay their debts. In virtually every state, militia laws protected

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175. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840). Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U.L. REV. 585 (2012) typifies the gun rights misreading of this tradition. O’Shea offers no explanation of why a common law right of self-defense and a civic constitutional right could not have existed separately from one another. Instead, he simply assumes that rights embedded in the Bill of Rights have always been treated the same at all times and places in American history, a dubious historical proposition with little factual basis. “Why not the *hybrid* view of the right, which combines a militia purpose with a personal guarantee against disarmament, thereby treating the Second Amendment ‘right of the people’ in the same way the other rights of the people in the Bill of Rights have been treated?” For a critique of this type of ahistorical approach to eighteenth century rights, see Cornell, *Meaning and Understanding*, *supra* note 154.

176. On the difficulty of conceptualizing bearing arms outside of the modern rights discourse, see Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813 (2014). For examples of gun rights scholars who have trouble understanding that “the past is a foreign country,” DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* (1985), in which conceptions of rights might not function in the same way as they do in contemporary law, see Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens’s Heller Dissent*, 39 FORDHAM URB. L.J. 1503 (2012) (arguing anachronistically that the idea that rights might impose duties makes no sense because modern conceptions of rights do not impose obligations on citizens) and Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 259 (2004) (reviewing H. Richard Uviller & William G. Merkel, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)) (finding it hard to accept that the Pennsylvanians would have not constitutionalized the individual right of self-defense). Barnett’s error stems from his failure to grasp the nature of the English common law context. For a corrective that shows that *Heller*’s individual right is better understood as a traditional English common law right, not a Second Amendment claim, see Reva Siegel, *Heller and Originalism’s Dead Hand*, 56 UCLA L. REV. 1399, 1415 (2009) (“[T]here is more evidence in the majority opinion establishing the existence of a common law right of self-defense than there is demonstrating that such a right was constitutionalized by the Second Amendment’s eighteenth-century ratifiers.”).

177. On the role of debt in Founding era culture, see T.H. BREEN, *TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTERS ON THE EVE OF REVOLUTION* 31–32 (1985); WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA* 61–62 (1999); Emory G. Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 WM. & MARY Q. 511 (1962). See also Kevin Sweeney, *Amendment*, *supra* note 132.

privately owned guns from seizure in debt proceedings or sale for failure to pay taxes.<sup>178</sup> In practical terms, these types of protections were of enormous significance. Indeed, during the ratification debate, Anti-Federalists repeatedly stressed that the federal government's power of the purse, particularly onerous taxation, was nearly as dangerous as its control of the military. Had legal protections for privately owned militia arms not existed, this Anti-Federalist fear might have easily come to pass: the state militias might have been disarmed without government taking any direct action. Simply by raising taxes, government could induce debt-ridden farmers to disarm themselves by selling off militia weapons.<sup>179</sup>

In the antebellum South two different models of arms bearing emerged and each had profound consequences for the scope of government regulation of armed travel in public. A more libertarian gun rights tradition exemplified by cases such as *Bliss*, *Nunn*, and *Huntley* emerged in parts of the Slave South that vindicated a robust right to travel armed in public. Bans on concealed weapons were permissible, but only if open carry was available. A different, more restricted model also emerged that carried forward a distinctly eighteenth century civic republican vision of arms bearing. In *Aymette* and *Buzzard*, guns related to militia purposes were given full constitutional protection. Other weapons were subject to the full authority of the state's police power.<sup>180</sup>

Legal scholarship prior to *Heller* naturally focused considerable attention on antebellum case law, a fact reflected in Justice Scalia's majority opinion which looked to this tradition to understand the scope of Second Amendment rights in the decades after its adoption.<sup>181</sup> The fact that this jurisprudential tradition was unique to the slave South did not spark much scholarly interest at that time and accordingly did not receive any judicial notice in *Heller*. More recent scholarship by contrast has been directed by Scalia's injunction to look more closely at the history of regulation for guidance.<sup>182</sup> Among the most important discoveries of this new body of scholarship is the importance of local and regional variation in the regulatory tradition that emerged after the adoption of the Second Amendment. This profound localism and regionalism was effectively invisible to the *Heller* court, which erroneously assumed that the Southern tradition embodied in the extant case law was representative of broader American legal attitudes in the Founding era and early republic. In fact, the Southern libertarian

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178. Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 *FORDHAM URB. L.J.* 1695, 1708–09 (2012).

179. See CORNELL, *supra* note 135 and Sweeney, *supra* note 132.

180. *District of Columbia v. Heller*, 554 U.S. 570, 619–21 (2008). For two leading late nineteenth century commentators who argued that *Buzzard*, not *Bliss* was the ascendant paradigm in American law, see JOEL PRENTISS BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* (1868) and John Foster Dillon, *The Right to Keep and Bear Arms for Public and Private Defense*, 1 *CENT. L.J.* 259 (1874).

181. *Heller*, 554 U.S. at 610–14.

182. See Joseph Blocher, *Firearm Localism*, 123 *YALE L.J.* 82 (2013) and Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 *YALE L.J. FORUM* 121 (2015).

tradition of permissive carry was exceptional. Outside of the slave South, a different and more restrictive tradition of public carry had emerged.<sup>183</sup>

The foundation for this alternative tradition was the version of the Statute of Northampton enacted by Massachusetts in 1795. Rather than draw on the text of the Parliamentary statute itself, the Massachusetts legislature adopted a gloss that had become popular in many of the justice of the peace manuals. Massachusetts framed its prohibition on public carry in robust terms: It outlawed anyone who “shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth.”<sup>184</sup> A New Jersey justice of the peace manual published a decade after the Massachusetts statute used the same language regarding bans on traveling “armed offensively.”<sup>185</sup> The guide elaborated on what this prohibition meant, describing the considerable powers enjoyed by peace officers to preserve the peace. “So a Justice of the Peace may, in his own discretion, require sureties for the peace from one who shall go or ride armed offensively to the terror of the people, though they he may not have threatened any person in particular, or committed any particular act of violence.”<sup>186</sup> As one Connecticut justice of the peace manual made clear, it was not simply breaches of the peace, but even an “inchoate breach” such as traveling “offensively armed” or with “an unusual number of attendants” that ran afoul of the law. In a comprehensive overview of the “common law, the statute Laws of Massachusetts, and of the United States,” the powers of the justice of the peace to detain and arrest those who traveled with offensive weapons, was listed as a separate category from such other crimes affray, riot, and disturbing the peace.<sup>187</sup> In 1835, Massachusetts revised its public carry law. The new Massachusetts statute prohibited armed travel, but it recognized an exception in cases where a person had a reasonable cause to fear imminent violence.<sup>188</sup>

If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace. . . .<sup>189</sup>

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183. See Ruben & Cornell, *supra* note 182.

184. THE PERPETUAL LAWS, OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION TO THE SECOND SESSION OF THE GENERAL COURT, IN 1798 259 (Isaiah Thomas ed., 1799).

185. JAMES EWING, A TREATISE ON THE OFFICE AND DUTY OF THE JUSTICE OF THE PEACE, SHERIFF, CORONER, CONSTABLE 546 (1805).

186. *Id.*

187. See JOSEPH BACKUS, THE JUSTICE OF THE PEACE 23–24 (1816).

188. 1836 Mass. Acts 750.

189. *Id.*

One of the state's most distinguished jurists, Peter Oxenbridge Thacher, offered this gloss on the new law:

In our own Commonwealth, no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property.<sup>190</sup>

A contemporary newspaper writer saw the new law in similar terms, using it as a jumping off point to explore the scope of the state's police powers. After noting that there was nothing unconstitutional about laws prohibiting the discharge of weapons "in cities and populous towns," the article went on to observe that the legislature saw fit to go even further: "have not our legislature forbidden, and ought not every legislature" the dangerous practice of traveling "armed with pistols, swords, daggers, bowie-knives or other offensive and dangerous weapons."<sup>191</sup> The power to prohibit such weapons followed naturally from the state's police power. Indeed, it was an argument "unfounded and alarming" to claim that a state had the power to punish crimes, but could do nothing to prevent them.<sup>192</sup>

In the decades following the adoption of the Massachusetts model of restrictive public carry states and localities across the nation used it as a model for enacting limits on public carry.<sup>193</sup> The constitutionality of such statutes came

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190. PETER OXENBRIDGE THACHER, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK, FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF THE TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, ON MONDAY, DECEMBER 5TH, A.D. 1836 AND ON MONDAY, MARCH 13TH, A.D. 27 (1837); *see also Judge Thacher's Charges*, CHRISTIAN REG. & BOS. OBSERVER 91 (1837) (excerpting and reprinting the section of the grand jury charge dealing with traveling armed).

191. *An Address*, HAMPSHIRE GAZETTE, Oct. 24, 1838.

192. *Id.*

193. *See* 19 DEL. LAWS 733 (1852) ("Any justice of the peace may also cause to be arrested . . . all who go armed offensively to the terror of the people, or are otherwise disorderly and dangerous."); ME. REV. STAT. tit. 12 § 16 (1840) ("Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without a reasonable cause to fear an assault on himself . . ."); MICH. REV. STAT. ch. 162, § 16, reprinted in THE REVISED STATUTES OF THE STATE OF MICHIGAN 690, 692 (1846) ("If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided."); Of Proceedings to Prevent the Commission of Crimes, ch. 14, § 16, 1847 VA. ACTS 127, 129 ("If any person shall go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may be required to find sureties for keeping the peace for a term not exceeding twelve months, with the right of appealing as before provided"); 1870 W. VA. LAWS 702, 703, ch. 153, § 8 ("If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance, with the right of appeal, as before provided, and like proceedings shall be had on such appeal."); REVISED STATUTES OF THE STATE OF DELAWARE, TO THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED AND FIFTY-TWO 333 (1852) ("Any justice of the peace may also cause to be arrested . . . all who go armed offensively to the terror of the people, or are otherwise disorderly and dangerous."); THE REVISED CODE OF THE DISTRICT OF COLUMBIA, PREPARED UNDER THE AUTHORITY OF THE ACT OF CONGRESS 570 (1857) ("If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his

before the Texas Supreme Court in *English v. State* (1872).<sup>194</sup> In response to widespread violence, including targeted violence against Freedmen, a Republican-led Texas legislature enacted a statute based on the 1835 Massachusetts model.<sup>195</sup> The Republican-controlled Texas Supreme Court upheld the law, noting that such laws were “not peculiar to our own State,” but had become common: “It is safe to say that almost, if not every one of the States of this union have a similar law upon their statute books, and, indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration.”<sup>196</sup> Although the Texas arms-bearing provision recognized a right to regulate the scope of the right, the court did not think the power the legislature had exercised extraordinary, but rather saw it as a basic exercise of the state’s police powers.<sup>197</sup> “The powers of government are intended to operate upon the civil conduct of the citizen; and whenever his conduct becomes such as to offend against public morals or public decency, it comes within the range of legislative authority.”<sup>198</sup> Two years later, a new court dominated by Democrats opposed to Reconstruction took up a series of cases on the right to carry.<sup>199</sup> In contrast to the earlier court composed of Republicans, the new Democrat-dominated court took a more expansive view of the right to bear arms, one close in spirit to *Heller’s* individual rights model. One point of commonality between the courts was the

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person . . . .”); THE REVISED STATUTES OF THE STATE OF WISCONSIN: PASSED AT THE ANNUAL SESSION OF THE LEGISLATURE COMMENCING JANUARY 13, 1858, AND APPROVED MAY 17, 1858 985 (1858) (“If any person shall go armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person . . . .”); THE STATUTES OF OREGON: ENACTED AND CONTINUED IN FORCE BY THE LEGISLATIVE ASSEMBLY, AT THE SESSION COMMENCING 5TH DECEMBER, 1853 220 (1854) (“If any person shall go armed with dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault, injury, or other violence to his person, or to his family or property, he may, on complaint of any other person, having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace for a term not exceeding six months, with the right of appealing as before provided.”); JOHN PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TWENTY-FIRST DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE 250 (9th ed. 1862) (“If any person, not being an officer on duty in the military or naval service of the state or of the United States, shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence . . . .”); GEORGE B. YOUNG, THE GENERAL STATUTES OF THE STATE OF MINNESOTA, AS AMENDED BY SUBSEQUENT LEGISLATION, WITH WHICH ARE INCORPORATED ALL GENERAL LAWS OF THE STATE IN FORCE AT THE CLOSE OF THE LEGISLATIVE SESSION OF 1878 629 (1879) (“Whoever goes armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapons, without reasonable cause to fear an assault or other injury or violence to his person . . . .”).

194. *English v. State*, 35 Tex. 473 (1871).

195. Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas* 4 TEX. A&M L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2810806](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2810806), [<https://perma.cc/MDM8-MAJG>] (analyzing Republican and Democratic views of gun regulation in Reconstruction era Texas).

196. *Id.*

197. TEX. CONST. of 1869, art. I § 13 (“Every person shall have the right to keep and bear arms, in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe.”).

198. *English*, 35 Tex. 473.

199. See Frassetto, *supra* note 195.

view that as long as the law allowed for a self-defense exception for cases of imminent threat, the prohibition on public carry was legal.<sup>200</sup>

Finally, even more sweeping bans on public carry were enacted in parts of the West. In some instances such laws were enacted at the state level and in other cases local communities passed ordinances limiting public carry.<sup>201</sup> Thus, by the end of the nineteenth century there were multiple models for dealing with the issue of public carry. The permissive Southern model developed in the antebellum slave South did not have much appeal to Americans in the post- Civil War era.

Additional evidence that America had not embraced the permissive Southern model may be found in a comprehensive overview of the laws pertaining to public carry published in *The American and English Encyclopedia of Law*, an influential and popular legal reference work published at the end of the nineteenth century.<sup>202</sup> The *Encyclopedia* includes a detailed entry on the laws covering carrying firearms in public. It noted that “[t]he statutes of some of the States have made it an offence to carry weapons concealed about the body, while others prohibit the simple carrying of weapons, whether they are concealed or not. Such statutes have been held not to conflict with the constitutional right of the people of the United States to keep and bear arms.”<sup>203</sup> The contributors explained that American law recognized both a permissive and restrictive approach to carry.

The repeated claim made by gun rights advocates and others that there was a widely recognized right of open carry in the nineteenth century is demonstrably false. To the extent that such a right did exist it reflected a regional, not a national

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200. See *State v. Duke*, 42 Tex. 455 (1874).

201. On restrictions in the “wild west,” see Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876) and 1876 WYO. COMP. LAWS 52, § 1 (prohibiting anyone from “bear[ing] upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village.”) For robust local laws, see Ordinances of the Council of the City of Dallas and Annual Reports of City Officers from October 1st, 1886 to June 25th, 1888 (that if any person in the City of Dallas shall carry on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slungshot, sword- cane, spear, or knuckles made of any metal or hard substance, bowie knife, or any other kind of knife manufactured or sold for purposes of offense or defense, he shall be punished by fine of not less than twenty-five nor more than two hundred dollars and shall be confined in the city prison not less than twenty nor more than sixty days.). THEODORE HARRIS, CHARTER AND ORDINANCES OF THE CITY OF SAN ANTONIO COMPRISING ALL ORDINANCES OF A GENERAL CHARACTER IN FORCE AUGUST 7TH, 1899 (“If any person, within the corporate limits of the city of San Antonio, shall carry on or about his or her person, saddle, or in his saddle bags, any pistol, dirk, dagger, sling shot, sword cane, spear, or knuckles made of any metal or any hard substance, bowie knife, or any other kind of knife manufactured or sold for purposes of offense or defense, he or she shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200.00).”). Pueblo Colorado, Ordinances, Section Six, art. II, ch. 8 (“ If any person other than a law officer shall carry upon his person any loaded pistol, or other deadly weapon, he shall upon conviction be fined not less than fifteen nor more than fifty dollars for each offense, and in addition thereto forfeit to the city any weapon found on his person.”)

202. *Review American and English Encyclopedia of Law*, 29 CENTRAL L.J. 400 (1896).

203. THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 408 (1887). It addressed both relevant state case law and noted that the Second Amendment had not been incorporated. For the rejection of Second Amendment incorporation in the nineteenth century, see *United States v. Cruikshank*, 92 U.S. 542 (1875). In *McDonald v. City of Chicago*, the Second Amendment was held to apply to the states. *McDonald v. Chicago*, 561 U.S. 742 (2010).



norm. Similarly, the notion that states are prohibited from requiring a reason to travel armed is also historically false. Many states followed Massachusetts and restricted such a right to situations in which individuals had a reasonable fear of imminent threat. If one follows *Heller's* rule and looks at the historical record in an impartial and scholarly manner, the gun rights mythology about the right to carry turns out to reflect a partial account of the historical record. As the detailed treatment of this issue in the *American and English Encyclopedia of Law* makes clear, the notion of limiting public carry was an uncontroversial proposition at the end of the nineteenth century.<sup>204</sup>

## IX

### CONCLUSION

A systematic survey of popular guides to the law aimed at justices of the peace, constables, and other peace officers provides an excellent set of sources for exploring how the concepts of self-defense, the right to keep or travel with arms, and the need to balance these claims against the preservation of the peace evolved in the more than two centuries following the Glorious Revolution. Scholarship written before *Heller* offered a static and flawed account of the scope of the English right to keep and travel with arms. The actual history of this pre-existing English right and its evolution under American law is both fascinating and far more complex than either side in the modern debate over gun rights or gun violence prevention have realized. In parts of the American South, a more expansive conception of the right to travel armed emerged. Outside of the South, a more restrictive attitude toward armed travel took hold. By the end of the nineteenth century the more restrictive model was ascendant, but traces of the Southern model continued to exist.

The dispute between Justice Scalia and Justice Breyer over balancing may have been misplaced. The notion that the right of self-defense had to be balanced against the necessity to keep the peace was central to the way the common law dealt with arms. Preserving liberty while protecting the peace is not some modern imposition sprung from the head of modern activist jurists. It is the fundamental guiding principle at the root of Anglo-American law in this area and has always defined the way legislators, justices of the peace, and judges approach the regulation of arms. Perhaps the least appreciated part of the text of the Second Amendment is the clause that asserts the goal of promoting the "security of a free state." Policies that undermine that security are clearly not consistent with the Amendment's purpose. A variety of regulations on the right to keep and bear arms are not only permissible, but are in some sense essential to harmonize the two parts of the Amendment. The long history of common law restrictions only underscore this basic point.

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204. See Kopel *supra* note 111; O'Shea, *supra* note 155; Volokh, *supra* note 20.

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