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Cover Page Footnote

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THE PERSISTENCE OF RESISTANCE: CIVIC RIGHTS, NATURAL RIGHTS, AND PROPERTY RIGHTS IN THE HISTORICAL DEBATE OVER “THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS”

David Thomas Konig*

Whenever we talk of “the people,” we would do well to consult Mark Twain, whose jaundiced views of “the people” were balanced by an equally hopeful appeal to our better efforts. Twain’s first venture into reporting and the writing of fiction (a distinction he often blurred) took place in Nevada, where he worked as a newspaper reporter, covering, as all cub reporters must, the crime beat. A decade later he drew on those experiences in *Roughing It*.¹ Murder by gunfire—often upon the slightest provocation—amazed the young transplant, despite his upbringing in Missouri, which had its own bloody legacy. What startled Twain most, however, was the routine acquittal of the defendant “desperadoes” by jury verdict. “Not less than a hundred men have been murdered in Nevada—perhaps I would be within bounds if I said three hundred—and as far as I can learn,” he confessed, “only two persons have suffered the death penalty there.”²

The source of the problem was trial by jury—“the very palladium of free government” according to Alexander Hamilton³ and to generations that followed. “Trial by jury is the palladium of our liberties,” Twain concurred.⁴ “I do not know what a palladium is, having never seen a palladium, but it is a good thing no doubt at any rate.”⁵ He acknowledged that the trial by jury once had had its justifications. “It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago,” he admitted.⁶ Caring neither for the kind of originalism that lurked behind the

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1. Mark Twain, *Roughing It* (University Press 1996) (1872).

2. *Id.* at 351.

3. The Federalist No. 83, at 562 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

4. Twain, *supra* note 1, at 351.

5. *Id.*

6. *Id.* at 343.

eneration of the ancient constitution (nor, for that matter, historical accuracy), he explained:

Alfred the Great, when he invented trial by jury, and knew that he had admirably framed it to secure justice in his age of the world, was not aware that in the nineteenth century the condition of things would be so entirely changed that unless he rose from the grave and altered the jury plan to meet the emergency, it would prove the most ingenious and infallible agency for *defeating* justice that human wisdom could contrive. For how could he imagine that we simpletons would go on using his jury plan after circumstances had stripped it of its usefulness, any more than he could imagine that we would go on using his candle-clock after we had invented chronometers?⁷

Twain was describing a process that we would do well to consult in our efforts to understand how the eighteenth-century “right of the people to keep and bear Arms”⁸ has undergone a transformation similarly destructive of its original understanding and object. I refer—as did Twain—to *popular* understandings of constitutionalism, ideas at odds not only with the historical record but with law as interpreted in our courts. Whatever their vague understanding in the mining camps of Nevada, both jury participation and the keeping and bearing of arms had once been conceived as “civic rights” within an eighteenth-century conception of rights. Such civic rights, as Cornell and DeDino demonstrate, were “the rights and obligations associated with a citizen’s duty to society: participation in government as a political official, participation in the legal process as a juror, participation in the electoral process as a voter, and participation in the militia.”⁹

Like Twain, Cornell and DeDino remind us of the vast gap between judicial and popular constitutionalism. Prof. Cornell has written about “plebeian” populist constitutionalism as a “dissenting tradition” in American law in *The Other Founders*.¹⁰ In that important book he examined the many competing traditions in the American Founding and provided a constitutional dimension to the persistence of a pre-modern agrarian tradition¹¹ in the form of nineteenth-century grass-roots insurgency.¹² This conflict reflected another persistent clash over legal institutions in Anglo-American legal history—what Peter

7. *Id.* at 341.

8. U.S. Const. amend. II.

9. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *Fordham L. Rev.* 487, 508 (2004).

10. Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*, at 107-20 (1999).

11. See David Thomas Konig, *Law and Society in Puritan Massachusetts: Essex County, 1629-1692* (1979).

12. See Alan Taylor, *Liberty Men and Great Proprietors: The Revolutionary Settlement on the Maine Frontier, 1760-1820* (1990); see also Charles W. McCurdy, *The Anti-Rent Era in New York Law And Politics* (2001).

Karsten has called the contest between “‘high’ and ‘low’ legal cultures”¹³ in a legal tradition where the common law acknowledges organic growth, local imperatives, and the force of localism. Much of that contest derives from the uneasy tension between “periphery” and “center,” of course, and the uncompleted project of extending a unified and coherent constitutional regime among a westering people.¹⁴ But what Cornell and DeDino examine, and what I wish to expand upon here, is not a question of the federal relationship, though it does involve a heavy localist component. Rather, I wish to examine the persistence of an extralegal insurgent tradition that is deeply rooted historically, and thus all the more intractable as a problem in the rule of law in our culture. “Violence has been used repeatedly in our past, often quite purposefully,” writes Richard Hofstadter, “and a full reckoning with the fact is a necessary ingredient in any realistic national self-image.”¹⁵ We ignore this lay populist tradition at our peril, for to do so is to fail to recognize—and acknowledge—its reality and thus its impact on present debates. It will not go away, because its pedigree as history—even if not as law—is all too genuine.

How a constitutional right conceived within “the powerful legal discourse of civic obligation”¹⁶ can be claimed by many today as an entirely different sort of personal right is a challenge to the historian, and it is to that confusion that I wish to turn. At its core, this problem touches how people regard rights. Cornell and DeDino discuss the “civic right” of bearing arms—one that locates the bearing of arms within a tradition of citizen obligation to the community. It was not a purely “individual” right in the sense of a personal right removed from civic obligation. As I have examined it elsewhere in the British and American tradition, it stood with the right to serve as a juror in pronouncing communal judgment and imposing the force of the community on those who violated its legally established norms, or—in the case of bearing arms—against those who threatened its safety. It was, that is, an individual right exercised collectively.¹⁷

13. Peter Karsten, *Between Law and Custom: “High” and “Low” Legal Cultures in the Lands of the British Diaspora—The United States, Australia, and New Zealand, 1600-1900* (2002).

14. This is most notably expressed for early American constitutional development by John Phillip Reid in a multivolume series abridged as John Philip Reid, *Constitutional History of the American Revolution* (1995) and by Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788* (1986).

15. *American Violence: A Documentary History 475* (Richard Hofstadter & Michael Wallace eds., 1970).

16. Cornell & DeDino, *supra* note 9, at 491-92.

17. David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of ‘the Right of the People to Keep and Bear Arms,’* 22 *Law & Hist. Rev.* 119 (2004); see also Richard Primus, *The American Idea of Rights* 85 (1999).

The desperadoes and sympathetic jurors of Twain's Nevada reflected a frontier ethos, to be sure, but not one confined to the distant reaches of new settlements where established institutions did not reach. It had deep historic roots in the legacy of Anglo-American society, where there existed a dissenting tradition that never fully accepted orthodox law and legal institutions. Cornell's plebeian constitutionalists drew on this long tradition and bequeathed it to the nineteenth century, where it was exaggerated by a fervent cult of honor and justified by an egalitarianism that made firearms an agent of equality—altogether producing what Richard Slotkin has called “the Cult of the Colt.”¹⁸ Private or extralegal communal violence gained legitimacy in such a culture, where both jury service and the bearing of arms were divorced from their civic (that is, *legally and politically sanctioned*) exercise, and the impulses behind them returned to their pre-political natural state. Thomas J. Kernan, a Louisiana attorney, criticized this private usurpation of a community's legal procedures in 1906 when he lamented—but accepted as reality—what he called a “jurisprudence of lawlessness.”¹⁹ According to its rules, for example:

Any man who commits rape upon a woman of chaste character shall, without trial or hearing of any kind, be instantly put to death by his captors or other body of respectable citizens not less than three in number; and they shall have the right to determine the mode of execution, which may be both cruel and unusual, the Constitution and laws of the state and of the United States to the contrary notwithstanding.²⁰

Kernan's activist lay jurists were transforming both the jury and the right to bear arms from civic rights exercised within established legal institutions into the natural rights of self-defense and justice by the aggrieved, exercised either individually or in a group, to protect the norms of the community.

Their vigilantism sprang from the same “low” legal culture that motivated many of Cornell's plebeian constitutionalists and pitted them against a more formal legal culture they distrusted. This culture clash was not new, nor has it vanished. Michael Dorf recognizes it in his contribution to this Symposium, and correctly contrasts a preference for nonjudicial action by those favoring an individual right to firearms possession with the gun control camp that looks to the courts.²¹ This conflict over law goes deep, historically, and it is this

18. Richard Slotkin, *Equalizers: The Cult of the Colt in American Culture, in Guns, Crime, and Punishment in America* 54-67 (Bernard E. Harcourt ed., 2003).

19. Thomas J. Kernan, *The Jurisprudence of Lawlessness*, 29 A.B.A. Rep. 450, 451 (1906).

20. *Id.*

21. Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 Fordham L. Rev 549 (2004).

resistance to law and legal institutions that drives many pro-gun advocates who “claim to be[] victimized by what they and their sympathizers regard as an elitist liberal establishment.”²² Dorf could very well be describing the plebeians of which Cornell wrote.

Such anger and resentment at elites tapped deep springs of resentment, as well as a nostalgic evocation of simpler social arrangements, uncomplicated by law and legal arrangements governing what they saw as the source of their liberty and survival—their property. Central to these fears was the precarious nature of their land claims. As Alan Taylor has amply demonstrated, squatter claimants in colonial Maine appealed to a Lockean principle of property rights based on occupancy and labor.²³ Proprietors, on the other hand, saw property as legal matter, based on documents.²⁴ The naming of “Freetown, Maine,” therefore, was not only a tribute to freedom, but, Taylor writes, it also “announced the settlers’ determination to pay no outside proprietor for their lands.”²⁵ If challenged as to whether they had properly and legally purchased their land, squatters might reply, as did one group, “no, hang the proprietors. They said they were nothing but rogues and they would cut [timber] where they pleased.”²⁶ Legal action was seen as an attack not only on their property as land, but on all forms of the property they saw as essential to their freedom. If challenged by the legal instruments of the state, a land claimant might claim that the political contract had been broken. “When Property is made uncertain and precarious,” asserted a Lockean land rioter in New Jersey in 1747, “this band [of government] is broken.”²⁷ In such a case, armed resistance was justified—indeed, obligatory.

“Property” meant more than land and the tangible items people owned. In the eighteenth century it embodied all that gave one the capacity for autonomy and survival—“whatever gave a person independence,” writes Gordon Wood, whether that be tools or land.²⁸ It might also be embodied in the weapons used to repel legal challenges to the land, an act seen as a matter of survival—a matter, that is, of the most elemental natural right of self-preservation. Indeed, arms need not be guns. Itinerant minister Samuel Ely rallied

22. *Id.* at 568.

23. Taylor, *supra* note 12, at 25.

24. *Id.*

25. *Id.* at 128.

26. *Id.* at 25.

27. Edward Countryman, ‘*Out of the Bounds of the Law*’: *Northern Land Rioters in the Eighteenth Century*, in *The American Revolution: Explorations in the History of American Radicalism* 48 (Alfred F. Young ed., 1976).

28. Gordon S. Wood provides a concise description of this concept in his Preface to *Liberty, Property, and the Foundations Of the American Constitution* ix-xiv (Ellen Frankel Paul & Howard Dickman eds., 1989).

the men of western Massachusetts to protect their property against merchants about to sue and oust them in 1782 with the cry: "Come on, my brave boys, we'll go to the woodpile and get clubs enough and knock their grey wigs off and send them out of the world in an instant."²⁹ How else, asked a farmer there, could they "crush or at least put a proper check or restraint on that order of gentlemen denominated lawyers"?³⁰

But guns served as the best of all tools to fight off the law. In today's world, argues Richard Slotkin, a firearm is no longer "merely a tool," but historically many have rejected that distinction. "A gun is just a tool, Marion," explains the hero of the movie *Shane*. "Like an axe or a plow. It's as good or as bad as the man that uses it."³¹ A Maine land rioter, invited to take part in an impending action against proprietors, was asked "if I had my Gun ready," because firearms offered many advantages to him and the men who would resist outside challengers. Direct confrontation, of course, always remained an option, but pitched battles were to be avoided. Rather, firearms allowed those resisting the law to hide along roadsides and intimidate process servers or land agents on their way to oust squatters. Guns fired near a house at night served the same purpose, as did random shots fired at homes. These tactics are important, I think, because as Taylor makes clear, they constituted the extralegal action of a dispossessed group resisting what it viewed as a threat to its survival. Their firearms were not only a means of protecting their property, however; they were a form of property themselves, as necessary as a plow or a roof over their heads. The tenacity with which gun rights advocates defend their "right" to keep and bear arms, therefore, is a product of this basic claim to the natural right of self-defense and survival. A proprietor's spy among defiant Maine squatters described their claim to be:

[T]he sole owners of such lands as they have made themselves the possessors of, and . . . they have a good right to hold their possessions by the firelock and will kill any person who offers to run a compass thro' their possession. This they say is no Murder! This is the education which they have received from the practice and parental instruction which they have received³²

Pennsylvania squatters were especially receptive to this logic. Ethan Allen, already famous for his support of land claimants in Vermont, had visited the Wyoming Valley of Pennsylvania in the

29. David P. Szatmary, *Shays' Rebellion: The Making Of An Agrarian Insurrection* 42-43 (1980).

30. *Id.*

31. Slotkin, *supra* note 18, at 58-59. Slotkin continues, "[i]n private hands, unfettered by regulation, the gun allows an individual to do what in other countries only the state can legitimately do." *Id.* at 59.

32. Taylor, *supra* note 12, at 17.

1770s. Haranguing squatters there with the cry, “[l]iberty & [p]roperty, or slavery and poverty, are before us,” he called on them to “procure fire-arms, and ammunition, [and] be united among yourselves.”³³ It is no coincidence that such rhetoric thrived in that part of Pennsylvania that produced the famous “Dissent of the Minority” with its unique claim “[t]hat the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game.”³⁴ It is also no coincidence that the author of the “Dissent,”³⁵ in his concluding remarks, explicitly combined support of bearing arms and opposition to a standing army with protection against court-ordered property seizures supporting

a very expensive and burthensome government. The standing army must be numerous, and as a further support, it will be the policy of this government to multiply officers in every department: judges, collectors, tax gatherers, excisemen, and the whole host of revenue officers will swarm over the land, devouring the hard earnings of the industrious³⁶

Squatters saw their rights as given by nature and validated by labor, and those in Maine disguised themselves as the embodiment of a pre-political, natural world—as “white Indians”—in their resistance.³⁷ They claimed a pre-political right—a natural right, as it were—that responded to their rejection of the political contract embodied in law. So far, such a concept echoes the most proper invocation of Lockean contract theory. What distinguishes these apostles of natural rights from the mainstream of the Anglo-American constitutional tradition, however, and what sets them apart on a dissenting tradition that has no originalist constitutional credentials, is their failure to complete the process that Locke and Jefferson saw as necessary. The Declaration of Independence sets out the stages of revolution as conventionally understood in the political theory of the Founding Era: once “the political bands” have been dissolved, a people has the right—and thus the obligation—“to assume among the powers of the earth the separate and equal station to which the laws of Nature and of Nature’s God entitle them.”³⁸ The people were to reorganize through a new

33. Karsten, *supra* note 13, at 166; see also *id.* at 164-76 (providing a highly insightful discussion of “[t]he [i]nformal [l]aw [o]f [s]quatters [a]nd [p]roprietors”).

34. 2 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Pennsylvania 623-24 (Merrill Jensen ed., 1976).

35. 2 *Id.* at 617.

36. 2 *Id.* at 639.

37. Taylor, *supra* note 12, at 181-207. Taylor notes the irony of these claims, based as they were on dispossessing the very people whose identity they were claiming. It might be argued, however, that these “white Indians” were basing their dispossession of Native Americans on a claim of natural law.

38. Thomas Jefferson, *The Declaration of Independence as Adopted by Congress*, in 1 The Papers of Thomas Jefferson 429 (Julian P. Boyd ed., 1950).

political contract, establish political and legal institutions, and to join the sovereign nations of the world—not revert permanently to a pre-political status under those natural laws. Jefferson, like Locke, began with a state of nature; neither ended with one. As Locke explains, only when “a long train of abuses” by “those in authority” convinces a majority that such an act is needed would “the dissolution of government” be justified, whereupon “the people”—an entity he is at pains to identify as an organized majority—“continue the legislative in themselves; or erect a new form, or under the old form place it in new hands, as they think good.”³⁹ This distinction is crucial for Locke:

To conclude, The *Power that every individual gave the Society*, when he entered into it, can never revert to Individuals again, as long as the Society lasts, but will always remain in the Community; because without this, there can be no community, no Common-wealth, which is contrary to the original Agreement⁴⁰

Natural rights might authorize the dissolution and reformulation of the political community, but they could not serve as an ongoing structure and could only be exercised within a framework recognized by law. Jefferson made this distinction when he associated the right to navigate the Mississippi River as based “on the law of Nature and Nations”—that is, as recognized in the community of nations and given force by international law. Such a right, though “written in the heart of man,” was nevertheless “an imperfect right” subject to negotiation between nations as to how it would actually operate, and involving “mutual disposition to make equal sacrifices.”⁴¹

Nevertheless, the power of natural rights, crudely understood in an age of revolution and egalitarianism, could be an intoxicating brew. Though Jefferson upheld the use of firearms on one’s own “lands or tenements,”⁴² he denied it to groups who took arms against duly and democratically enacted laws with which they disagreed, such as the embargo. Such assemblages he carefully distinguished as “a number of individuals.”⁴³

Historians can contribute to the discussion of Second Amendment rights and to the national debate on gun control if they acknowledge that the most ardent opponents of firearms regulation, like those supporting such laws, *do* have a pedigree reaching back to the

39. John Locke, *Two Treatises of Government* 433 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

40. *Id.* at 445-46.

41. Thomas Jefferson, *Report on Negotiations with Spain (1792)*, in 1 *The Papers of Thomas Jefferson*, *supra* note 38, at 296, 301-03.

42. Thomas Jefferson, *Second Draft of Virginia Constitution (1776)*, in 1 *The Papers of Thomas Jefferson*, *supra* note 38, at 353. Locke addressed the issue by rejecting rules by which “honest men may not oppose robbers or pirates.” Locke, *supra* note 39, at 434-35.

43. Jefferson to Daniel D. Tompkins, 15 August 1808, in 12 *The Writings of Thomas Jefferson* 132 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

Revolution. The founders repudiated an individual right to unrestricted firearms possession, however, as a dangerously incomplete “right” which, if allowed to survive, might grow into a grotesque form of licentiousness that threatened the liberty they were seeking to preserve. That it survives today despite those vague constitutional efforts is a testament as much to the distortion of history as to the distortion of rights theory.

Notes & Observations