The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928

Saul Cornell[*]

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INTRODUCTION

Following *Heller*'s instruction to look to history for guidance in evaluating the scope of permissible regulation under the Second Amendment, recent scholarship has uncovered a previously hidden history of arms regulation in the Anglo-American legal tradition.[1] Much

 Paul and Diane Guenther Chair in American History, Fordham University.

[1] *See* Eric M. Ruben & Darrell A. H. Miller, *Preface: The Second Generation of Second Amendment Law & Policy*, 80 LAW & CONTEMP. PROBS. 1, 5-7 (2017) (discussing a

of this material was largely unavailable to the *Heller* court because the sources were difficult to identify, search, and collect. The creation of powerful searchable digital "virtual" archives has transformed this once moribund sub-field of legal scholarship and facilitated a more sophisticated understanding of the scope of gun regulation under Anglo-American law.[2]

In contrast to much pre-*Heller* scholarship, this new Second Generation of Second Amendment scholarship has moved beyond the narrow focus on the single issue that defined the previous era's scholarly obsession, the individual or collective nature of the right entrenched in the Second Amendment.[3] The first generation of legal scholars approached their subject matter without engaging directly with other relevant bodies of research and scholarship necessary to understand early American legal history and culture.[4] This tunnel history model, working backward from today's debates and focusing on a narrow range of sources, inevitably produced a distorted ahistorical view of the right to keep and bear arms, confusing the preoccupations of modern Americans with those of earlier generations who lived in a pre-modern society that conceptualized firearms regulations in distinctly different terms than those familiar to modern lawyers and judges.[5] The Second Generation of Second Amendment scholarship, by contrast, has incorporated insights from other subfields of legal history outside of the field of Second Amendment study, importing insights from the history of criminal law and the rich literature on the role of regionalism in the Americanization of the common law.[6] It has also taken *Heller's*

variety of post-*Heller* articles that incorporate or explore the history of gun regulation and the use of new sources to illuminate this history).

[2] *See* ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS 39-42 (2015).

[3] *See* Saul Cornell, "Half Cocked": The Persistence of Anachronism and Presentism in the Academic Debate over the Second Amendment, 106 J. CRIM. L. & CRIMINOLOGY 203, 206-07 (2016) [hereinafter *Half Cocked*].

[4] *See* Martin S. Flaherty, *Can the Quill Be Mightier than the Uzi?: History "Lite," "Law Office," and Worse Meets the Second Amendment*, 37 CARDOZO L. REV. 663, 677 (2015).

[5] *See generally* 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 complex set of processes shaping the evolution of early American law, most notably the profound regional differences that emerged as a result of slavery).

[6] *See* Cornell, *Half Cocked*, *supra* note 3, at 207, 210. For a discussion of the minimum standard for undergraduate history majors, see MARY LYNN RAMPOLLA, A POCKET GUIDE TO WRITING IN HISTORY 18 (7th ed. 2012) and MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 1-3

injunction to look closely at the history of gun regulation seriously and placed Second Amendment scholarship on a more historically sound footing.

The divergent paths taken by rigorous historical scholarship and ideologically driven gun rights advocacy, masquerading as serious scholarship, is evident in many of the amicus briefs filed in *NYSRPA v. Bruen*, the most important Second Amendment case to reach the Supreme Court in more than a decade.[7] The law at issue in *Bruen*, a good cause permit scheme, builds on a tradition of arms regulation stretching back centuries in Anglo-American law. Indeed, permit schemes similar in scope to New York's permit law first emerged in the era of the Fourteenth Amendment. Such laws were part of a post-Civil War constitutional transformation in the meaning of the right to bear arms that swept across the nation. This reformulation of the right to bear arms in terms of a "right to regulate" in turn triggered an enormous expansion in both the number and types of gun laws passed by states and localities. There was broad agreement among courts, and constitutional commentators in the era of the Fourteenth Amendment that these new laws were consistent with both the Second Amendment and various state arms bearing provisions.[8]

Rather than break free from an earlier generation's penchant for law office history, recent gun rights scholarship, particularly as it was

(2001). On the methods of professional legal history, see THE OXFORD HANDBOOK OF LEGAL HISTORY (Markus Dirk Dubber & Christopher L. Tomlins eds., 2018). Thus, Paul Clement's briefs in *NYSRPA v. Bruen* rely heavily on dubious historical claims made by legal scholars who mischaracterized the nature of these laws by failing to use the standard techniques of legal history. *See* Transcript of Oral Argument at 23, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. Nov. 3, 2021) [hereinafter Transcript of Oral Argument]. For examples of misreading of surety laws, see Brief of Professors Robert Leider & Nelson Lund, & the Buckeye Firearms Ass'n as Amici Curiae in Support of Petitioners at 19-33, *Bruen*, No. 20-843 [hereinafter Brief of Professors Leider & Lund]. For a discussion of the way sureties functioned, see *infra* pp. 33-35, 35 n.131. Indeed, during oral argument, Justices Breyer and Sotomayor both challenged Clement's interpretation as little more than "law office history." *See* Transcript of Oral Argument, *supra*, at 10-11. On the concept of law office history, see Flaherty, *supra* note 4, at 677.

[7] *See* Brief of Amicus Curiae Mountain States Legal Foundation's Center to Keep & Bear Arms in Support of Petitioners at 11-33, *Bruen*, No. 20-843; Brief of Professors Leider & Lund, *supra* note 6, at 7-8; Brief of Amici Curiae Professors of Second Amendment Law et al. in Support of Petitioners at 21-35, *Bruen*, No. 20-843.

[8] Saul Cornell, Symposium, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 UC DAVIS L. REV. ONLINE 65, 68, 74-79 (2021) [hereinafter *The Right to Regulate*] (demonstrating the explicit affirmation of the right to regulate firearms in public included in Reconstruction era state arms bearing provisions and the consequent expansion of state and local regulation of firearms).

deployed in the *Bruen* amicus briefs, has carried forward this earlier flawed approach, enhancing it with the power of digital searching and an infusion of nearly limitless research support by the NRA and other right-wing sources of funding.[9] New technologies have made some types of sources more readily available, but digital searching is not a substitute for rigorous historical research, informed by the standard methods employed by legal historians across disparate fields.[10]

This Article charts the six-century arc of arms regulation in public in the Anglo-American legal tradition. It summarizes existing historical scholarship, exposes historical flaws in gun rights activist writing pretending to be engaged in serious scholarly inquiry, including the dubious claims advanced in the many gun rights amicus briefs filed in *Bruen*, and presents new research crucial to understanding the history of gun regulation and enforcement.

I. EARLY MODERN "RIGHTS TALK" AND ON-GOING PROBLEMS OF PRESENTISM IN SECOND AMENDMENT SCHOLARSHIP AND LAW

Curiously, much of the debate over the Second Amendment has proceeded without considering a more basic question: how did the Founding era understand the nature of rights? Indeed, during the oral argument in *Bruen*, Chief Justice Roberts and Justice Kavanaugh expressed considerable discomfort because New York's discretionary permit system did not fit with how modern law typically deals with rights. In Justice Kavanaugh's view, "that's just not how we do constitutional rights."[11] Ironically, Justice Barrett queried New York's

[9] On the problems with the gun rights narrative about Anglo-American law, see Cornell, *Half Cocked*, *supra* note 3, at 207-08 and Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 196-97 (2008). The Federalist Society has consistently endorsed a strongly libertarian reading of the Second Amendment and, for a good illustration of this approach, see Symposium, *The Second Amendment in the New Supreme Court*, 43 HARV. J.L. & PUB. POL'Y 319 (2020). The NRA funded gun rights scholar David Kopel's brief, which was filed in *Bruen*. Will Van Sant, *The NRA Paid a Gun Rights Activist to File SCOTUS Briefs. He Didn't Disclose it to the Court*, TRACE (Nov. 3, 2021), https://www.thetrace.org/2021/11/scotus-nra-foundation-david-kopel-nysrpa-v-bruen-documents/ [https://perma.cc/CFP8-DUWM]. For a general discussion of the rise of coordinated and funded amicus campaigns, see Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J. F. 141, 141-74 (2021).

[10] On historical methodology, see HOWELL & PREVENIER, *supra* note 6. On the methods of professional legal history, see THE OXFORD HANDBOOK OF LEGAL HISTORY, *supra* note 6.

[11] Transcript of Oral Argument, *supra* note 6, at 50. The claim that federal law treats all rights uniformly, including rights enumerated in the Bill of Rights is erroneous. In fact, rights, including rights expressly protected by the first eight amendments, are not

Solicitor General about her views on the correctness of *Heller*, but her question would have been better directed to her fellow justices. In essence, Roberts and Kavanaugh's concerns were premised on an implicit rejection of *Heller*'s originalism, which requires that we treat rights claims in the manner that the Founding era approached such matters.[12] *Heller* announced that rights are entrenched with the scope they enjoyed when adopted, but Roberts and Kavanaugh balked at approaching gun rights in the more crimped manner that Founding era rights were generally treated. Rather than honestly express reservations about Scalia's originalism, both justices simply smuggled a quintessentially living constitution approach to rights into their questions without addressing the doctrinal problems such an approach posed for *Heller*'s framework.[13]

To understand the roots of the rights anxiety articulated by Roberts and Kavanaugh, one must contrast the way modern law treats rights with the radically different approach taken to rights in the Founding era.[14] There is a large scholarly literature on the nature of legal rights in contemporary Anglo-American law. One of the most useful conceptualizations of modern legal rights was enunciated by the legal philosopher Joseph Raz whose conception of rights claims is apposite: "An individual has a right if an interest of his is sufficient to hold another to be subject to a duty. His right is a legal right if it is recognized by law, that is if the law holds his interest to be sufficient ground to hold another to be subject to a duty."[15] This approach was decidedly not how the Founding era conceptualized rights. The rights tradition shaping early American constitutionalism combined social contract theory (including Lockean theory), common law, and Whig republicanism. The constitutional synthesis that emerged from the

treated in a uniform manner in existing jurisprudence. *See* Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, U. ILL. L. REV. 1479, 1485 (2020).

[12] *See* District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).

[13] *See* Transcript of Oral Argument, *supra* note 6, at 24-25, 27. The approach to rights in the living constitution tradition is dynamic, not static. *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1754 (2007) (discussing how the scope and understanding of constitutional rights has changed over time).

[14] *See* Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 32-33 (2020) [hereinafter *Natural Rights*].

[15] Joseph Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 14 (1984). *See generally* Leif Wenar, *Rights*, STANFORD ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/entries/rights/ (last updated Feb. 24, 2020) [https://perma.cc/C6N9-7SGV] (discussing the modern understanding of rights).

fusion of these legal traditions treated rights differently than modern courts typically approach rights.[16]

The American lawyers, jurists, and ordinary citizens who participated in the great wave of constitution writing that swept across America in the period immediately following the American Revolution drew on this novel approach to rights when framing the first state constitutions. A proper understanding this tradition is the logical starting point for interpreting the Second Amendment and its various state analogs.[17] Historian Jonathan Gienapp's gloss on the problem of interpreting Founding era rights discourse offers a useful cautionary reminder of the danger of smuggling in contemporary legal ideas into accounts of eighteenth-century era texts, beliefs, and practices. "Early state constitutions," as Gienapp notes, "vested local legislatures with sweeping authority, not because Revolutionary Americans were indifferent to individual liberty but because they assumed that empowering the people's representatives was the same thing as preserving the people's rights."[18] Thus, America's true first freedom — the foundation of all other liberties — was neither the right to bear arms nor the core First Amendment freedoms of speech and the press, but the right of the people to enact laws to regulate their own internal police.[19]

Understanding the Founding era conception of "police" is therefore indispensable to applying *Heller's* originalist model of rights. The original Second Amendment co-existed with a robust view of the people's right to regulate their own police. Liberty and power were not seen as antithetical as they are in modern law. Lawyers, judges, and the educated elite, who played such a central role in framing and ratifying

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[16] *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 92-98 (2017) [hereinafter *Republicanism*].

[17] *See* Dan Edelstein, *Early-Modern Rights Regimes: A Genealogy of Revolutionary Rights*, 3 CRITICAL ANALYSIS L. 221, 233-34 (2016). *See generally* GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780s–1830s, at 8-41 (discussing the issues surrounding the drafting and ratification of the Constitution); Victoria Kahn, *Early Modern Rights Talk*, 13 YALE J.L. & HUMAN. 391 (2001) (discussing how the early modern language of rights incorporated aspects of natural rights and other philosophical traditions).

[18] Jonathan Gienapp, Response, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115, 125 (2019).

[19] *See* THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) ("He has refused his Assent to Laws, the most wholesome and necessary for the public good."). *See generally* Joseph Postell, *Regulation During the American Founding: Achieving Liberalism and Republicanism*, 5 AM. POL. THOUGHT 80 (2016) (examining the importance of regulation to Founding political and constitutional thought).

the Constitution and the subsequent amendments, approached rights with a different conceptual tool kit and set of assumptions.[20]

In this scheme of ordered liberty, regulation was the necessary precondition for the protection and flourishing of rights, not a threat to freedom.[21] As one patriotic revolutionary era orator observed, almost a decade after the adoption of the Constitution: "True liberty consists, not in having *no government*, not in a *destitution of all law*, but in our having an equal voice in the formation and execution of the laws, according as they effect [*sic*] our persons and property."[22] By allowing individuals to participate in politics and enact laws aimed at promoting the health, safety, and well-being of the people, liberty flourished.[23]

The key insight derived from taking rights seriously and applying the Founding era's conception of liberty is that the modern terms and categories that have dominated Second Amendment debate, terms such as individual rights and collective rights, distort more than they illuminate the original meaning of the right to keep and bear arms.[24] Eighteenth century discussions of rights simply do not fit such a simplistic modern dichotomy. Legal scholar Jud Campbell's observations regarding the vital Founding era category of retained natural rights, which included the right of self-defense, is an essential starting point for making sense of the Second Amendment and state arms bearing provisions. The inclusion of rights guarantees in constitutional texts was not meant to place them beyond the scope of legislative control. "The point of retaining natural rights," Campbell reminds us "was not to make certain aspects of natural liberty immune from governmental regulation. Rather, retained natural rights were aspects of natural liberty that could be restricted only with just cause

[20] *See* Gienapp, *supra* note 18, at 121-22.

[21] *See* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 31-35 (2016); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 3-6, 17-25 (2014). For critiques of these ahistorical approaches to rights at the Founding, see Campbell, *Republicanism*, *supra* note 16, at 87.

[22] Joseph Russell, An Oration; Pronounced in Princeton, Massachusetts, on the Anniversary of American Independence, July 4, 1799, at 7 (July 4, 1799), (text available in the Evans Early American Imprint Collection) (emphasis in original).

[23] *See generally* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998) (examining neo-Roman theories of free citizens and how it impacted the development of political theory in England); THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND (Barry Alan Shain ed., 2007) (discussing how the Founding generation approached rights, including the republican model of protecting rights by representation).

[24] *See* Cornell, *Half Cocked*, *supra* note 3, at 206-08.

and only with consent of the body politic."[25] Rather than limit rights, regulation was the essential means of preserving rights, including self-defense.[26]

Unrestrained liberty was not a guardian of rights in this scheme, it was among the greatest threats to it.[27] This dangerous form of liberty was described by Founding era writers in terms that seem alien to modern law, including a word that has largely disappeared from modern discourse — *licentiousness*. Thomas Tudor Tucker, a prominent South Carolina political leader who sat in the first Congress that drafted the first ten amendments to the Constitution, including the Second Amendment, captured this vision of how liberty and rights sought to steer a course between tyranny and anarchy. "Licentiousness," he warned members of Congress, "is a tyranny as inconsistent with freedom and as destructive of the common rights of mankind, as is the arbitrary sway of an enthroned despot. And those, who wish to call themselves truly free, have to guard, with equal vigilance, against the one and the other."[28] Well-regulated liberty, what modern legal theorists often describe as ordered liberty, sought to navigate between the danger of unrestrained power and licentiousness.[29] Recovering this

[25] Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 527 (2019) (emphasis in original). *See generally* Cornell, *Half Cocked*, *supra* note 3, at 206 (noting that the Second Amendment was not understood in terms of the simple dichotomies that have shaped modern debate over the right to bear arms).

[26] *See* Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569, 576-77 (2017). Campbell's work is paradigm shifting and it renders Justice Scalia's unsubstantiated claim in *Heller* that the inclusion of the Second Amendment in the Bill of Rights placed certain forms of regulation out of bounds totally anachronistic. This claim has no foundation in Founding era constitutional thought, but reflects the contentious modern debate between Justice Black and Justice Frankfurter over judicial balancing, on Scalia's debt to this modern debate, see generally SAUL CORNELL, THE POLICE POWER AND THE AUTHORITY TO REGULATE FIREARMS IN EARLY AMERICA 1-2 (2021), https://www.brennancenter.org/sites/default/files/2021-06/Cornell_final.pdf [https://perma.cc/J6QD-4YXG] [hereinafter THE POLICE POWER] and Joseph Blocher, Response, *Rights as Trumps of What?*, 132 HARV. L. REV. F. 120, 123 (2019).

[27] CORNELL, THE POLICE POWER, *supra* note 26, at 4. Campbell's work builds on a broad scholarly consensus derived from the work of a previous generation of scholars. *See supra* notes 25–26. *See generally* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND, *supra* note 23 (discussing the history of rights in America and the understanding of early declarations of rights).

[28] Philodemus, *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice*, (Charleston 1784), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 606, 628 (Donald S. Lutz & Charles S. Hyneman eds., 1983) (using the pen name "Philodemus," Thomas Tudor Tucker published various works on politics and constitutional law).

[29] On the idea of well-regulated liberty and founding era conceptions of rights, see generally JOHN J. ZUBLY, THE LAW OF LIBERTY (1775). The corresponding modern legal

lost language of eighteenth-century rights, including the conception of liberty and regulation that shaped American law in the era of the Second Amendment, is essential if *Heller's* originalist framework is to remain true to Founding Era understandings.[30]

II. THE MODERN GUN RIGHTS INVENTION OF A RIGHT TO PEACEABLE ARMED TRAVEL: ENGLISH HISTORY VS. GUN RIGHTS FANTASY

Under English law, the monarchy and the English state enjoyed a monopoly on violence. Any arming — outside of those situations where subjects assisted in restoring or preserving the peace — was an encroachment on royal power and therefore a violation of English law.[31] The claim that ordinary subjects had a free-standing right to travel armed, what modern gun rights advocates scholars have dubbed a right to "peaceable armed travel," would be legally incoherent under English theories of sovereignty and law. Claims about a right to peaceable armed travel are not rooted in history, but are part of an invented tradition, conjured out of thin air by modern gun rights activists.[32]

As Sir William Blackstone's *Commentaries* reminded its readers: "all offenses are either against the king's peace or his crown and dignity."[33] Therefore, it followed that any "affronts to that power, and breaches of

concept would be "ordered liberty." *See* Palko v. Connecticut, 302 U.S 319, 325 (1937). For a more recent elaboration of the concept, see JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES (2013).

30 For a useful summary of *Heller*'s complex relationship to other fields of constitutional law, see JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* (2018).

31 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *258, *338. For an elaboration of the common law framework described by Blackstone, see 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135-36 (London, Eliz. Nutt 1716). This was the conclusion of the Chief Justice of the King's Bench who wrote, "It is likewise a great offence at the *common law*, [traveling armed] as if the King were not able or willing to protect his subjects." Sir John Knight's Case (1686) 87 Eng. Rep. 75, 76 (KB). Arms were typically described as offensive (edged weapons and firearms), and defensive (armor or shields). The suggestion made by some gun-rights advocates that the limits on armed travel only applied to armor and not to offensive weapons is contradicted by the clear exposition of the meaning of these terms in legal dictionaries popular in the Founding era. *See* District of Columbia v. Heller, 554 U.S. 570, 581 (2008); *Armour and Arms*, A NEW LAW DICTIONARY (Henry Lintot, 7th ed. 1756).

32 The idea of unfettered peaceable public carry is a modern invention of the gun rights movement. For a discussion of how this invented tradition was introduced into legal scholarship, see Patrick J. Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, 2021 U. ILL. L. REV. ONLINE 195, 202-06 (2021).

33 1 BLACKSTONE, *supra* note 31, at *258.

those rights, are immediate offenses against [the King]."[34] Traveling armed was an affront to the King's sovereignty and was only justified in a limited set of circumstances.[35] Giles Jacob, perhaps the most prolific author of popular legal guidebooks in the Anglo-American world in the eighteenth century, captured this fundamental insight in his influential legal dictionary, a text that Thomas Jefferson and John Adams included in their law libraries.[36] Jacob's offered a pithy summary of how English law treated armed travel. "By the Common Law it is an Offence for [Persons] to go or ride *armed* with dangerous and unusual Weapons; But Gentlemen may wear common *Armour* according to their Quality."[37] These inter-related legal principles derived from one of the most elemental features of English law: the King's monopoly on the use of force. "The King may prohibit Force of *Arms*, and punish Offenders according to Law."[38] The idea of a right to peaceable travel would have contravened the King's authority and because of this fact individuals had no such right under common law.

One mechanism for enforcing the King's Peace was the Statute of Northampton (1328), which prohibited appearing armed before representatives of the King's authority and expressly banned traveling armed at "Fairs, Markets, . . . [or] elsewhere."[39] Thus, the basic legal framework of English law created by the Statute of Northampton and applied by conservators of the peace (sheriffs, constables, and justices of the peace) in the centuries after it was enacted, clearly excluded arms from sensitive places such as courts, and crowded public spaces such as fairs and markets. The statute also recognized the common law crime of affray as a separate violation of the King's Peace because traveling armed created an asymmetry of power between the armed individual and a law-abiding subject who followed the law's prohibition on

[34] *Id.* at *259.

[35] *See Sir John*, 87 Eng. Rep. at 76 ("It is likewise a great offence at the *common law*, [traveling armed] as if the King were not able or willing to protect his subjects."(emphasis in original)).

[36] On Jacob's influence, see Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 AM. J. LEGAL HIST. 257, 260-62 (2000).

[37] A NEW LAW DICTIONARY, *supra* note 31 (alteration in original) (emphasis in original).

[38] *Id.* (emphasis in original).

[39] Statute of Northampton 1328, 2 Edw. 3, c. 3 (Eng.), *reprinted in* 1 THE STATUTES OF THE REALM 258 (London, John Raithby ed., 1235–1377). On the importance of the Statute of Northampton to maintain the peace, see generally 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).

traveling armed. This asymmetry was the source of the public terror that violated the King's Peace. There was no requirement that one establish an intent to terrify or that the armed travel terrorized any specific person, the injury was to the King's Peace and sovereignty. English conceptions of criminal law in this era inferred the requisite *mens rea* to establish criminal culpability from the illegal act, there was no necessity to demonstrate a specific evil intent. In modern terms the necessary *mens rea* was objective in nature, not subjective.[40] The notion that the Statute of Northampton was limited only to "punish people who go armed to terrify the King's subjects" is mistaken because it applies an anachronistic understanding of criminal law that did not emerge until centuries later.[41] The mere act of traveling armed was the source of the terror that violated the peace and hence undermined the King's authority.

One of the best sources for understanding this common law framework is Michael Dalton's *Country Justice*.[42] This text became one of the most popular legal guidebooks in the Anglo-American world. Dalton's gloss on the law governing armed travel was unambiguously stated in forceful terms: "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 carry them before the Justice of Peace, and the Justice may bind them to the Peace; yea, though those persons were so armed or weaponed for their defense upon any private quarrel . . . ."[43] There was no right to arm pre-emptively under common law because one feared attack. In such situations, Dalton reminded his readers the proper response was not arming, but to seek out an agent of the crown and bind those who threatened the peace to a surety of the peace or good behavior. Sureties were designed to both prevent future crime and punish those who violated the prohibition on arming in public and disturbed the peace.

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[40] Under common law the requisite criminal intent at this period of English history "was presumed from the performance of the unlawful act." GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW 140-41 (2016).

[41] Sir John Knight's Case (1686) 87 Eng. Rep. 75, 76 (KB); *see* BINDER, *supra* note 40, at 140-41.

[42] MICHAEL DALTON, THE COUNTRY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 264 (London, William Rawlins & Samuel Roycroft, eds., 1690). On Dalton's influence and the role of justice of the peace guides to Anglo-American legal culture, 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, 317-18 (1977), and JOHN B. NANN & MORRIS L. COHEN, THE YALE LAW SCHOOL GUIDE TO RESEARCH IN AMERICAN LEGAL HISTORY 87 (2018).

[43] DALTON, *supra* note 42, at 264.

This system made sense given the social realities of early modern England, a pre-industrial society in which the enforcement of the peace rested on informal mechanisms of community-based policing.[44]

Dalton's popular text not only summarized legal orthodoxy, but it offered insights into the reasons undergirding the common law's approach to the peace. Traveling armed was a particular threat to the peace and a per se violation of the King's peace because "it striketh a fear and Terror in the King's Subjects."[45] The act of traveling with an offensive weapon by its very nature provoked a "fear of the people" — there was no need to establish a specific intent to terrify or prove that an action was an actual breach of the peace to meet this terror requirement.[46] When read in the context of criminal law norms appropriate to the eighteenth century, the meaning of the legal term of art, *in terrorem,* does not support the modern subjective psychological model of *mens rea* and its focus on actual intent or the subjective experiences of those who were terrified by the prohibited conduct. Rather the terror requirement under law arose from the mere act of arming, an action that threatened the King's authority, and disturbed the peace of the realm.[47]

Furthermore, modern law typically characterizes the use of arms in terms of the intent of the user.[48] A gun in this framework may either be an offensive weapon or a defensive weapon depending on its use and the user's mental state at a particular moment. Under English common law, a different categorical approach governed; firearms were always considered as offensive weapons independent of any intent or action. Defensive weapons were a different class of arms entirely and included weapons such as armor and shields.[49]

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[44] *See generally* STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, C. 1550-1640, at 99-101 (2000) (discussing how the system of sureties functioned in an early modern English society). The system rested on the strong bonds of community and the power of local elites who often posted bonds for poor neighbors, further tying elites and ordinary Britons together in bonds of patronage and deference.

[45] DALTON, *supra* note 42, at 264.

[46] *See id.*

[47] *See* BINDER, *supra* note 40, at 140-41.

[48] On the legal debate over guns and self-defense, see generally Eric Ruben, *An Unstable Core: Self-defense and the Second Amendment*, 108 CALIF. L. REV. 63 (2020). For an overview of the modern public policy debate over defensive gun uses, see generally Jens Ludwig, *Gun Self-defense and Deterrence*, 27 CRIME & JUST. 363 (2000).

[49] Although a firearm was always an offensive weapon under English law, other items in certain circumstances could be treated as offensive arms. *See Gun*, THE COMPLETE DICTIONARY OF ARTS AND SCIENCES 1526 (London, Homer's Head 1764) (defining firearms as the quintessential offensive weapons in the eyes of the law: "GUN,

There were a small number of well-recognized exemptions to the general ban on armed travel embodied in the Statute of Northampton.[50] These exceptions aimed to facilitate community-based forms of law enforcement which preserved the King's Peace.[51] Accordingly, one might arm oneself to put down riots, rebellions, or join the "hue and cry." Traditionally, the arms used to meet one's obligation to the crown to enforce the peace were determined by socio-economic class status so that during much of this period ownership of firearms was limited to members of the gentry elite.[52]

Sir John Knight's Case, the most significant judicial interpretation of the Statute of Northampton, offers additional confirmation that Dalton's understanding embodied legal orthodoxy. Unfortunately, the case has been misinterpreted by gun rights advocates to support the anachronistic claim that peaceable armed travel was permissible under English common law. Sir John Knight's case stands for the opposite proposition.[53] Gun rights advocates mistakenly assert that the case illustrates that the Statute of Northampton had gone into "desuetude" by the era of the Glorious Revolution (1688–9). If one parses the text of the opinion closely, the reference to desuetude in the Lord Chief Justice's opinion was a specific claim about the rights of members of the gentry to travel armed, not a general endorsement of peaceable armed carry. Members of the English gentry, not ordinary subjects, enjoyed a class privilege to travel armed in a manner appropriate to their station

fire-arm, a weapon of offense"). Defensive weapons included shields and armor. *See Arms*, A NEW AND ENLARGED MILITARY DICTIONARY (London, Military Library 1805).

50 WILLIAM HAWKINS, A SUMMARY OF THE CROWN-LAW BY WAY OF ABRIDGMENT OF SERJEANT HAWKINS'S PLEAS OF THE CROWN 155-63 (1728). (describing exceptions to the general prohibition on armed travel, including the class based privileges of members of the gentry.)

51 *See* BLACKSTONE, *supra* note 31, at *148-49; J.P. GENT, A NEW GUIDE FOR CONSTABLES, HEAD-BOROUGHS, TYTHINGMEN, CHURCHWARDENS 13 (London, Richard Atkins & Edward Atkins eds., 1705).

52 *See* Henry Summerson, *The Enforcement of the Statute of Winchester 1285–1327*, 13 J. LEGAL HIST. 232, 240-41 (1992). On gun ownership in England during this period, see Kevin M. Sweeney, *Firearms Ownership and Militias in Seventeenth- and Eighteenth-Century England and America*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 54-57 (Jennifer Tucker et al. eds., 2019) and Philodemus, *supra* note 28, at 628.

53 *See* Sir John Knight's Case (1686) 87 Eng. Rep. 75, 76 (KB). *But see* Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009) (erroneously arguing that the Statute of Northampton only forbade the carrying of arms when it was "unusual and therefore terrifying"). For additional discussion and corrective to Volokh's ahistorical claims, see Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. U. L.J. 61, 79 (2018).

in life. Thus, to prosecute Knight, a member of the gentry, required a higher burden of proof. The mere possession of arms would not have violated the statute because of his class-based privilege: there had to be an additional demonstration of an actual evil intent ("*in malo animo*") because the law assumed that individuals of his elevated social status did not transgress the statute when they traveled armed in a manner appropriate to their station in life. Historian Tim Harris offers the most accurate summary of the legal and historical significance of the case:

> [A]s the presiding judge at Knight's trial, Lord Chief Justice Herbert, observed, the statute had almost gone into desuetude, and there was "now … a general Connivance to *Gentlemen to ride armed for their Security*." Herbert felt it necessary to show that Knight had acted *malo animo* (with evil intent) for his alleged offense to come within the terms of the act, though significantly, he insisted that the things of which Knight stood accused were already offenses at common law.[54]

The Chief Justice of the King's Bench wrote that the prosecution should have charged Knight for a crime at common law which would have been a better legal strategy to bring him to justice than an indictment under the Statute of Northampton. It is true that Knight's jury refused to convict him of violating that statute, but if Knight's acts were perfectly legal it would have made no sense for the Chief Justice to argue that there was an alternative legal strategy that would have resulted in conviction. Nor does it make much sense that the court still imposed a peace bond if Knight's actions were lawful. As Harris and others have noted, the only interpretation that makes sense is that Knight's actions were both a violation of the Statute of Northampton and the common law.[55] Although some disagreements remain about how to interpret *Knight's Case,* the one thing that is clear, the case does not support the notion that a robust right to peaceable carry of firearms existed under English law; rather, it contradicts this claim.

The principle that the English State could control every aspect of the ownership and use of firearms, including the open carry of firearms,

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[54] Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT, *supra* note 52, at 25 (emphasis added).

[55] *See Sir John*, 87 Eng. Rep. at 76. For an excellent summary of the political climate in England during the era of the Glorious Revolution, see Tim Harris, *James II, the Glorious Revolution, and the Destiny of Britain*, 51 HIST. J. 763, 768 (2008). On the difference between the common law crime of affray and the specific prohibitions in the Statute of Northampton, see BLACKSTONE, *supra* note 31, at *184.

was later reaffirmed by the language employed in the English Declaration of Rights, which stated "[t]hat the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."[56] Rather than entrench a strong rights claim, this act reaffirmed Parliament's plenary power to regulate in this area.[57] Parliament's power over the regulation of arms was not restrained by the act, and efforts to secure a general free standing right for a subject to have arms in their homes for reasons of self-defense were rebuffed at this time as a threat to public order and safety.[58] In short, despite tendentious efforts to read the act as a gun rights provision, virtually every English historian views the act as an affirmation of legislative power to regulate arms.[59]

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[56] English Declaration of Rights 1689, 1 W. & M., c. 2 (Eng.); *see* BLACKSTONE, *supra* note 31, at *139 (discussing the rights of Englishmen.).

[57] *See* TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720, at 343 (2006) ("It has been claimed that the Declaration of Rights established a new right to bear arms. In fact, clause seven does not use the term 'right' and seems clearly to state that no new legal privilege is being granted here. It explicitly confirms existing limitations on who was allowed to possess arms and, if anything, should more accurately be seen as a gun-control measure." (footnote omitted)).

[58] *See* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 50 (1989) (discussing the plenary power of Parliament during this period); John Phillip Reid, *"In Our Contracted Sphere": The Constitutional Contract, the Stamp Act Crisis, and the Coming of the American Revolution*, 76 COLUM. L. Rev. 21, 24 (1976) (same); *see also* Lois G. Schwoerer, *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 arms). English courts eventually reinterpreted the game laws to allow guns in the home in a series of cases in the middle of the eighteenth century. These decisions occurred more than fifty years after the adoption of the English Bill of Rights. *See* Wingfield v. Stratford (1752) 96 Eng. Rep. 787, 787-88 (KB); Rex v. Gardner (1739) 93 Eng. Rep. 1056, 1056 (KB).

[59] Malcolm posited that arms possession and carrying was a fundamental right that Americans inherited from England. Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 287 (1983). Yet neither the sources cited by Malcolm nor recent historical scholarship support her account of the English past. *See* Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1795 (2012) (describing how gun rights advocates, supporters of the so-called Standard Model, "fell into line as they imported Malcolm's research and conclusions into their own writings"). For works challenging Malcolm's claims about gun ownership and usage in England, see LOIS G. SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND 169-70 (2016), and Priya Satia, *Who Had Guns in Eighteenth-Century Britain?*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT, *supra* note 52, at 37. The English historian most closely associated with this interpretation, Joyce Lee Malcolm, holds an NRA-funded chair at George Mason Law School, and her work on this topic has been largely discredited. *See, e.g.*, HARRIS, *supra* note 57, at 23 ("The

In sum, there is no compelling historical evidence that there was ever a general free-standing right to armed travel for ordinary Britons; rather, the general rule was that open carry and concealed carry of firearms was prohibited, with a class-based exception for the political and economic elite, and due recognition that subjects were required to assist agents of the crown in preserving the peace with whatever weapons they were legally entitled to own under English law.[60] The Declaration of Rights permitted only a limited right to have firearms and travel armed in public outside of a narrow list of exceptions related to the preservation of the peace.

III. THE ABSORPTION AND TRANSFORMATION OF THE COMMON LAW IN EARLY AMERICA

A good illustration of how the Statute of Northampton and common law limits on armed travel were understood in colonial America are evidenced in an early American justice of the peace manual published just before the American Revolution. Echoing earlier English writers, the prohibition on armed travel in public was summarized as follows:

> 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 the People, or who shall appear, so armed, before the King's Justices sitting in Court . . . .[61]

Glorious Revolution has been extensively studied and debated ever since it occurred, yet until the work of Joyce Lee Malcolm, no historian had ever sought to argue that one of its most significant accomplishments was to establish a new right for Protestants to bear arms."); SCHWOERER, *supra*, at 169-70 ("My disagreement here is not with the interpretation that the Second Amendment granted an individual right to arms, but with the idea that the Second Amendment is a legacy of Article VII of the English Bill of Rights."); Satia, *supra*, at 37-40 (describing how gun ownership in England was not normalized or seen as a fundamental right until the Napoleonic era); Priya Satia, *On Gun Laws, We Must Get the History Right*, SLATE (Oct. 21, 2015, 9:34 AM), https://slate.com/news-and-politics/2015/10/wrenn-v-d-c-gun-case-turns-on-english-laws-of-1328-and-1689.html [perma.cc/5CRC-4GWP] (describing Malcolm's gun rights interpretation as conjured "out of thin air"). For an especially trenchant critique of Malcolm's work, see Harris, *supra* note 54, at 23.

60 *See generally* Summerson, *supra* note 52 (discussing the Statute of Winchester and the class-based limits on carrying arms).

61 JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 13 (New Bern, N.C., James Davis 1774). Fairs and markets were centers of commerce and were typically the location for the placement of important public announcements, facts which mark them as almost the antithesis of "sensitive places." The proper analogy to sensitive places would be the prohibition on coming armed before the King's servants and courts.

Living on the edge of the British empire, facing French and Spanish imperial power on its borders, an enslaved labor force in much of North America, and an almost constant state of war with Indian tribes, Americans were far better armed than their English brethren. In some instances, colonies required individuals to arm themselves in other circumstances in addition to mandatory militia service, including church going and when working beyond the fortified stockades that protected the early settlements of colonial America. But most of these examples of arming in such circumstances were from the earlier colonial period, before the French and Indian War had secured the borders of British North America.[62]

Apart from Quaker Pennsylvania, settled by pacifists who opposed arms bearing, every colony required a broad swath of the free white male population to submit to militia training and participate in a well-regulated militia. Yet, these militia obligations did not create a modern style rights' claim that could be asserted against early American governments; it imposed legal obligation on the King's subjects.[63] Under English law, all subjects were obligated to assist agents of the King to put down rebellions and enforce the peace. In the colonies these common law obligations existed together with a robust militia system. The standard militia weapon was a musket. Most colonies required white men eligible for militia service to procure military quality arms at their own expense. For much of the eighteenth century most English

See Chris R. Kyle, *Monarch and Marketplace: Proclamations as News in Early Modern England*, 78 HUNTINGTON LIBR. Q. 771, 784 (2015).

[62] *See* Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11, 28 (2017) [hereinafter *Right to Keep*]. During the era of the Fourteenth Amendment, states began expressly prohibiting arms in places where people gathered, including places of worship. *See* 2 GEORGE WASHINGTON PASCHAL, A DIGEST OF THE LAWS OF TEXAS: CONTAINING LAWS IN FORCE, AND THE REPEALED LAWS ON WHICH RIGHTS REST 1322 (Washington D.C., W. H. & O. H. Morrison 3d ed.1873); LEANDER G. PITMAN, THE STATUTES OF OKLAHOMA, 1890, at 496 (Guthrie, O.K., The State Capital Printing Co. 1891).

[63] The imposition of a militia obligation does not create a right. This legal confusion is pervasive in discussion of minors and the right to bear arms. *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495 (2019) (asserting, erroneously, a core right of minors to bear arms). Simply put, rights and duties are not the same. Modern constitutional theory typically treats them as correlatives, not synonyms. Accordingly, while the existence of a right may impose a duty on *another* legal actor (such as a duty to refrain from interfering with the right), *duties* do not automatically confer individual *rights* and did not do so on those who were required by law to participate in the militia. For a critique the claim that duties create rights, see Saul Cornell, *"Infants" and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record*, 39 YALE L. & POL'Y REV. INTER ALIA 1, 16 (2021).

subjects living outside of the colonies, the public obligation to assist in preserving the peace or serving in the militia would not have created a right to own firearms which were prohibited to all but the gentry elite.[64]

Contrary to the claims of many gun-rights advocates, widespread habitual open carry was not the norm in the era of the Second Amendment and the early Republic in the nation's towns and cities.[65] The fact that some of the individual state constitutions and the Second Amendment protected arms bearing tells us little about armed travel in public outside of the context of militia service and musters. Indeed, states regulated the public carry of arms even in the context of militia service, banning the firing of guns, and in some instances prohibiting traveling to and from muster with a loaded weapon.[66]

A good illustration of the ahistorical approach adopted by gun rights advocates to buttress the invented tradition of peaceable armed travel is evident in an amicus brief filed by a group of pro-gun law professors in *Bruen*.[67] The brief argued that because prominent members of the Founding era often carried arms in public, there was a general right to travel armed in populous areas. Context is key to making sense of this practice and a failure to pay attention to context has led gun rights advocates to distort the past to further their ideological agenda. Thus, Paul Clement doubled down on the "Founders with guns" argument in his reply brief in *Bruen*, making much of the fact that Thomas Jefferson and Patrick Henry owned and used firearms, and carried them in public.[68] Rather than contextualize such evidence, Clement and the Second Amendment Law Professors' brief he cites ignore the realities of life in eighteenth century America which was a sparsely settled and a largely agrarian pre-industrial society. The case of Thomas Jefferson is illustrative. As was true for many in the Founding generation, Jefferson was certainly fond of his guns. He advised his nephew, Peter Carr, that "as to the species of exercise, I advise the gun." To promote a healthy

[64] In colonial America, firearms ownership was mandated by law for the segment of the population required to bear arms. *See* Cornell, *Right to Keep*, *supra* note 62, at 11.

[65] For a recent effort to support this dubious claim, see David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. Hawaii, 2021 U. ILL. L. REV. ONLINE 172, 181 (2021). For a critique of this argument, see Charles, *supra* note 32, at 195.

[66] Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1712 (2016) [hereinafter *Right to Carry*].

[67] *See* Brief of Professors of Second Amendment Law et al., *supra* note 7, at 2.

[68] *See* Reply Brief for Petitioners at 11, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. Oct. 14, 2021) [hereinafter Reply Brief].

body, he recommended that "your gun therefore be the constant companion of your walks."[69]

Making sense of Jefferson's statement requires some appreciation for historical context. Jefferson was a large landowner who lived in the western part of Virginia; he owned almost 5,000 acres of largely contiguous land.[70] Carrying a gun in the mountainous regions of western Virginia, on private property, does not tell us much about issues relevant to public carry in more settled areas of the new nation. Indeed, Jefferson securely locked his guns when riding into town or traveling by coach on the public roads, a fact that Clement and the Second Amendment law professors conveniently neglect to mention.[71] Similarly, the interpretation of the significance and meaning of Patrick Henry carrying his musket when he traveled to court is equally ahistorical and lacks vital context. In Virginia, court days were typically muster days for the militia, so Henry travelling with the weapon Virginia law mandated for militia service on day in which the militia was training tells us little about general attitudes towards limits on public carry in populous areas.[72]

One of the many problems with the gun rights account of the Founding era is the assumption that post-Revolutionary America was governed by a single homogenous legal system. This understanding of early American law has been thoroughly discredited by legal historians who have demonstrated that existence of divergent regional legal cultures in colonial America and the Founding era.[73] In particular, few

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[69] *Firearms*, JEFFERSON MONTICELLO, https://www.monticello.org/site/research-and-collections/firearms (last visited Feb. 6, 2022) [https://perma.cc/FN4K-84HT] (quoting Thomas Jefferson to Peter Carr, Aug. 19, 1785).

[70] *Thomas Jefferson's List of Landholdings and Monticello Slaves, [ca. 1811–1812]*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/03-04-02-0295 (last visited Feb. 8, 2022) [https://perma.cc/UKK5-EM65].

[71] *Thomas Jefferson to John Payne Todd August 15, 1816*, FOUNDERS ONLINE, https://founders.archives.gov/?q=Jefferson%20to%20Payne%20Todd%20%20August%2015%2C%201816&s=1111311111&sa=&r=1&sr= (last visited Feb. 8, 2022) [https://perma.cc/FW3C-S3RB] ("I had other holsters also made for both to hang them at the side of my carriage for road use; & with locks & staples to secure them from being handled by curious people. one of the wheel locks is a little out of order, and will require a skilful [sic] gunsmith to put to rights . . . .").

[72] E. Lee Shepard, "*This Being Court Day": Courthouses and Community Life in Rural Virginia*, 103 VA. MAG. HIST. & BIOGRAPHY 459, 466 (1995). *See generally* RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790, at 88-114 (1982) (discussing the rituals of court day and muster).

[73] On the importance of early American regional differences in the evolution of the common law, see generally David Thomas Konig, *Regionalism in Early American Law*,

serious scholars conversant with the last three decades of legal history would ignore the impact of slavery on the creation of a distinctive southern legal culture. The importance of this regional perspective is evident in the use and abuse of the writings of the distinguished Jeffersonian jurist St. George Tucker. Gun rights scholars are fond of quoting Tucker but have persistently misinterpreted him by failing to adequately contextualize his writings.[74] Tucker was a vocal critic of the Federalist judges who dominated the nation's courts in the decade after the adoption of the Constitution. Curiously, gun rights advocates have chosen to accord Tucker's critical remarks of these judges greater legal authority than the decisions of the federal courts. Thus, in the case of gun rights, lawyers and jurists have inverted the hierarchy of authorities familiar to most first-year law students, dismissing federal case laws and taking such critical comments of the established law as legally determinative.[75]

The often-quoted Tucker passage so esteemed by gun rights champions was made as a criticism of the way federal courts prosecuted rebels in western Pennsylvania after the adoption of the bill of rights.[76] The federal courts adopted a traditional English common law view of riot: according to this view a group of men traveling armed was *per se* a crime that violated the peace. For the Federalists in Pennsylvania there was no legal doubt that the rebels in Pennsylvania had rioted, the only legal issue for Federalist judges was if their actions rose to the level of treason under the Constitution. Tucker protested that in Virginia, the traditional English legal understanding of riot no longer applied because the common law in Virginia had evolved and led to the creation of a new higher standard of proof to sustain a charge of riot. In contrast to Pennsylvania, Tucker insisted that a group of men traveling armed with their *muskets* could not *per se* sustain a charge of riot without additional evidence that showed a violation of the peace.

> 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 States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand,

in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 144 (Michael Grossberg & Christopher Tomlins eds., 2008).

[74] *See* Cornell, *Half Cocked*, *supra* note 3, at 213.

[75] On the hierarchy of legal authority in modern constitutional law, see Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 58-62 (2018).

[76] For a discussion of the mis-readings of this widely cited Tucker text by gun rights scholars, see Cornell, *Right to Carry*, *supra* note 66, at 1711-12.

> than an European fine gentleman without his sword by his side.[77]

Setting aside the probative value of Tucker's commentary as compared to the decision of a federal court, the plain meaning of Tucker's text contradicts the idea that the Founding generation adopted a single monolithic approach to interpreting the legality of armed travel in public. Tucker himself expressly stated that American law diverged on this issue. In fact, Tucker claims that if the fact pattern before the federal courts in Pennsylvania had been adjudicated in his home state of Virginia, the outcome would have been different because absent additional evidence of criminal activity, the charge of riot at common law would have likely failed.[78] What gun rights advocates ignore is that such action did result in successful prosecutions in Pennsylvania. In short, the example gun rights advocates cite to support their view of a general right of peaceable armed travel in the early Republic undercuts that claim. In Tucker's view, Virginia and Pennsylvania law did not treat armed travel in the same fashion. In one place such action was criminal and in the other the mere act of armed travel would not have constituted a criminal offense. Finally, it is worth underscoring the fact that Tucker was talking about carrying a musket, the standard weapon of the militia, not an easily concealed weapon, i.e. a hand gun.

Tucker's comments offer strong evidence that American law had already started to diverge on the legality of armed travel in public. It is easy to forget that the one of the reasons Tucker felt compelled to publish an American edition of Blackstone was because he felt that too few Americans grasped the significance of the divergent trajectories of the common law in different states.[79] Generations of English legal commentators had praised the genius of the common law for its adaptability, and its absorption in America proved no exception to this general pattern. There was no single American version of the common law, but thirteen different common law traditions. There were

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[77] 5 BLACKSTONE, *supra* note 31, at app. n.B at *19 (Philadelphia, William Young Birch & Abraham Small 1803).

[78] *See id.*

[79] *See generally* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006) (discussing the divergent evolution of common law across America as a prime motivating force for Tucker's decision to do an American edition of Blackstone); Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. COLLOQUY 406 (2009) (discussing modern gun rights misreading of Tucker and the problem of applying modern legal categories to Founding era thought).

important regional commonalities that led to some convergence as well, so it is important to acknowledge the complexity of this process of adaptation. There is a broad scholarly consensus among legal historians that one of the most important forces contributing to this process of differentiation was the impact of slavery on American law. Gun rights advocates have simply ignored this rich body of scholarship, proceeding with an outdated model of consensus history and its assumptions about the homogeneity of early American legal history and culture.[80] Early American firearms law was not an exception to this larger pattern of regional divergence. Nor was early American firearms law static; profound changes swept over American law in the decades after the adoption of the Second Amendment that contributed to further divergence and the emergence of distinctive regional approaches to gun regulation.[81]

Gun-rights advocates focus primarily on a string of Southern cases decided by slave-holding judges to ascertain the public meaning of the right to bear arms in the early Republic and have largely ignored or dismissed the approach to firearms regulation in other parts of the new nation. Again, taking legal cues from the most repressive legal regime in American history ought to give modern judges pause, but even more problematic, gun rights advocates have consistently misread the key gun cases adjudicated by Southern jurists.[82] The on-going distortion of Southern jurisprudence remains one of the most pervasive problems in post-*Heller* litigation.[83] It is true that in some parts of the slave South a more expansive view of public carry developed, but this tradition was far more limited in scope than the modern gun rights theory of promiscuous carry absent any specified need. The right to carry, even in the Slave South, was always conditioned on a specific purpose. In short, the body of cases that purports to affirm a universal right of peaceable carry supports a much more limited right of purposive carry. The southern paradigm acknowledged a right to ban concealed carry, a

[80] *See generally* NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 1 (Nicholas J. Johnson et al. eds., 2018) (offering an ideological, slanted, and historically flawed account of the Second Amendment).

[81] On the diversity of early American law and the importance of understanding the changes that transformed constitutionalism, see generally LEONARD & CORNELL, *supra* note 17. On the emergence of regional differences in firearms regulation, see Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 125 (2015).

[82] *See* CORNELL, THE POLICE POWER, *supra* note 26, at 2.

[83] *See* Reply Brief, *supra* note 68, at 9-10; Brief of Professors Leider & Lund, *supra* note 6, at 4; Brief of Amici Curiae Professors of Second Amend. L., *supra* note 67, at 33, 35.

dastardly and cowardly practice, but it asserted that open carry was protected in cases of specified threats and other specific lawful purposes. There was no unfettered right to carry arms openly in public in pre-Civil War America.[84]

Understanding this body of antebellum Southern case law requires an appreciation of the way early American law framed issues of gun regulation in terms of an emerging police power jurisprudence that was developed by the Marshall Court and various state judges.[85] Although antebellum southern jurists did not use the modern legal metaphor of balancing, judges did employ an analogous type of reasoning to modern balancing analysis, an approach rooted in police power jurisprudence. "Constitutional Rights," Justice Scalia wrote in *Heller*, "are enshrined with the scope they were thought to have when the people adopted them."[86] Included in this right was the most basic right of all: the right of the people to regulate their own internal police. The texts of the first state constitutions clearly articulated such a right — including it alongside more familiar rights such as the right to bear arms. Thus, if Scalia's rule applies to the scope of the right to bear arms, it must also apply to the scope of the right of the people to regulate.[87]

Although the concept of a "police right" has fallen out of favor in modern law, it was fundamental to Founding era law and persisted into the early Republic. The lack of familiarity with this concept among modern lawyers and judges is a fitting testimony to the success of the Marshall Court's reformulation of this Founding era right into the forerunner of the modern judicial concept of the police power. The legal concept of a police right, grounded in popular sovereignty, was slowly overshadowed by an evolving jurisprudence focused on police power.[88] Antebellum jurists developed this body of law to address the complex issues that regulation posed for a rapidly changing society — and few issues were more vexing than firearms regulation. Indeed, the

[84] For examples see the sources discussed in Cornell, *supra* note 79.

[85] On *Heller*'s heavy reliance on antebellum Southern case law, see generally Ruben & Cornell, *supra* note 81 (discussing the problem of viewing American law through the distorted perspective of southern case law in the early nineteenth century).

[86] District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).

[87] *See id.*

[88] *See generally* LEONARD & CORNELL, *supra* note 17 (discussing how state police power was not curtailed by the federal constitution); Aaron T. Knapp, *The Judicialization of Police*, 2 CRITICAL ANALYSIS L. 64 (2015) (discussing the early American origins of modern jurisprudence on police power); Christopher Tomlins, *Necessities of State: Police, Sovereignty, and the Constitution*, 20 J. POL'Y HIST. 47 (2008) (discussing police power being derived from the people and was rooted in the theory of popular sovereignty).

application of the police power to regulating firearms and ammunition was singled out as the *locus classicus* of state police power by Chief Justice John Marshall in *Brown v. Maryland*, in which the Court observed that "[t]he power to direct the removal of gunpowder is a branch of the police power."[89] Although Scalia decried modern style judicial balancing in *Heller*, the antebellum southern cases he treated as oracular on the Second Amendment's meaning and the scope of permissible regulation were all interpreted using the legal tools provided by early American police power jurisprudence, a type of legal reasoning that engaged in a form of balancing analysis.[90]

The first modern-style gun control laws aimed at limiting the access and use of handguns emerged during the period of the market revolution, when American industry mass-produced not only wooden clocks and Currier and Ives prints, but reliable and cheap handguns.[91] Courts seeking to interpret these new types of laws, the historical antecedents of today's gun control laws, were addressing a novel problem — the problem of gun violence posed by easily concealed weapons. Although Scalia opined that handguns were the quintessential weapon protected by the Second Amendment, long guns, particularly military quality muskets were the weapon at the core of the original Second Amendment's protections. Indeed, the era of the Second Amendment handguns were a tiny fraction of the weapons owned by Americans and contrary to *Heller's* undocumented historical claims, the entire focus of American arms policy was to discourage Americans from bringing guns in common use to muster.[92] Instead, the government sought to force Americans to purchase heavier military quality weapons needed by the militia that few Americans desired to own because they were less useful in agrarian society in which hunting and pest control were the primary uses of arms.[93]

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[89] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443 (1827). *See generally* Thurlow v. Massachusetts, 46 U.S. (5 How.) 504 (1847) (discussing the police power ability to regulate laws that interfere with foreign commerce).

[90] *See* CORNELL, THE POLICE POWER, *supra* note 26, at 2-3.

[91] On the relationship between the market revolution and firearms production, see Lindsay Schakenbach Regele, *A Different Constitutionality for Gun Regulation*, 46 HASTINGS CONST. L.Q. 523, 524 (2019) and Andrew J. B. Fagal, *American Arms Manufacturing and the Onset of the War of 1812*, 87 NEW ENG. Q. 526, 526 (2014).

[92] *See* Sweeney, *supra* note 52, at 57.

[93] *See generally id.* (providing statistics on who owned guns during the founding era, which revealed farmers and laborers were less likely than merchants to own a handgun). In *Heller*, Scalia relies on questionable claims in United States v. Miller, 307 U.S. 174 (1939), a case that Scalia had derided because of its poor handling of the relevant history, *supra* note 26. Moreover, recent historical research also has

The emerging body of police power jurisprudence was employed by antebellum judges to weigh the rival claims of those seeking tighter regulations of guns from those opposed to such policies. Understanding the police power is therefore essential to make sense of the antebellum cases *Heller* treats as probative of the Second Amendment's meaning.[94] The scope of the police power was discussed in some detail by the Supreme Court in the *License Cases*, where Justice John McClean formulated this guiding principle:

> It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied.[95]

The police power — in particular, the right of the people to regulate themselves in the interest of public safety — was thus dynamic, adaptable to the changing needs of American society.

One of the most important cases discussed in *Heller*, *State v. Reid*, offers an excellent illustration of the way police power jurisprudence was used by antebellum judges to adjudicate claims about gun rights and the right of the people to regulate.[96] Although the case has been treated as an example of the permissive theory of open carry by gun rights advocates, including Paul Clement in his *Bruen* briefs, a careful reading of the text reveals that it was a classic example of antebellum police power jurisprudence: the *Reid* Court concluded that the state's concealed carry prohibition was a legitimate exercise of police power authority. "The terms in which this provision is phrased," the court

demonstrated that guns were seldom used for crimes, including crimes of violence, in the era of Second Amendment. Gun crime gradually became a serious problem over the course of the nineteenth century, particularly as easily concealed and more reliable handguns became common. *See* RANDOLPH ROTH, AMERICAN HOMICIDE 180-249 (2009).

[94] Post-*Heller* scholarship generally has not examined this important element of antebellum jurisprudence. But there is a notable exception to this general silence. *See generally* Campbell, *Natural Rights*, *supra* note 14 (discussing the antebellum right-to-bear-arm cases in terms of Founding era rights theory). Campbell's essay is paradigm shifting, recasting the entire debate over the Second Amendment in terms that genuinely reflect the distinctive and radically different way Founding era law conceptualized the problem of rights and regulation.

[95] Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 592 (1847).

[96] *See* State v. Reid, 1 Ala. 612, 612 (1840) (discussing how a police power analysis is essential to adjudicating the constitutionality of firearms regulations).

noted, "leave with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals."[97] The regulation of arms was in the court's view at the very core of state police power.

When ripped out of context, *Reid* might seem to support a modern-type permissive conception of public carry, but when read closely and in the context of pre-Civil War judicial writing about the police power, the case supports the opposite conclusion. *Reid* does not vindicate a promiscuous right to carry arms in public; rather, it forcefully articulates a more limited notion of purposive carry. In short, to justify arming in public, one had to have good cause — a specified reason to do so. This requirement applied to open carry as much as it applied to concealed carry.[98]

Reid was a case in which a sheriff carried a concealed pistol in violation of Alabama's prohibition on public carry of concealed arms.[99] The fact that a peace officer was prosecuted for carrying a weapon in the course of his duties might seem odd given that police in modern America are typically armed with guns. Firearms were not routinely carried by peace officers and police forces until decades after the Civil War.[100]

It is also vital to read *Reid* against the background of an inherited common law tradition. "If the emergency is pressing," the *Reid* Court declared, "there can be no necessity for concealing the weapon, and if the threatened violence will allow of it, the individual may be arrested and constrained to find sureties to keep the peace, or committed to jail."[101] *Reid* acknowledged a fact that many modern gun rights activists and some judges have ignored — the imposition of a peace bond was the primary mechanism for the enforcement of the peace in the early

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[97] *Id.* at 616.

[98] Most public carry cases in the antebellum South, apart from rare outlier decisions, such as *Bliss v. Commonwealth*, adopted this approach to firearms regulation. *See* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822). In that case the court adopted an absolutist view of the right to bear arms, but the decision was overturned by a revision of the state constitution. For a useful discussion of *Bliss* in terms of the police power, see ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 91 (1904).

[99] Reid, 1 Ala. at 612.

[100] *See* Scott W Phillips, *A Historical Examination of Police Firearms*, 94 POLICE J.: THEORY, PRAC. & PRINCIPLES 122, 124 (2021).

[101] *Reid*, 1 Ala. at 621, 616 ("[The state constitutional right to bear arms] neither expressly nor by implication, denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne. The right guaranteed to the citizen, is not to bear arms upon all occasions and in all places . . . .").

republic and was among the core powers of justices of the peace, constables, and sheriffs, who all continued to function as conservators of the peace under American law. The appropriate legal response to the danger posed by someone traveling armed in public was to impose a peace bond, a surety of the peace. Only if circumstances precluded following this course of action would a sheriff be justified in arming — and in that case, the correct decision was not to carry the weapon concealed but in the open. So rather than demonstrate a broad free-standing right of peaceable carry, *Reid* shows that armed law enforcement had not yet emerged as the primary means to keep the peace. A peace bond was the proper legal course of action if one faced a threat. Thus, the sheriff-defendant in *Reid* could be prosecuted, the court reasoned, because there was no necessity to arm. The state could not categorically ban open carry in cases where an individual had a specified need for self-defense, but it could limit carry to those with good cause and punish those who carried without good cause.[102] Reid supports a narrowly tailored right to carry arms openly for reasons of a specified need for self-defense.[103]

State v. Huntly, another favorite case of modern gun-rights advocates, adopted a broader conception of the scope of public carry, but it, too, clearly articulated a theory of purposive carry and rejected the ideal of permissive open carry.[104] *Huntly* marked a bolder departure from the traditional English common law limits on armed travel in public and for this reason it has become the lodestar for much modern gun rights

[102] For evidence that open carry of handguns was relatively rare, see another essay in this symposium, Mark Frassetto, *The Myth of Open Carry*, 55 UC DAVIS L. REV. 2515 (2022) [hereinafter *Open Carry*].

[103] The good cause requirement at the heart of *Bruen* was clearly established by the time *Reid* was decided, a fact that ought to render it presumptively lawful under *Heller*'s framework. Moreover, *Reid* raises further questions about the modern conception of rights and related standards of review invoked by Chief Justice Roberts and Justice, Kavanaugh. *See* Transcript of Oral Argument, *supra* note 6 and accompanying text.

[104] *See* State v. Huntly, 25 N.C. 418, 422-23 (1843). *Huntly* did adopt the emerging modern understanding of criminal *mens rea* that slowly developed over the course of the nineteenth century and superseded the traditional common law view. According to this new view, criminality was linked to a psychological state of mind, an evil intent. This view repudiated the objective view of criminal intent in which the evil design was inferred from the illegal act itself. Yet, reading this modern conception of criminality backward in time into the Founding era and English common law, as gun rights advocates have continued to do, is profoundly anachronistic. For a good illustration of this gun rights error, see 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, 635-37 (2012).

scholarship and advocacy.[105] Yet even this case drew a sharp distinction between purposive carry and permissive carry. In *Huntly*, the court wrote:

> No man amongst us carries . . . [a pistol] about with him, as one of his every day accoutrements — as a part of his dress — and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment. But although a gun is an "unusual weapon," 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.[106]

Carrying weapons for a specified lawful purpose openly was protected; carrying weapons with no specific purpose — *habitual carry* — was not. "Lawful purpose" was defined as a specific activity that merited being armed: hunting, target practice, traveling beyond one's community, or self-defense in response to a clear and specific threat.[107] The phrase "business or amusement" was not synonymous with carrying a weapon every day as one might carry a pocket watch, the court observed; it was an action that had to be grounded in some specified reason.[108] Thus, even in one of the most expansive interpretations of gun rights in the antebellum South, the region of the new nation with the most tolerant view of public carry, the right asserted was purposive in nature and not permissive.

An 1838 Virginia law clearly reveals the limited notion of public carry at the core of antebellum southern law. The statute did not embrace promiscuous gun carry, it expressly singled out "habitual carry" as a violation of the peace:

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[105] For an illustration of how modern gun rights advocates and scholars have misread the Southern tradition, see Reply Brief, *supra* note 68, at 7-8.

[106] *Huntly*, 25 N.C. at 422-23 (emphasis in original).

[107] Modern American self-defense law has specified a variety of qualifications limiting the use of deadly force, and thus, this body of law is in tension with the idea of permissive carry championed by gun-rights advocates. This issue has not received sufficient attention by jurists and scholars. For a notable exception to this general scholarly neglect, see Ruben, *supra* note 48, at 64-65.

[108] Kopel and Moscary mistakenly claim that "business or amusement" was a legal term of art that included all lawful activity. However, the text of *Huntly* makes clear that wearing a gun habitually without good cause was not lawful, so in this decision the term clearly refers to purposive carry, not permissive carry. *See* Kopel & Mocsary, *supra* note at 65, at 183 n.86.

> Be it enacted by the general assembly, That if any person shall hereafter habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind, from this use of which the death of any person might probabily [sic] ensue, and the same be hidden or concealed from common observation, and he be thereof convicted, he shall for every such offense forfeit and pay the sum of not less than fifty dollars nor more than five hundred dollars, or be imprisoned in the common jail for a term not less than one month nor more than six months, and in each instance at the discretion of the jury; and a moiety of the penalty recovered in any prosecution under this act, shall be given to any person who may voluntarily institute the same.[109]

The legal principle articulated in both *Reid* and *Huntly,* and clearly expressed in the Virginia statute (1836) rejected "habitual carry" — the vision of public carry championed by today's gun rights advocates and the key issue at stake in *NYSRPA v. Bruen*. Purposive carry, traveling armed with a good cause, including a specified threat, is the tradition that is deeply rooted in American history. Permissive open carry, the goal of modern gun rights advocates, and the aim of the challenge to New York's century old law in *Bruen*, is an invented tradition that only emerged relatively recently in American history.[110]

IV. GUN REGULATION OUTSIDE OF THE SLAVE SOUTH: THE DEVELOPMENT AND SPREAD OF THE MASSACHUSETTS MODEL

Outside of the antebellum South, a different and more restrictive tradition of gun regulation took hold. First developed in Massachusetts, this alternative approach was more expansive than the traditional English right, but less capacious than the Southern model advanced in *Reid* and *Huntly*.[111]

The new Massachusetts model built on earlier American statutes reaffirming the principals embodied in the Statute of Northampton. In 1795, Massachusetts enacted its own version of the Statute of Northampton using language drawn from prior English commentators. The law forbade anyone who "shall ride or go armed offensively, to the

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[109] 1838 Va. Acts 76, § 1.

[110] *See* Charles, *supra* note 32, at 205-07.

[111] *See* Cornell, *Right to Carry*, *supra* note 66 at 1720 & n.134.

fear or terror of the good citizens of this Commonwealth."[112] The legal terms "armed offensively" and "terror of the good citizens" tracked closely the traditional common law usage of these terms. Justices of the peace manuals on both sides of the Atlantic in the eighteenth century were all in accord that the mere act of traveling armed was the source of the terror and that firearms were the quintessential offensive weapon.[113]

Gun rights advocates have misinterpreted the 1795 statute, reading it in isolation and ignoring the common law tradition against which it would have been interpreted at the time of its enactment.[114] The common law model of conserving the peace was rooted in the face-to-face communal practices of early modern England's rural communities. Until the rise of modern police forces later in the nineteenth century, this community-based model of policing dominated on both sides of the Atlantic.[115] As conservators of the peace, justices of the peace, sheriffs, and constables maintained their traditional authority to enforce the peace.[116] A key early case vital to understanding the continuing

[112] Act of Jan. 29, 1795, ch. 2, 1795 Mass. Acts 436, *reprinted in* ASAHEL STEARNS & LEMUEL SHAW, THE GENERAL LAWS OF MASSACHUSETTS 454 (Theron Metcalf ed., Boston, Wells & Lilly & Cummings & Hilliard 1823).

[113] *See* BINDER, *supra* note 40, at 139-42; GEORGE FLETCHER, RETHINKING CRIMINAL LAW 208 (1978). Many discussions of the terror requirement read backward from the nineteenth century subjective standard. *See, e.g.*, Volokh, *supra* note 53, at 101 (erroneously taking the holding in *State v. Huntly*, 25 N.C. 418, 423 (1843), as dispositive of Anglo-American criminal law assumptions from preceding centuries, using a method that essentially reads history backwards).

[114] *See* Act of Jan. 29, 1795, ch. 2, 1795 Mass. Acts 436. The mischief rule advanced in *Heydon's Case*, (1584) 76 Eng. Rep. 637 (KB) — the legal principle that the meaning of a legal text was shaped by an understanding of the state of the common law prior to its enactment and the mischief that the common law had failed to address and legislation had intended to remedy — continued to shape Anglo-American views of statutory construction well into the nineteenth century. For Blackstone's articulation of the rule, see 1 BLACKSTONE, *supra* note 31, at *61. The relevance of common law modes of statutory construction to interpreting antebellum law, including the mischief rule, is clearly articulated in 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 11 (New Haven, S. Converse 1822). For a modern scholarly discussion of the rule, see Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 970 (2021).

[115] *See* LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 105-06 (2009) (discussing how the peace functioned to enforce social hierarchy in a patriarchal society).

[116] For unreliable ahistorical accounts of sureties that ignore the role of the justice of the peace as conservators of the peace, see Kopel & Mocsary, *supra* note 65 at 175-76 and the unpublished essay by Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms* 13 (George Mason Univ. Legal Stud. Rsch. Paper Series No. LS 21-06, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697761

relevance of the English legal tradition in Massachusetts, *Commonwealth* v. *Leach*, affirmed that the statutes of Edward III bestowing extensive powers on justices of the peace had been absorbed into the common law of their state, including the wide-ranging authority to detain, disarm, and bind to the peace any individual who traveled armed outside of the recognized exemptions.[117] The importance of this idea is evident in the treatment of this concept in the popular justice of the peace manual, *The Massachusetts Justice*: "The statues of Edward III, respecting the jurisdiction and powers of the justice of the peace, have been adopted and practiced upon here, and are considered to be as part of our common law."[118]

The law in Massachusetts governing armed travel in public did not remain static between the Founding era and the rise of Jacksonian democracy: a period of profound legal and constitutional change.[119] One area that drew the attention of reformers was the need to revise the criminal law. In fact, in Massachusetts many of the state's leading jurists, including Joseph Story, were involved in this ambitious project to codify and rationalize the state's criminal law.[120] The first important iteration of these changes was incorporated into the revised criminal code in the 1830s. The approach taken by the Massachusetts codifiers in this effort to rationalize their law built on the landmark Massachusetts decision, C*ommonwealth v. Selfridge*, a case that changed the course of American criminal law and its view of armed self-defense.[121] It is impossible to understand developments in

[https://perma.cc/RV6P-RS88]. Leider omitted his discussion of Madison liquidation and repurposed his analysis for his amicus brief in *Bruen*. *See* Brief of Professors Leider & Lund, *supra* note 6, at 19-30. Both the *draft* book chapter and brief engage in the type of law office history that has marred so much Second Amendment scholarship. *See* Cornell, *Half Cocked*, *supra* note 3 at 205-06; *see also* discussion *infra* pp. 2579-88.

117 *See* Commonwealth v. Leach 1 EPHRAIM WILLIAMS, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 31 (Boston, Tileston & Weld 1804–1805).

118 JOHN C. B. DAVIS, THE MASSACHUSETTS JUSTICE: A TREATISE UPON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE WITH COPIOUS FORMS 1 (Worcester, W. Lazell 1847).

119 *Republicanism*, *supra* note 16.

120 *See* JOSEPH STORY, *Codification of the Common Law*, *in* THE MISCELLANEOUS WRITING OF JOSEPH STORY 698, 698 (William Story ed., Boston, Charles C. Little & James Brown 1852) (discussing the evolution of the American common law). The best study of Story's complicated relationship to codification is R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 272-81 (G. Edward White ed.1985).

121 *See* Commonwealth v. Selfridge, 2 Am. St. Trials 544, 700 (Mass. 1806). For the political context of the case, see SAUL CORNELL, A WELL-REGULATED MILITIA: THE

Massachusetts and elsewhere on armed travel in public without some appreciation of the impact of Selfridge on American law.

The bitter political conflicts of the Jeffersonian era provided the backdrop for the *Selfridge* case which became one of the new nation's first sensational murder trials. A scant two years after the Hamilton and Burr duel ended in tragedy, partisan political acrimony again led to a fatal shooting that shocked the nation. The site for this tragedy was not an isolated field in New Jersey, but the crowded streets of Boston. The victim, Charles Austin, was a Harvard student and the son of Benjamin Austin, one of New England's most prominent Jeffersonians and an influential newspaper publisher. Young Austin was shot in front of a crowd of onlookers on a busy street in Boston. Thomas Selfridge, the man charged with Austin's murder, was one of the city's most respected lawyers and a leading light of New England Federalist's establishment.[122] The key issue in the case was the legality of Selfridge's decision to pre-emptively arm himself because he believed that an imminent and specified threat to his life existed.[123] Under English common law there was no good cause or imminent threat exception that allowed individuals to pre-emptively carry arms to defend against possible aggression.[124] The decision in *Selfridge* broke with this precedent and established a new reasonable fear standard for the use of deadly force in self-defense. According to the new *Selfridge* standard, if an individual had a reasonable fear of serious injury or death, faced a

FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 110-17 (2006) [hereinafter WELL-REGULATED].

122 Jack Tager, *Politics, Honor and Self-Defense in Post-Revolutionary Boston: The 1806 Manslaughter Trial of Thomas Oliver Selfridge*, 37 HIST. J. MASS 84, 85 (2009).

123 *See* Trial of Thomas O. Selfridge, Attorney at Law, Before the Hon. Isaac Parker, Esquire. For Killing Charles Austin on the Public Exchange, in Boston, August 4th, 1806, (Boston, 1806); THO. O. SELFRIDGE, A CORRECT STATEMENT OF THE WHOLE PRELIMINARY CONTROVERSY BETWEEN THO. O. SELFRIDGE AND BENJ. AUSTIN; *see also* A BRIEF ACCOUNT OF THE CATASTROPHE IN STATE STREET, BOSTON, ON THE 4TH AUGUST, 1806: WITH SOME REMARKS (1807).

124 Retreat, not stand your ground, was the legal requirement under English common law. The notable exception to this rule was the "castle doctrine," covering deadly force in the home against intruders. *See* Semayne's Case (1604) 77 Eng. Rep. 194, 195 (KB). *See generally* Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85 (2017) (discussing the nature of self-defense law in America). On *Selfridge*'s importance to the American law of self-defense, see RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 7 (1991). For a useful summary of the holding in *Selfridge* and its importance to understanding the history of armed self-defense in America, see Ruben, *supra* note 48, at 84. By failing to grapple with the paradigm shifting role of *Selfridge*, gun rights advocates have misread the early history of self-defense and regulation of armed public carry in Massachusetts. *See supra* p. 2571; *infra* pp. 2579-88.

specified threat, arming was now legal. Although the new *Selfridge* standard marked a significant expansion of the right of self-defense and set America on a radically different legal course than England in this area of criminal law, it was not a total rejection of the entire common law approach to limiting armed travel. The new standard did not justify promiscuous carry or a free-standing right of peaceable public carry, it carved out a significant new exception to the traditional common law model, allowing individuals to arm when they faced a specific threat. *Selfridge* was an implicit recognition that the traditional communal methods of enforcement of the peace, including the use of sureties, was insufficient to protect life in the changed circumstances of the new American republic, where individuals could no longer depend on their community for protection from threats. The traditional community-based approach of the common law had to be supplemented with a new more individualistic conception of armed self-defense, an approach that recognized the need to arm in situations in which an individual could not depend on neighbors or the law for protection.[125]

The new post-*Selfridge* standard in self-defense law in Massachusetts was codified in two distinct provisions of the revised Massachusetts criminal code adopted in the 1830s. The first provision reaffirmed the right of any person to seek a peace bond against any individual who threatened the peace, but now recognized a good cause exception for armed travel.

> 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 . . . .[126]

Massachusetts law also expressly reaffirmed the broad powers of Justice of the Peace to maintain the peace even in cases in which no individual brought forward a complaint.

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[125] Gun rights advocates have ignored the importance of *Selfridge* in transforming traditional English common law views of self-defense, an omission that has led them to assert a static and quintessentially ahistorical view of the evolving law of self-defense. For example, Leider's discussions of Massachusetts law in both his unpublished essay and *Bruen* brief, proceed without any references to *Selfridge*'s modifications of English law, a vital context for understanding the Massachusetts surety statutes. *See* Brief of Professors Leider & Lund, *supra* note 6, at 2, 4-7; Leider, *supra* note 116, at 12-17.

[126] Act of Feb. 1836, tit. 2, ch. 134, § 16, 1836 Mass. Acts 748, 750.

> Every justice of the peace, within his county, may punish by fine, not exceeding ten dollars, all assaults and batteries, and other breaches of the peace, when the offence is not of a high and aggravated nature, and cause to be stayed and arrested all affrayers, rioters, disturbers and breakers of the peace, and all who go armed offensively, to the terror of the people, and such as utter menaces or threatening speeches, or are otherwise dangerous and disorderly persons.[127]

Gun rights advocates have misinterpreted the way surety laws functioned in antebellum America because they have ignored the role *Selfridge* played in changing the law of self-defense. The revised laws carved out a specific exemption for specified threat, it did not sanction promiscuous carry.

The mechanisms for enforcing the new Massachusetts model was surety of the peace or good behavior. Any justices of the peace or any member of the community could have an individual bound to the peace. The payment of a peace bond did not function as a de facto license to carry, a claim that is wholly invented and has no foundation in the historical record. In his reply brief in *NYSRPA v. Bruen*, Paul Clement repeated this false claim which is little more than a gun rights fantasy. According to Clement's erroneous account, the surety laws "required a magistrate to find 'reasonable cause' that someone had demonstrated a propensity to *misuse* a firearm to cause 'injury, or breach the peace,' before a surety could be demanded to *continue* carrying it."[128] In fact, as the statute's text makes clear the reasonable cause standard applied to the exception, not to the rule.[129] Clement's conclusion that "these laws thus reinforced the understanding that the people had a baseline *right* to carry arms, and that only *abuse* of that right could justify its restriction," is demonstrably false. Nor does the text support Clement's claim that one could continue to carry arms if bound to the peace, another idea pulled out of thin air. This distorted version of the past ignores the plain meaning of the relevant statutes and the long history of how sureties of the peace functioned under Anglo-American law.[130] If Clement's contention were true then the language of the statute would

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[127] Act of Feb. 1836, tit. 1, ch. 85, § 24, 1836 Mass. Acts 526, 529.

[128] Reply Brief, *supra* note 68, at 9.

[129] *See* Act of Feb. 1836, tit. 2 ch. 134 § 16, 1836 Mass. Acts 748, 750.

[130] For the best account of the English tradition of sureties, see HINDLE, *supra* note 44, at 94-114. On the American use of sureties, see EDWARDS, *supra* note 115, at 96. Leider's account fails to take cognizance of this history and accordingly produces an ahistorical account of how criminal law functioned in both England and early America. *See* Leider, *supra* note 116, at 12-17.

also sanction individuals to continue uttering "menacing speeches" if they paid their bond, an absurd contention. The only justification for traveling armed was the existence of a specified threat, the new *Selfridge* standard. In fact, violators of the Massachusetts law not only faced the prospect of being bound to the peace, but they were liable to further fine or jail time if they traveled armed.

> All persons, arrested for any of the said offences, shall be examined by the justice, before whom they are brought, and may be tried before him, and if found guilty, may be required to find sureties of the peace, and be further punished by fine as before provided; or, when the offence is of a high and aggravated nature, they may be committed or bound over, for trial before the court of common pleas, or other court having jurisdiction of the case.[131]

By failing to understand the role that *Selfridge* played in the evolution of the law of self-defense, gun rights advocates have failed to understand that the key innovation in the new regulatory scheme implemented in Massachusetts was the inclusion of a new good cause exception for cases where a specific threat existed. Grounded in *Selfridge's* new understanding of self-defense, a legal acknowledgement of a right to arm pre-emptively if a specified threat existed was a significant expansion of gun rights.[132] Although this new conception falls far short of the extreme libertarian vision at the core of the modern gun rights movement, it is important not to smuggle modern ideological assumptions into an assessment of what the law in the 1830s meant. The new criteria were no longer based on where and when one traveled, the key factors underlying the common law's approach to determining if self-defense was legitimate, but now included some recognition of the subjective psychological state of the person threatened and their reasonable fears of harm. Including this principle made the Massachusetts model consistent with the Enlightenment goals of criminal law reform in Massachusetts and elsewhere.[133] Modern gun

[131] Act of Feb. 1836, tit. 1, ch. 85, § 25, 1836 Mass. Acts 526, 529.

[132] One of the leading commentators on the common law, William Hawkins, was emphatic that arming oneself could not be justified or "excuse[d]," by claiming "that such a one threatened him, and that he wears for the safety of his person from his assault." HAWKINS, *supra* note 31, at 136. On *Selfridge*'s role in changing the course of American law, see BROWN, *supra* note 124, and CORNELL, WELL-REGULATED, *supra* note 121, at 116-17.

[133] On the role of Enlightenment thought, particularly Scottish Enlightenment thought, in legal reform in antebellum America, see Susanna Blumenthal, *The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-*

rights advocates support for shall issue or constitutional carry is a type of habitual or promiscuous public carry, a practice that was expressly prohibited in early America.[134] The Massachusetts model did not, as Clement and other gun rights claim, sanction habitual public carry: it expanded the right to travel armed in a limited fashion by recognizing the new reasonableness standard premised on the existence of a specified and concrete threat that justified arming oneself in public.

One of the best sources for understanding the public meaning of the Massachusetts law that provided a template for the Massachusetts Model emulated by other states is a commentary on the original statute authored by one of the nation's most respected jurists in pre-Civil War America, Peter Oxenbridge Thacher.[135] Lawyers and judges in antebellum America were familiar with a legal maxim drawn from Lord Coke that "great regard, in the exposition of statutes ought to be paid to, the construction that sages of the law, who lived about the time."[136]

century American Law, 26 LAW & HIST. REV. 99, 104-05 (2008). Thus, the new Massachusetts model shared one feature with the southern Huntley decision, both reflected a new emphasis on an Enlightenment based view centered on subjective psychological experience, a departure from the traditional common law approach to criminal law.

134 *See* Clayton E. Cramer & David B. Kopel, "*Shall Issue*"*: The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 694-96 (1995). For a more scholarly treatment of this issue, see generally Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution,* 120 MICH. L. REV. 581 (2022).

135 The dominant model of originalism, public meaning originalism focuses on how an ideal, legally knowledgeable reader at the time would have understood the words of the text. For a useful guide to originalist theory, see generally Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013). Critiques of originalism are legion. For historical critiques of originalist methodology, see generally Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 LAW & HIST. REV. 821 (2019); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015); and Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969 (2015). For other critiques, see generally FRANK CROSS, THE FAILED PROMISE OF ORIGINALISM 112-15 (2013) and Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1186-91 (2008).

136 E. FITCH SMITH, COMMENTARIES ON STATUTES AND CONSTITUTIONS 739 (New York, Banks, Gould & Co. 1848). Coke's legal maxim regarding the importance of consulting the sages of the law when interpreting statutes was familiar to lawyers and judges in the early Republic. *See id.* On Smith's significance to antebellum legal culture, see WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 69-70 (1999). Modern gun rights advocates have ignored this rule, substituting their own ahistorical reading of the law in place of the views of the leading criminal jurists of period. *See, e.g.*, Leider, *supra* note 116 (dismissing Thacher's reading of Massachusetts law based on a presentist assumptions and ignoring the relevant early American rules of statutory construction).

Few jurists in Massachusetts, better fit the category of "sage of the law" than Peter Oxenbridge Thacher. Indeed, Judge Thacher's reputation extended well beyond Massachusetts; he was recognized by members of the antebellum legal community to be one of the nation's leading experts on criminal law. Contemporaries praised him for his "thorough knowledge of the criminal law and its practical application."[137]

Thacher explained the meaning of his state's prohibition on armed travel in an influential grand jury charge that was reprinted as a pamphlet and was deemed sufficiently important to be published separately in the press. *The American Review*, an influential Whig magazine, singled out the publication of a collection of Judge Thacher's cases and grand jury charges as a major contribution to American law. Praising the judge's "high character as a magistrate," the review remarked that Thacher "was not only known to the profession in New England, but his published charges to grand juries, and occasional reports of important cases tried before him, had made him known throughout the country."[138] Gun rights advocates have either ignored or dismissed the relevance of Thacher's commentary on his state's law, casting his authoritative explication of the text as little more than empty verbiage uttered on a largely meaningless ceremonial occasion.[139] In fact, grand jury charges were important civic occasion in antebellum America because they gave the "sages of the law" an opportunity to expound and elucidate important legal concepts to the public.[140] Jury charges offer one of the clearest illustrations of the way judges in the

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[137] *Reports of Criminal Cases Tried in the Municipal Court of the City of Boston, Before Peter Oxenbridge Thacher, Judge of that Court, from 1823 to 1843*, AM. REV.: WHIG J. POL., LITERATURE, ART & SCI., Feb. 1846, at 222-23; *see* REPORTS OF CRIMINAL CASES, TRIED IN THE MUNICIPAL COURT OF THE CITY OF BOSTON, BEFORE PETER OXENBRIDGE THACHER, JUDGE OF THAT COURT, FROM 1823 to 1843, at v (Horatio Woodman ed., Boston, Charles C. Little & James Brown 1845).

[138] *Reports of Criminal Cases tried in the Municipal Court of the City of Boston, supra* note 137, at 222-23; *see* REPORTS OF CRIMINAL CASES, TRIED IN THE MUNICIPAL COURT OF THE CITY OF BOSTON, *supra* note 137, at v.

[139] The decision of gun rights advocates to disregard Thacher's interpretation of his own state's law violates both the accepted rules of legal historical method and the relevant rules of statutory construction well known to judges and lawyers in antebellum America. *See* JOHNSON ET AL., *supra* note 80, at 79-80; Leider, *supra* note 116, at 13.

[140] The phrase "sages of the law" was frequently used by legal commentators from Coke to Kent. *See, e.g.*, JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 463 (New York, O. Halsted 1826) (describing law reports as faithful records containing "true portraits of the talents and learning of the sages of the law"). On Coke's instantiation of the concept in Anglo-American law, see Wilfrid Priest, *History and Biography, Legal and Otherwise*, 32 ADEL. L. REV. 185, 188 (2011).

antebellum era would have interpreted the Massachusetts statute prohibiting armed travel absent a good cause.[141]

Thacher's reading of his own state's laws on public carry left no room for interpretive confusion: "In our own Commonwealth [of Massachusetts]," he reminded members of the grand jury "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."[142] The Massachusetts model of gun regulation limited public carry to situations in which an individual faced a specified threat. It embodied the new *Selfridge* standard that modified the traditional common law framework inherited from English law. It was a significant expansion of the right of self-defense, but it was not, as modern gun rights advocates have mistakenly urged, an endorsement of habitual carry.[143]

Nor was Thacher the only distinguished Massachusetts jurist to characterize his state's ban on armed travel as a general prohibition absent a specified threat. Other jurists in Massachusetts echoed Thacher's account of the law. Judge Abel Cushing, who served on the Roxbury Police Court, interpreted the Massachusetts statute in the same manner as Thacher. Cushing endorsed the view that the mere act of traveling armed, even if done peaceably, without good cause, violated the statute.[144]

Cushing's views on the law emerged clearly in the Snowden case, a gun prosecution that generated considerable interest in the press because of its connection with the increasingly militant turn of abolitionism in the wake of controversy over the Fugitive Slave Act

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[141] On the role of grand jury charges in this period of American legal history, see DENNIS HALE, THE JURY IN AMERICA: TRIUMPH AND DECLINE 93-98 (2016); Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1754 (2003).

[142] PETER OXENBRIDGE THACHER, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON ON MONDAY, DEC. 5TH A.D. 1836, AND ON MONDAY, MARCH 13TH, A.D. 1837, at 27 (Boston, Dutton & Wentworth 1837); *see Judge Thacher's Charges*, CHRISTIAN REG. & BOS. OBSERVER, June 10, 1837, at 91.

[143] *Supra* note 132.

[144] Judge Cushing's Police Court remarks were reported in the abolitionist press, see *Arrests for Carrying Concealed Weapons*, LIBERATOR, Apr. 11, 1851, at 59. *Cf.* the official accounts in the Complaint, Commonwealth v. Snowden, No. 1443 (Bos. Police Ct. Apr. 5, 1851) (providing an account of the court's actions); Record Book Entry, Commonwealth v. Snowden, Bos. Police Ct. R. Book 1117 (May 1851) (showing the disposition of the case and Snowden's adherence to the terms of the peace bond imposed by the court).

(1850).[145] Isaac and Charles Snowden were the sons of a prominent Black minster allied with the radical Garrisonian wing of abolitionism. Their arrest became a newsworthy event covered in papers across the nation after the two men were charged with violating the state's statute prohibiting armed travel absent good cause. Ardent supporters of the immediate end to slavery, Garrisonians denounced the Constitution as a "covenant with death."[146] Abolitionists in Boston allied with the Garrisonian wing of the movement believed that the law no longer bound individuals who were engaged in the abolitionist fight against slavery. To gain a full understanding of the Snowden trial and its significance as a source for understanding the enforcement of antebellum gun laws one must situate the case in two inter-related contexts: the violent history of abolitionism in Boston and the norms governing criminal law and prosecutions in the city.

The Snowden brothers were apprehended late at night in the vicinity of one of Boston's armories at a time when city officials feared the prospect of violence between abolitionists and their opponents.[147] "Night walking," was a crime under Massachusetts law, a fact that itself would have justified members of the night watch stopping and interrogating the two men.[148] Prior to their arrest Boston had been convulsed by abolitionist and anti-abolitionist violence. At a tumultuous public meeting, Wendall Phillips, one of the nation's most fiery anti-slavery orators, exhorted Boston's abolitionist community, including African-Americans, to arm themselves against slave catchers and anti-abolitionist mobs. Anticipating possible bloodshed, the mayor

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[145] *See generally* H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution,* 30 LAW & HIST. REV. 1133 (2012) (examining the changing interpretations of the fugitive slave clause over time).

[146] On the politics of abolitionism during this period, see generally Corey M. Brooks, *Reconsidering Politics in the Study of American Abolitionists*, 8 J. CIV. WAR ERA 291 (2018).WAR ERA 291 (2018) and James B. Stewart, *The Aims and Impact of Garrisonian Abolitionism,* 1840-1860 15 CIVIL WAR HISTORY 197 (1969). For a historical discussion of Black abolitionists in Boston during this period, see James Oliver Horton & Lois E. Horton, *The Affirmation of Manhood: Black Garrisonians in Antebellum Boston*, *in* COURAGE AND CONSCIENCE: BLACK & WHITE ABOLITIONISTS IN BOSTON 127, 146 (Donald M. Jacobs ed., 1993).

[147] A number of anti-abolitionist papers charged that the Snowdens had attempted to force their way into an armory, but it is difficult to verify the accuracy of this claim. *See The Boston Slave Case*, N.H. PATRIOT & STATE GAZETTE, Apr. 10, 1851; WILMINGTON J. April 11, 1851, at 2.

[148] Report of the Chief of Police and Captain of the Watch, City Document No. 4, at 5, DOCUMENTS OF THE CITY OF BOSTON FOR THE YEAR 1855 (1856) (listing arrests for night walking).

had mobilized units of the militia and put the watch on high alert.[149] When the two men were apprehended near a city armory and searched by the watch, a loaded pistol and a large butcher's knife were discovered, a clear violation of the state law on traveling armed without a good cause.[150]

A deeply flawed and ahistorical account of the Snowden case figures prominently in two gun rights amicus briefs filed in *Bruen*.[151] Instead of presenting the full story of this fascinating case, the two gun rights accounts of the Snowden case in *Bruen* cast the two men as innocent gun owners peaceably engaged in legal activities who were harassed by police eager to target Boston's Black community.[152] Yet, if one looks at all of the available historical evidence, a different story emerges that supports the account of Massachusetts law in Judge Thacher's grand jury charge and directly contradicts a central claim of gun rights advocates in *Bruen* that surety laws did not restrict public carry and were seldom enforced.

The most egregious historical error committed by gun rights advocates is the omission of any discussion of radical abolitionism in Boston, a vital context for making sense of the case. By the 1850s many abolitionists had abandoned pacificism and embraced a militant view, championing armed resistance to slavery. In the inflammatory speech that preceded the arrest of the Snowdens, Phillips, a close friend of the Snowdens, had denounced the futility of continuing to use constitutional and legal means to thwart slavery. Rather than follow laws tainted by slavery, Phillips urged his audience to arm themselves and resist all efforts to enforce the fugitive slave act and any other legal processes that supported slavery. In short, Phillips advised abolitionists

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149 A transcription of Phillips's speech based on an abolitionist account by a spectator was published in the Antislavery Bugle. *Remarks of Wendell Phillips*, ANTISLAVERY BUGLE, May 24, 1851. For other less sympathetic contemporary accounts of Phillips' call to arms to Bostonians, see THE DAILY UNION, April 08, 1851, at 3 and *From the Sublime to the Ridiculous*, THE SOUTHERN PRESS April 07, 1851.

150 *Supra* note 144. The Massachusetts Law allowed arming for a specified threat, but the general tumult in the city was not judged to be such a threat by the court that heard the *Snowden* case.

151 *Supra* note 7.

152 Racial harassment of African-Americans in Boston was undoubtedly a problem. Similarly, some gun laws, particularly in the South, were designed to disarm African-Americans selectively. But the fact that gun laws sometimes were used to further an insidious agenda does not mean all gun laws and all examples of enforcement were racially motivated. *See* Mark A. Frassetto, *The Nonracist and Antiracist History of Firearms Public Carry Regulation*, 74 SMU L. REV. F. 169, 173-74 (2021) [hereinafter *The Nonracist*].

in Boston to carry arms regardless of the legality of the practice under Massachusetts law.[153]

The decision of the Snowden's to arm themselves takes on a different meaning and significance when read against Phillips' recent appeal to arms and the unrest in the city. The Snowdens were closely linked with Phillips and his militant abolitionist agenda. At their hearing Phillips not only helped pay the two men's peace bonds, but he unleashed a fusillade of invective at the presiding judge in the case, Abel Cushing who responded by declaring that he would dispense "equal justice," and render his decision "*irrespective of color*." The Garrisonian newspaper, The *Liberator,* presented the judge in a less than favorable light, but if one looks at the press coverage of the case from papers representing the full range of antebellum political views, the charge of racial bias seems less persuasive.[154] Still, one point that is beyond dispute is that Judge Cushing believed that armed travel without good cause violated the state law. The *Liberator's* summary of the Judge's interpretation of the state law makes this point clearly: Judge Cushing, *The Liberator* noted: "held that walking peacefully . . . with arms in your pocket which you neither use nor threaten to" met the statute's definition of traveling "'armed offensively, to the terror of the people,' against the statute."[155] Despite the clear statement by the presiding judge of the Snowden case on the meaning of the Massachusetts law, the two amicus briefs discussing the case in *Bruen* conclude that the case illustrates that surety laws were not enforced, apart from some isolated racially targeted prosecutions.[156]

Moreover, both briefs assume that the views of radical abolitionists who counseled violating existing laws were representative of orthodox legal views in antebellum America. Elevating the views of radical abolitionists over the views of leading jurists in the state makes neither historical nor legal sense. If the goal of originalism is the reconstruction of the public meaning of the law, Judge Cushing's views, not those of his radical abolitionist critics, are legally dispositive. Garrisonian abolitionists, including Phillips, rejected the authority of the

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153 Kellie Carter Jackson, FORCE AND FREEDOM: BLACK ABOLITIONISTS AND THE POLITICS OF VIOLENCE 82 (2019); Wendell Phillips, THE CONSTITUTION: A PRO-SLAVERY COMPACT, OR EXTRACTS FROM THE MADISON PAPERS, 5-10 (New York, American Anti-Slavery Society, 3rd ed. 1856).

154 Abolitionist newspapers such as *The Liberator* viewed the prosecution as racist. Pro-Slavery newspapers and Whig publications articulating a less radical version of anti-slavery ideology portrayed the judge's actions as appropriate. *See supra* notes 144, 147.

155 *Supra* note 144, 147.

156 *Id.*

Constitution and expressly counseled violating existing laws to achieve their laudable goals of immediate abolitionism.[157]

The final resolution of Isaac Snowden's case in police court illustrates the way sureties functioned and further highlights the problem of approaching antebellum law without an understanding of the relevant legal history. Having been bound to the peace and having adhered to the terms of his peace bond the trial judge dismissed the case, correctly concluding that no further legal action was necessary, nor warranted by the terms of the statute.[158] The appropriate legal strategy for Snowden to avoid prosecution would have been to argue that he had a good cause to fear attack and hence armed himself in accord with the exception recognized by the statute. Snowden had made such an argument at his hearing, but the court rejected his claim. Instead, Snowden was bound to the peace, the primary mechanism for enforcement provided by the law. When Snowden later appeared in court, the judge concluded that there was no further need for prosecution because Isaac had adhered to the terms of his bond. The case does not support the non-enforcement thesis, the law had been *enforced* because the peace had been kept and Snowden had adhered to the term of his surety.[159] The claim that the

[157] Phillips embraced the radical Garrisonian view and declared that the path forward for abolitionism "is over the Constitution, trampling it under foot; not under it, trying to evade its fair meaning." *See* WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER'S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY 35 (1847). For Phillips' relationship to abolitionist constitutionalism, see WILLIAM WIECK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 246 (1977). On the moral dilemma and legal quandary of being an anti-slavery judge after the passage of the Fugitive Slave Act of 1850, see Peter Karsten, *Revisiting the Critiques of Those Who Upheld the Fugitive Slave Acts in the 1840s and '50s*, 58 AM. J. L. HIST. 291 (2018).

[158] Gun rights advocates have applied anachronistic assumptions and principles drawn from modern criminal law instead of using the antebellum rules that governed the case at the time. *See* Brief of Professors Leider & Lund, *supra* note 6, at 8-30. They erroneously argue that because Isaac Snowden was "caught red handed" and could not challenge the arrest using the modern exclusionary rule, he would have been prosecuted if the mere circumstances of carrying a gun had been a crime under common law. In fact, the court documents and contemporary newspaper accounts make clear that crime was not charged at common law: Snowden was prosecuted for a violation of the state's prohibition on armed travel absent good cause and the court dismissed his arguments that he had a specified need to be armed. The correct penalty under the statute was a peace bond. On the norms of criminal prosecution during this period and the continuing importance of peace bonds, see generally Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860*, 33 LAW & SOC'Y REV. 161 (1999).

[159] Both of the *Bruen* Amicus that discuss the Snowden case depend on the flawed scholarship of Robert Leider, *supra* note 116. Kopel and Mocsary describe Leider's work as "exhaustive," but ignoring the abolitionist context of the Snowden case, confusing common law crimes with statutory offenses, and giving greater weight to radical

Snowden case demonstrates a right to carry arms in public rests on a series of ahistorical claims and legal interpretive errors. The case offers dramatic evidence that confirms Judge Thacher's understanding of his state's law was the orthodox legal view at the time and undermines the non-enforcement thesis of modern gun rights advocates advanced in *Bruen*.

Francis Hilliard, another prominent Massachusetts jurist interpreted his state's law in the same manner as Thacher and Cushing. A prolific legal author, Hilliard's *Elements of the Law* a popular legal text, went through two editions before the Civil War.[160] Hilliard also served as a justice on the Police Court of Roxbury, Massachusetts, a position that gave him first-hand exposure to the practice of criminal law in his home state of Massachusetts. In a study published at the end of his distinguished career that spanned almost a half a century, Hillard wrote that the right to bear arms did not sanction carrying arms "habitually."[161] This was the orthodox view in American law. There is no contemporaneous account by any sitting judge in antebellum Massachusetts supporting the gun rights interpretation of the Massachusetts Model. The "sages of the law" who wrote about the law at the time all rejected the habitual public carry view advanced by Paul Clement and the gun rights briefs in *Bruen*.[162] In fact, three of the leading jurists sitting on criminal courts in antebellum Massachusetts

abolitionist ideas than the views of the "sages of the law" is an example of law office history, not rigorous and neutral scholarship. *See* Kopel & Mocsary, *supra* note 65 at 184. Rather than follow orthodox legal history methods, an approach that requires consulting a wide range of sources, Leider's argument rests on cherry picked evidence gleaned from digital keyword searches. Although key word searches of digital sources may form part of an effective research strategy they are not a substitute for a truly exhaustive canvass of the relevant sources. In particular, key word searching encourages confirmation bias because the results are shaped by the choice of terms, Tim Hitchcock (2013) *Confronting the Digital,* 10 CULTURAL AND SOCIAL HISTORY 9, 14-17 (2013). On the dangers of historical bias and ways to minimize it, see C. Behan McCullagh, *Bias in Historical Description, Interpretation, and Explanation*, 39 HIST. & THEORY 39, 63 (2000). Consulting multiple sources representing diverse points of view of the same event is one of the most widely employed methods used by historians to minimize confirmation and selection bias. Leider's failure to consult a full range of contemporary accounts of the case is therefore a significant departure from accepted historical practice.

160 FRANCIS HILLIARD, THE ELEMENTS OF LAW: BEING A COMPREHENSIVE SUMMARY OF AMERICAN CIVIL JURISPRUDENCE FOR THE USE OF STUDENTS, MEN OF BUSINESS, AND GENERAL (2d ed., Boston, Hillard, Gray & Co. 1848).

161 FRANCIS HILLIARD, 1 AMERICAN LAW: A COMPREHENSIVE SUMMARY OF THE LAWS IN ITS VARIOUS DEPARTMENTS 18 (1883).

162 *Supra* note 68.

unambiguously described their state's laws as a total ban on armed travel in populous areas in the absence of a good cause.

Massachusetts continued the work of codifying its criminal law code in the decade following the enactment of the two statutes prohibiting public carry of arms without good cause. A report produced by the commission appointed to analyze the state criminal code in 1844 offers further insight into how armed travel in public was understood by the leading legal minds in the state. The report adopts the same interpretation evidenced in the writings of the leading criminal law jurists in the state.[163] The report's authors noted that there were several criminal activities that might result in a justice of the peace imposing a surety of the peace or good behavior.[164]

The commission discussed the type of persons included in the category of "dangerous or disorderly person." Among the categories of persons who were considered dangerous and disorderly were any "affrayer, rioter, disturber of the peace," and those "uttering menaces or threatening speeches." Additionally, the commissioners treated individuals who went "offensively armed" as a separate category of dangerous and disorderly person.[165] The commissioners viewed armed travel absent good cause as a violation of the law. The inclusion of a good cause exception for those traveling armed would have made no sense if there was a presumptive right to travel armed. In the view of the commissioners there was no unfettered right to peaceable armed travel, apart from situations in which an individual faced a specified threat.[166]

Gun rights advocates have not only ignored or dismissed the express statements of antebellum jurists and the commission report's comments about limits on armed travel in antebellum Massachusetts, but they have buttressed their invented theory of a right of peaceable armed travel based on a wholly speculative and implausible set of claims derived from

[163] WILLARD PHILLIPS & SAMUEL B. WALCOTT, REPORT OF THE PENAL CODE OF MASSACHUSETTS PREPARED UNDER A RESOLVE OF THE LEGISLATURE, PASSED ON 10TH OF FEBRUARY, 1837, at 369, 391 (1844).

[164] *Id.*

[165] *Id.*

[166] Leider and Lund do not consider the report of the Massachusetts commissioners, one of many relevant sources absent from their analysis. Their analysis relies largely on newspapers selected by digital searches, a deeply flawed methodology that exacerbates confirmation bias. For a discussion of the danger of confirmation bias in historical research using digital searching, see Claude Ewert, *Reflections on Historical Research Using Digital Archives: A Bias We Cannot Overcome*, THE CAMBRIDGE RESEARCHER (Apr. 4, 2021), https://cambridgeresearcher.com/reflections-on-historical-research-using-digital-archives-a-bias-we-cannot-overcome/ [https://perma.cc/VN3N-2PWC] (Apr. 14, 2021).

silences in the historical record.[167] According to this view gun carry was the norm because there were no cases challenging the Massachusetts law. This non-enforcement thesis rests on multiple interpretive errors. It misreads the silences in the historical record, ignores readily available evidence of enforcement available for Boston, effectively jumbles the historical chronology of gun regulation in the state by ignoring important changes in the law over time, and fails to understand how criminal justice and law enforcement functioned in the early republic.[168]

First, it is important to recognize that records of the activities of local justices of the peace, particularly in rural areas of New England are difficult to locate, if they survive at all.[169] Although the records of justice of the peace in rural New England are rare, there is ample evidence from Boston, the area's most populous city that shows the armed travel in public was a rare event, but nonetheless was a crime that was enforced by the Boston police and courts. The rules and ordinances governing the Boston police expressly empowered police officers and members of the watch to arrest any who traveled armed in violation of state law. Individuals could be stopped and searched and if weapons were found could be prosecuted, exactly what happened in the Snowden case. The rules governing Boston police were explicit about this power: police had the power to stop and search any individual who disturbed the peace or was "unduly armed with a dangerous weapon."[170] Again the good cause exception included in the law was a key element in deciding if a case merited prosecution.

The most obvious explanation for why there were no challenges to the Massachusetts prohibition on armed carry is that few individuals traveled armed in populace areas such as Boston without good cause. Historian Roger Lane, the leading authority on crime in nineteenth-century Boston, concluded that "not many criminals in fact carried arms, even after the invention of the revolver made it possible to do so inconspicuously."[171] This conclusion is consistent with the fact that Boston police did not themselves routinely carry firearms until decades after the Civil War period: the standard weapon issued to police in the antebellum era was a club, not a firearm. Property inventories of the Boston police further

167 *See* Kopel & Mocsary, *supra* note 65, at 183-85; Leider, *supra* note 116, at 14-17.

168 *See supra* note 116.

169 MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 61-62 (1980). On Boston, see ROGER LANE, POLICING THE CITY: BOSTON, 1822-1885, at 225-35 app. I (1967).

170 A SUPPLEMENT TO THE LAW AND ORDINANCES OF THE CITY OF BOSTON 91 (1866).

171 LANE, *supra* note 169, at 103-04.

underscore this point: the list of moveable property owned by the Boston police for the year 1862 shows a total of 270 clubs and only seven revolvers. If Bostonians were promiscuously traveling armed and gun toting posed a serious threat to public safety, it seems highly unlikely that the entire Boston police force would have owned a total of seven revolvers at the start of the Civil War era. Boston police did not routinely carry firearms till decades after the Civil War. If gun carry was common in the city, police practices would have adapted to this fact and police would have been armed with guns, not clubs. Boston police did not believe that promiscuous gun carriage was a serious threat to public safety or a threat to their lives. These undeniable facts are based on actual evidence, a stark contrast to the proponents of the non-enforcement thesis whose argument relies on the absence of evidence, and inferences from silences in the historical record.[172]

Enforcement statistics compiled by the city's Chief of Police offer the most direct evidence contradicting the non-enforcement thesis. As the data in Table One shows, only a tiny fraction of assaults in the city involved a weapon of any kind. Moreover, the number of arrests for unlawfully carrying weapons in public were also miniscule. Contrary to the claims of modern gun rights advocates, the evidence from Boston does not support the non-enforcement thesis, but rather suggest that citizens generally obeyed their state's prohibition on armed travel and few individuals carried weapons in public in the period leading up to the Civil War. In short, Bostonians, in contrast to their southern brethren, did not habitually arm themselves.[173]

Table 1. Boston Police Enforcement Data 1864 and 1866[174]

Year	Assault and Battery	Assault With Weapons	Disturbing the Peace	Carrying Weapons Unlawfully
1864	1016	100	309	8
1866	1091	78	666	5

When the commentaries by leading jurists from Massachusetts are considered alongside the data about policing practices in Boston, the

[172] *See* ANNUAL REPORT OF CHIEF OF POLICE 1862 CITY DOCUMENT NO. 3, at 13 (Boston, 1863).

[173] On the different patterns of gun violence in the North and the South in the pre-Civil War era, see ROTH, *supra* note 93, at 180-249.

[174] ANNUAL REPORT OF THE CHIEF OF POLICE, FOR THE YEAR 1864, CITY DOCUMENT NO. 6, at 8-9 (Boston, 1865); ANNUAL REPORT OF THE CHIEF OF POLICE 1866, CITY DOCUMENT NO. 9, at 9-10 (Boston, 1867).

gun rights non-enforcement thesis collapses under the weight of countervailing evidence.

V. RECONSTRUCTION, THE PROGRESSIVE ERA, AND THE RISE OF THE MODERN REGULATORY STATE

The Civil War and Reconstruction had a profound impact on American gun culture. The new state constitutions drafted after the Civil War abandoned Founding era language focused on ancient fears of standing armies that had haunted so many in the era of the American Revolution. In place of the militia-centric language of these eighteenth-century texts, Reconstruction era state constitutions substituted a new formulation of the right to bear arms that expressly recognized broad police power authority to regulate arms in public. The new threat facing Americans during Reconstruction was no longer "lobster back" British regulars, but easily concealed weapons, terrorist organizations such as the Ku Klux Klan and inter-personal gun violence.[175]

As weapons proliferated and gun violence increased, governments, including states and localities, implemented the new constitutional paradigm embodied in post-Civil War state constitutions and passed a range of laws to deal with gun violence and the increasingly common practice of concealed carry. The Republicans who framed the Fourteenth Amendment and dominated politics during the height of Reconstruction were not averse to using the power of state and local government to further their goals, and nothing was more pressing than restoring peace and public order. Protecting the rights of African Americans, including the right to keep and bear arms, was not incompatible with robust regulation of firearms. Racially neutral regulations aimed at promoting public safety was not in conflict with the goals of the Fourteenth Amendment; it was the indispensable public policy needed to implement its vision of equality and civil rights.[176]

This post war consensus on the need for robust gun regulation was evident in Texas. Indeed, the necessity of racially neutral gun regulations of this sort eventually was recognized by both Republicans and Democrats in Texas because the state was plagued by paramilitary violence that threatened public order and post-war stability.[177] This

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[175] Cornell, *The Right to Regulate*, *supra* note 8, at 69.

[176] For a discussion of the importance of such broad racially neutral laws aimed at demilitarizing the public sphere, see Darrell A. H. Miller, Peruta*, The Home-Bound Second Amendment, and Fractal Originalism*, 127 HARV. L. REV. F. 238, 241-42 (2014).

[177] *See* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 113-17 (2016) [hereinafter *The Law*]; *see*

view of the constitutionality of racially neutral gun regulation gained judicial notice in *English v. State*, a case in which the Texas Supreme Court confidently affirmed that restrictions on public carry were "not peculiar to our own State."[178] Indeed, the court concluded that "[i]t . . . [was] safe to say that almost, if not every one of the states of this Union . . . [had] a similar law upon their statute books, and, indeed, so far as we . . . [had] been able to examine them, they . . . [were] more rigorous than the act under consideration."[179] Even after the adoption of the Fourteenth Amendment, the court reasoned that good cause laws were entirely consistent with protections for the right to bear arms.[180]

The Texas Court was not mistaken. The Lone Star state was hardly unique in implementing an aggressive gun control regime in the era of Reconstruction. Colorado's Constitution (1876) included an express affirmation of the right to ban concealed carry in its arms bearing provision: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when hereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."[181] The state legislature acted quickly on this power and banned concealed carry by statute; a number of other localities also passed concealed weapons bans, and a few localities enacted more sweeping prohibitions on all public carry.[182] Localities in every region of the nation adopted similar bans.[183] Although modern gun rights

also Brennan G. Rivas, *An Unequal Right to Bear Arms: State Weapons Laws and White Supremacy in Texas, 1836-1900* 121 SW. HIST. Q. 284, 298-99 (2020).

178 English v. State, 35 Tex. 473, 479 (1871).

179 *Id.*

180 For a discussion of this case in the context of Reconstruction, see Frassetto, *The Law*, *supra* note 177, at 113-17.

181 COLO. CONST. of 1876, art. II, § 13.

182 *See* COLO. REV. STAT. § 248 (1774). For examples of local concealed carry ordinances, see DENVER, COLO., REV. ORDINANCES § 12 (1875); GEORGETOWN, COLO., REV. ORDINANCES § 9 (1877). For a more general ban on public carry, see GUNNISON, COLO., ORDINANCES ch. VIII, art. II, §§ 1, 16-20, 23 (1881).

183 *See, e.g.*, Tucson, Ariz., Ordinance 9 (Jan. 28, 1873), *reprinted in* ARIZ. WKLY. CITIZEN, Feb. 8, 1873, at 2 (prohibiting the carrying of deadly weapons by individuals who are not peace officers); 1871 Ky. Acts 89 ch. 1888, §§ 1-2, 5 (prohibiting the carrying of concealed deadly weapons); 1887 Mich. Pub. Acts 14 § 1 (prohibiting the carrying of concealed weapons); Worthington, Minn., Ordinance to Prevent the Carrying of Concealed Weapons (Feb. 9, 1882), *reprinted in* WORTHINGTON ADVANCE, Feb. 9, 1882, at 3 (prohibiting any person within the city to carry a concealed weapon and providing that any person who violates the ordinance shall be subject to a fine, and, if unable to pay the fine, jail time); 1885 Or. Laws 33 §§ 1-2 (prohibiting the carrying of concealed weapons within the city and providing that persons convicted of such shall be subject to a fine and jail time); Nashville, Tenn. Ordinance, Carrying Pistols, Bowie-

advocates have argued that bans on concealed carry left open a robust right to public carry, such a view ignores the cultural norms and practices of the post-Civil War period. Changes in firearms technology, consumer preferences, and social norms meant carrying pistols on the hip or openly was a relatively rare event, particularly in the increasingly urban world of post-Civil War America. Most Americans who armed themselves, particularly in urban areas, chose pocket pistols.[184]

In 1879 *The Gentleman's Magazine* confidently stated that "every State in the American Union has a law against carrying concealed weapons, and every pair of pants manufactured from Main to California, and from the Lakes to the Mexican gulf has a pistol pocket."[185] A popular guide to firearms published in the same decade echoed this observation, reminding its readers that "in many States the carrying of firearms, for purposes of defense, by private individuals is recognized by law; in others it is strictly prohibited." As for habitual carry, there was "no ground upon which it can be justified." The best method for carrying a pistol when there was "expected danger," a specified threat, was carrying a pistol in a pocket.[186] The popularity of sporting pistols in pockets, shaped the language of fashion in this period. One newspaper commented that "every pair of trousers in the United States" had a hip pocket that was frequently used to carry a small pistol, a development that led American tailors to begin describing this sartorial feature as a "pistol pocket."[187] Rather than usher in an era of pervasive open carry of arms, post-Civil War Americans overwhelmingly chose to carry arms concealed if they carried them at all. There is little evidence that open carry was common, particularly in urban areas.

The move away from public carry and turn to concealed carry prompted a prominent Colorado attorney to denounce his state's concealed carry prohibition as a *de facto* ban on all public carry.

Knives, Etc. (Dec. 26, 1873), *reprinted in* ORDINANCES OF THE CITY OF NASHVILLE 340-41 (William K. McAlister, Jr. ed., 1881) (providing that any person in the city found carrying a deadly weapon shall be guilty of a misdemeanor and fined fifty dollars); Austin, Tex., Ordinance Prohibiting the Unlawful Carrying of Arms (May 4, 1880), *reprinted in* DAILY DEMOCRATIC STATESMAN, May 9, 1880, at 2 (prohibiting the carrying of weapons by civilians).

184 For additional evidence supporting the waning popularity of open carry, see Frassetto, *Open Carry*, *supra* note 102.

185 Albany de Fonblanque, *The Pistol in America*, GENTLEMAN'S MAG., July to Dec. 1879, at 321.

186 *THE PISTOL AS A WEAPON OF DEFENSE* (1875) at 9, 12.

187 *Getting "The Drop."*, SAINT PAUL DAILY GLOBE, Aug. 11, 1889, at 8.

> Modern improvements and common convenience have driven every weapon out of consideration except the revolver, it is a practical disarmament where a man is not allowed to carry such weapon in the only way which common sense allows it to be carried. No one but a fool will parade the streets with a revolver outside the person any more than he would carry his pocket book or his watch outside the person. A man will carry his watch in his watch pocket, and his revolver in his hip pocket, which the tailor made for it, and the only place where he can carry it without making a hippodrome of his person. It is just as senseless as if the law allowed the use of hats-provided they are not worn on the head.[188]

A similar assessment of the decline in open carry prompted one pro-gun judge in Louisiana to lament his state's long-standing prohibition on concealed carry. In a spirited grand jury charge, he bemoaned prohibitions on concealed weapons because it meant that decent law abiding citizens would not carry openly: "he cannot, without being absurd, walk the public streets with his pistol exposed upon his person."[189] Respectable men who wished to "avoid being ludicrous" had little choice but to carry weapons concealed.[190] Given these facts, a ban on concealed weapons amounted to comprehensive ban on public carry in most jurisdictions, particularly populous areas.[191]

The other significant development in firearms regulation that began during Reconstruction was the growth of local permit schemes in many of the nation's cities and towns. This approach to gun regulation reflected the declining influence of justices of the peace as the primary agents of law enforcement in urban post-Civil War America. The rise of professional police forces and police courts changed the nature of law enforcement.[192] The traditional surety model of enforcing the peace, it is worth recalling, was rooted in common law and this in turn reflected the realities of life in the small face to face agrarian communities of the early modern Anglo-American world. This informal community-based approach was well suited to a pre-industrial society in which members

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188 *Carrying Concealed Weapons*, 4 COLO. L. REP. 277-78 (1884).

189 *Judge Moise Makes Up His Grand Jury*, DAILY PICAYUNE, Dec. 3, 1895, at 3.

190 *Id.*

191 *See* Frassetto, *Open Carry*, *supra* note 102, at 3.

192 On the transformation of American law and the rise of the modern regulatory state, see Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063, 1068-75 (2017), William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1081-83 (1994), and Jed H. Shugerman, *The Legitimacy of Administrative Law*, 50 TULSA L. REV. 301, 304-05 (2015).

of the local gentry elite, who typically served as justices of the peace, could count on the mechanisms of deference and a web of patron-client relationships to help them maintain social order.[193] Slowly over the course of the nineteenth century, as America modernized, urbanized, and became a more diverse and highly mobile society, traditional community-based mechanisms of law enforcement eroded. Sureties were less effective at securing the peace in America's growing metropolitan cities. New institutions and processes were necessary to police America's expanding and increasingly heterogeneous cities. Professional police forces, special police courts, and new administrative agencies were better suited to maintaining social order and the peace in the urban world of nineteenth-century America.[194]

By the end of the nineteenth century, Americans residing in urban areas, particularly those dwelling in the nation's most populous cities, were likely to be living under some form of restrictive public carry legal regime: bans on concealed carry, good cause permit schemes, or broad restrictions on public carry with good cause and affirmative self-defense exceptions.[195] (See Table Two). Millions of Americans were living in cities that implemented some form of public carry restriction by the end of the nineteenth century.

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[193] *See generally* ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800-1880, at 5-6 (Thomas A. Green ed., 1989) (noting that justices of peace were generally regarded as "neighbors" and "plain people" who sat on the criminal court and had legislative responsibilities, contributing to the maintenance of social order).

[194] ERIC H. MONKKONEN, AMERICA BECOMES URBAN: THE DEVELOPMENT OF U.S. CITIES AND TOWNS, 1780-1980, at 98-109 (1995).

[195] On the legal consensus that regulations of public carry were not in conflict with the right to bear arms, see THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 408 (John Houston Merrill ed., 1887) and John Forrest Dillon, *The Right to Keep and Bear Arms for Public and Private Defence*, 1 CENT. L.J. 259, 260 (1874). For modern confirmation of these assessments, see Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 68 (2017).

Table 2. Post Civil War Limits on Public Carry in the Nation's Ten Largest Cities

Rank	City	Population (1900)[196]	Regulation
1	N.Y.	3,437,202	Permit[197]
2	Chicago	1,698,575	Permit[198]
3	Phila.	1,293,697	State Concealed Carry Prohibition[199]
4	St. Louis	575,238	Permit[200]
5	Boston	560,892	Prohibition with good cause exception[201]
6	Baltimore	508,957	Concealed Carry Prohibition[202]
7	Cleveland	381,768	State Prohibition on Concealed Carry[203]
8	Buffalo	352,387	Permit[204]
9	Cincinnati	342,782	State Prohibition on Concealed Carry[205]
10	San Francisco	325,902	Permit[206]

Faced with rising levels of gun violence states and localities eagerly embraced the new tools to deal with threats to the peace.[207]

196 1 U.S. CENSUS OFF., CENSUS REPORTS 1xix tbl. XXII (1901).

197 *See* NEW YORK, N.Y., ORDINANCES OF THE MAYOR ALDERMAN AND COMMONALTY OF THE CITY OF NEW YORK art. XXVII (1881).

198 *See* CHICAGO, ILL., ORDINANCES pt. 1, ch. 8, § 1 (1873).

199 *See* FREDERICK C. BRIGHTLY, ANNUAL DIGEST OF THE LAWS OF PENNSYLVANIA FOR THE YEARS 1873 TO 1878, at 1778 (1878).

200 *See* ST. LOUIS, MO., REV. ORDINANCES ch. 26, art. 2, § 989 (1893).

201 *See* MASSACHUSETTS GENERAL STATUTES ch. 155, sec. 46; ch. 212, sec. 15 (1906).

202 *See* Act of Mar. 14, 1888, 1888 Md. Laws 522 (describing the consequences of a person found to be concealing a pistol or deadly weapon on their person). For discussion of the way this statute was interpreted at the time, see LEWIS HOCHHEIMER, A MANUAL OF CRIMINAL LAW, AS ESTABLISHED IN THE STATE OF MARYLAND 146-47 (1889).

203 *See* An Act to Prohibit the Carrying or Wearing of Concealed Weapons, OHIO REV. CODE ANN. § 33.211 (1860).

204 *See* An Act to Revise the Charter of the City of Buffalo, 1891 N.Y. Laws 129, 177.

205 *See* OHIO REV. CODE ANN. § 33.211 (1860).

206 *See* CITY OF SAN FRANCISCO, GENERAL ORDERS OF THE BOARD OF SUPERVISORS PROVIDING REGULATIONS FOR THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO 8 (1884).

207 *See* ROTH, AMERICAN HOMICIDE, *supra* note 93, at 347-54.

Constitutional commentators saw few problems with such regulations which were understood to be a straightforward application of the police power.[208]

VI. RECONSTRUCTION, RACE, AND THE POLITICS OF GUN CONTROL

One of the most persistent and insidious myths clouding debate over the Second Amendment during the period of Reconstruction is the false claim that gun control in this period was inherently racist.[209] This erroneous claim confuses the racist Black Codes enacted by Confederate sympathizers shortly after the conclusion of the war with the racially neutral laws passed and enforced by Republicans during the brief period when they controlled southern governments. Recent scholarship has illuminated the social and legal history of enforcement practices during Reconstruction, providing a remarkable glimpse into how the post-Civil War era restrictions on public carry functioned at the local level. Although parts of the antebellum South had a relatively lax regulatory regime for public carry, the Republican dominated legislatures in the Reconstruction South broke with this tradition and enacted a variety of sweeping laws aimed at preserving the peace. Protecting free persons and Republicans from the threat posed by vigilante violence and terrorist paramilitary groups such as the Ku Klux Klan was essential to

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[208] *See* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES: ESPECIALLY DESIGNED FOR STUDENTS, GENERAL AND PROFESSIONAL 152-53 (Boston, Houghton, Osgood & Co., 4th ed. 1879); THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 195, at 438; Dillon, *supra* note 195, at 261.

[209] For examples of historically dubious claims that gun control during Reconstruction was racist, see STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 10-11 (1998) and Robert J. Cottrol & Raymond T. Diamond, "*Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity – The Redeemed South's Legacy to a National Jurisprudence – Freedom: Constitutional Law*, 70 CHI.-KENT L. REV. 1307, 1309-11 (1995). *See also* NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS 81-82 (2014); Justin Aimonetti & Christian Talley, *Race,* Ramos*, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 210 (2021); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 17-18 (1995). These accounts rest on impressionistic and cherry-picked evidence. They also do not examine the actual practices in place at the local level. Equally problematic, all of these authors fail to distinguish between the actions of pro-Reconstruction Republicans during the period in which they controlled southern government and the actions of white supremacist Jim Crow governments that took control of the South after Reconstruction was dismantled. For a critique that gun control is a racist canard, see Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. (forthcoming 2022); Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 611, 621-22 (2006); and Frassetto, The Nonracist, *supra* note 152, at 173-74.

both restoring order and to advancing the political goals of Reconstruction.[210] Racially neutral limits on public carry were not inimical to the project of Reconstruction, they were indispensable to its success. These laws were not only actively enforced in the Reconstruction era South, but they were done in a racially neutral fashion.[211]

Consider the case of De Soto Parish in Louisiana. The pattern of prosecution and conviction rates for crime in this locality offer a remarkable glimpse into how law functioned during the brief window when Republicans controlled the South. Although local records for many areas of the South are not available, De Soto Parish is a rare exception where extensive documentation has survived the vicissitudes of time and local record keeping. The evidence from DeSoto illuminates the complex connections between race, guns, and Reconstruction.

Table 3. Race and Criminal Justice in De Soto Parish during Reconstruction: Racial Disparities in Prosecution and Conviction[212]

	Whites			Blacks		
	Convicted	Indicted	Rate	Convicted	Indicted	Rate
Crime						
Murder	1	12	8.3	6	10	60
Assault	6	20	30	4	15	26.6
Other violent	0	0	-	1	4	25
Total violent	7	32	21.8	11	29	37.9
Concealed weapon	9	13	69.2	6	13	46.1

Historian Mark Leon De Vries has produced a meticulous and deeply researched account of the legal history of this parish, exhuming a wealth of data about how law functioned at the local level.[213] De Vries' research reveals the complex racial dynamics governing the administration of local justice. Republicans had mixed success with protecting African Americans in De Soto. Forms of systematic racism endured, but the one

[210] *See* Cornell, *The Right to Regulate*, *supra* note 8, at 69-71.

[211] *See* Brennan Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, 55 UC DAVIS L. REV. 2603 (2022).

[212] The data in this table is adapted from Mark Leon De Vries, *Between Equal Justice and Racial Terror: Freedpeople and the District Court of DeSoto Parish During Reconstruction*, 56 LA. HIST. 261, 292-93 (2015).

[213] *Id.*

area in which Republicans did achieve the laudable goal of preserving the peace in a racially neutral manner was regulation of habitual public carry.

Reconstruction did not eliminate all forms of systemic racism from De Soto Parish. Facially neutral criminal laws did have a disparate impact on Blacks and whites but not in the way that gun rights advocates have asserted.[214] There was a sharp racial disparity in the outcome of homicide prosecutions. Black victims were far less likely to obtain justice against a white defendant and Black men accused of homicide were far more likely to be convicted and punished for alleged crimes. The racial disparity evident in vastly different outcomes of prosecutions reveals the continuing impact of structural racism in homicide cases. But, Republicans enjoyed far greater success at implementing a racially neutral regime for enforcing public carry restrictions. Whites were not only vigorously prosecuted for violations of the state's long-standing ban on concealed carry, but they were convicted at significantly higher rate than Blacks. In contrast to homicide prosecutions, neutral enforcement of prohibitions of public carry promoted the peace and hence made everyone safer, a fact that likely contributed to Republican's ability to enforce these laws in a racially neutral manner. The evidence from De Soto Parish is consistent with other recent scholarship on gun law enforcement in Reconstruction era Texas.[215] In Texas a similar pattern regarding enforcement of public carry laws also emerged during Republican rule. Based on this new body of scholarship it now seems clear that Republicans in the Reconstruction South not only passed facially neutral gun laws, but they successfully enforced them in a non-discriminatory fashion, aiming to protect the peace and further the goals of promoting equality.[216] Although the rise of Jim Crow eventually made neutral enforcement of gun laws in the South impossible, recognizing the brief historical window during Reconstruction era when Republican led governments enforced gun laws neutrally is a useful corrective to claims that gun control laws are always racist.

The dawn of the new century led to an intensification of efforts to regulate firearms, including public carry. In 1906, Massachusetts modernized its firearms regulatory scheme, prohibiting public carry

[214] *See id.*

[215] *See id.*; *see also* Rivas, *supra* note 211.

[216] *See* De Vries, *supra* note 212, at 292-93; *see also* Rivas, *supra* note 211.

without a license.[217] To obtain a permit one had to demonstrate a "good reason to fear an injury to [one's] person or property."[218] Other states adopted similar laws. New York's Sullivan law (1911), a comprehensive gun control measure that imposed limits on both the sale and ability to carry arms in public, prompted some criticism from gun rights advocates, but few mainstream legal commentators questioned its constitutionality.[219] The growing popularity of these types of law led other states and localities to adopt similar statutes and ordinances.[220] In 1923, the U.S. Revolver Association published a model public carry law, later adopted by additional states, that included a similar good cause requirement. The right to obtain a permit to carry was conditioned on having a "good reason to fear an injury to his person or property." The model law was approved by the NRA's future president, Karl T. Frederick.[221] The very first issue of the Duke Law School journal of Law and Contemporary Problems (1934) explained that the use of license or

[217] As legal scholar Eric Ruben observes, "administering weapons laws ex ante through a licensing scheme, rather than ex post at trial, has various advantages for the weapon bearer." Ruben, *supra* note 48, at 97.

[218] Act of Mar. 16, 1906, ch. 172, §§ 1-2, 1906 Mass. Acts 150 (regulating the carrying of concealed weapons).

[219] For the historical context of the enactment of the Sullivan law and reactions to it, see PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 175-98 (2018). For the constitutionality of the law, see People *ex rel.* Darling v. Warden of City Prison, 139 N.Y.S. 277, 286 (N.Y. App. Div. 1913).

[220] *See, e.g.*, Act effective 1927, §§ 1, 4-6, 1927 R.I. Pub. Laws 256 (regulating the possession of firearms); Act effective 1917, §§ 3-4, 1917 Cal. Stat. 221-25 (prohibiting "an act relating to and regulating the carrying, possession, sale or other disposition of firearms capable of being concealed upon the person; prohibiting the possession, carrying, manufacturing and sale of certain other dangerous weapons and the giving, transferring and disposition thereof to other persons within this state; providing for the registering of the sales of firearms; prohibiting the carrying or possession of concealed weapons in municipal corporations; providing for the destruction of certain dangerous weapons as nuisances and making it a felony to use or attempt to use certain dangerous weapons against another"); Act effective 1917, §§ 1, 3-A, 4, 4-A, 4-B, 4-C, 1917 Or. Laws 804-08 ("Prohibiting the manufacture, sale, possession, carrying, or use of any blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, dirk, dagger or stiletto, and regulating the carrying and sale of certain firearms, and defining the duties of certain executive officers, and providing penalties for violation of the provisions of this [A]ct.").

[221] *National Firearms Act: Hearing on H.R. 9066 Before the H. Comm. on Ways and Means*, 73rd Cong. 38-62 (1934) (statement of Karl T. Frederick, President, National Rifle Association of America).

permit schemes had become a standard feature of gun regulation in the twentieth century and was unquestionably constitutional.[222]

CONCLUSION

Limits on armed travel in public are of ancient vintage, stretching back deep into Anglo-American law. In England prior to colonization, the open carry of firearms was generally prohibited in populous areas, with limited exceptions for community defense and law enforcement, and with a legally sanctioned exception for the gentry elite. There is no historical evidence of an individual right for ordinary Britons to carry weapons outside of these narrow and well-defined exceptions. This common law framework was imported to the American colonies, but it was modified to reflect the realities of life in a frontier society that was in a constant state of preparedness for war with rival European powers and the indigenous population of North America.

American Independence did not mark a total rupture with this inherited tradition, but it did accelerate the transformation and Americanization of the common law. As was true for nearly every aspect of early American law, there was significant regional differences between the way the law evolved in the New Republic. While some Southern states recognized an individual right to openly carry firearms for specific purposes, this view was largely restricted to the white citizens of slave-holding states. In other parts of pre-Civil War America, there was a more limited right to carry for reasons of self-defense when a specified threat existed. Contrary to claims of gun rights advocates there was no broad free-standing right of peaceable armed travel in populous areas in antebellum America. Moreover, the claim that these laws were never enforced is historically inaccurate: these laws were enforced in multiple jurisdictions.

After the Civil War, commencing in the era of the Fourteenth Amendment, the level of firearms regulation at both the state and local level intensified. States and localities enacted a variety of limits on public carry, including bans on open carry, prohibitions on concealed carry, and permit schemes. Important changes in the modes of policing and enforcing the peace had profound implications for the enforcement of these regulations. The growth of professional police forces in urban areas, and expansion of police courts, in the years after the Civil War led to greater convergence in the approach to firearms regulation than had been possible in antebellum America where local justices of the

[222] John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 401-04 (1934).

peace dominated law enforcement. By the end of the century, a variety of gun laws limiting public carry, including good cause permitting had become a fixture in American law. Millions of Americans were living under regulatory regimes that limited the right to carry guns in public.

The trend toward greater regulation intensified during the early decades of the next century. By the dawn of the New Deal era, the basic contours of the modern approach to firearms regulation were firmly established. Limits on armed travel in public were central to this approach to preserving the peace and protecting the liberty of all Americans from the dangers of gun violence.