HISTORY, TEXT, TRADITION, AND THE FUTURE OF SECOND AMENDMENT JURISPRUDENCE: LIMITS ON ARMED TRAVEL UNDER ANGLO-AMERICAN LAW, 1688–1868

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I
INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court directed lower courts to consider history as one source for evaluating the constitutionality of gun regulations.[1] History is likely to assume even greater prominence in Second Amendment jurisprudence with the appointments of Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court.[2] *Heller*'s framework requires making difficult determinations regarding the accuracy of competing narratives about the American legal past. In the decade since *Heller* was decided, federal courts have been presented with two opposing versions of this history.[3] One theory, a

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1. *See generally* 554 U.S. 570 (2008) (using an originalist framework that included a superficial survey of the history of the Second Amendment).

2. For Justice Kavanaugh's view, see *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). For Justice Gorsuch's view, see *Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (noting positively that a Ninth Circuit panel decision "pointed to a wealth of cases and secondary sources from England, the founding era, the antebellum period, and Reconstruction . . ."). On the likely increasing relevance of history given the recent Court appointees, see Joseph S. Hartunian, *Gun Safety in the Age of Kavanaugh*, 117 MICH. L. REV. ONLINE 104, 116 (2019), and *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 140 S. Ct. 1525, 1540–41 (2020 (Alito, J. dissenting) (per curiam) (arguing that the fact that the City "point[ed] to no evidence of laws in force around the time of adoption of the Second Amendment that prevented gun owners from practicing outside city limits" was "sufficient to show that the New York City ordinance [was] unconstitutional"). Chief Justice John Roberts also gestured toward a historical approach in the *Heller* oral argument: "[W]e are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well." Transcript of Oral Argument at 77, *Heller*, 554 U.S. 570 (No. 07-290).

3. *See generally* Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-Heller Second Amendment Cases*, 21 WM. & MARY

libertarian model, has been advanced by modern gun-rights advocates.[4] An opposing interpretation grounded in a common law-based view of history has been propounded by legal historians working across a multiplicity of different sub-fields.[5] Gun-rights advocates and their allies among libertarian academics have argued that a right to peaceful public carry was well-established under English law and became the dominant paradigm under American law.[6]

The libertarian account misinterprets English common law, ignoring the concept of "the peace." Riding armed was a violation of the peace. Apart from protection for members of the gentry elite and a limited number of well-recognized exceptions related to preserving the peace, there was no freestanding right to travel armed under English law. Indeed, such a right would have been legally inconceivable given the fact that the monarchy held a monopoly on violence and any decision to arm oneself was by its very nature a rebuke to the authority of the Crown. Although the libertarian tradition does have deep roots in American history, its origin does not reach back to England but rather to the Slave South. Libertarians have read English and American law through the lens of antebellum Southern case law, essentially taking legal norms developed in parts of the Slave South and using them as reflections of broader trends in Anglo-American law. This approach not only seriously distorts the past, but it unwittingly fashions modern Second Amendment law on a model derived from one of the most brutal legal systems in the modern world.[7]

Given the serious analytical and historical flaws in the libertarian model, it is not surprising that as more empirical work has appeared on the scope of arms regulation under Anglo-American law, the extreme gun-rights reading of *Heller*

BILL RTS. J. (forthcoming 2020) (summarizing and analyzing the radically different views of the past that federal courts have used in making sense of the history of firearms regulation after *Heller*).

4. For a prominent example of the libertarian reading of the history of the Second Amendment and firearms regulation, see generally FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (Nicholas J. Johnson et al. eds., 2018) [hereinafter FIREARMS LAW].

5. *See generally* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT (Jennifer Tucker et al. eds., 2019) [hereinafter A RIGHT TO BEAR ARMS?] (reflecting the most recent historical scholarship and establishing the paradigm for this history). For another sampling of new historical scholarship on guns in American history that reflects the major trends in post-*Heller* research and casts doubt on the libertarian model, see the essays in *Engaging America's Gun Culture*, THE PANORAMA: EXPANSIVE VIEWS FROM THE *JOURNAL OF THE EARLY REPUBLIC*, http://thepanorama.shear.org/tag/engaging-americas-gun-culture/ [https:// perma.cc/2YMK-EFTM]. For an analysis of recent case law in this area that acknowledges the importance of the new regionalist paradigm in scholarship and explores its significance for the future of Second Amendment jurisprudence, see Young v. Hawaii: *Ninth Circuit Panel Holds Open-Carry Law Infringes Core Right to Bear Arms in Public*, 132 HARV. L. REV. 2066, 2070–71 (2019).

6. *See, e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y 127 (2016); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009) (arguing that the Statute of Northampton only forbade the carrying of arms when it was "unusual and therefore terrifying").

7. *See* Eric M. Ruben & Saul Cornell, *Firearms Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 128 (2015).

has collapsed under the weight of its own contradictions.[8] One of libertarians' central claims—the existence of a right to peaceable firearms carry under English common law—turns out to be a modern invention of gun-rights advocates, and is of fairly recent vintage.[9] Apart from a well-defined list of exceptions connected to the obligation of subjects to help maintain the King's Peace, there was no freestanding right to travel armed under Anglo-American law.[10] The other irrefutable fact that has emerged from this new body of post-*Heller* scholarship is that Anglo-American tradition was not static, but rather evolved in response to the rapidly changing circumstances of life in the early American republic.[11]

Moreover, once this older legal framework was transplanted to America, it fragmented, producing different regulatory regimes that reflected the diversity of early American law. After American Independence, these processes of change intensified, leading to the emergence of radically different approaches to firearms regulation in parts of the Slave South and elsewhere in the new nation. Although the common law evolved differently in each of the new states, virtually all reputable legal historians acknowledge that clear regional patterns also emerged.[12] In particular, virtually all scholars acknowledge the centrality of Southern slavery to this legal evolution. Rather than speaking with a single voice on firearms, American law spoke with different and distinctive regional accents. By the Civil War era, there were at least three different firearms regulatory regimes in America regarding public carry: (1) a permissive open-carry regime in parts of the Slave South; (2) a limited militia-based view restricting open carry in

8. See generally the essays in A RIGHT TO BEAR ARMS?, *supra* note 5, for examples of recent empirical work on the scope of arms regulation in early colonial American history. On gun rights, see generally Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813 (2014). On the anachronistic nature of libertarian approaches to rights in the Founding era, see generally Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85 (2017). For a persuasive argument that *Heller* can be read as accommodating well-accepted principles of American constitutional law, see JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 100–17 (2018).

9. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why it Matters*, 64 CLEV. ST. L. REV. 373, 392–94 (2016) (demonstrating that this libertarian interpretation was invented and propounded by activists with close connections to the firearms industry and then widely cited in law review articles); Saul Cornell, *"Half Cocked": The Persistence of Anachronism and Presentism in the Academic Debate Over the Second Amendment*, 106 J. CRIM. L. & CRIMINOLOGY 203 (2016).

10. *See infra* Part II.

11. *See* Brian DeLay, *A Misfire on the Second Amendment*, 47 REVIEWS AM. HIST. 319, 322 (2019) (reviewing ROXANNE DUNBAR-ORTIZ, LOADED: A DISARMING HISTORY OF THE SECOND AMENDMENT (2018), and commenting that "[t]his newer scholarship is more interested in the broad historical context, more willing to integrate social and cultural history with the familiar legal and political sources, more attentive to the range of views white Americans expressed about guns in the eighteenth and nineteenth centuries, and more sensitive to change over time").

12. *See generally, e.g.*, ELLEN HOLMES PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC (2011) (arguing that the American colonists adapted English common law to their local conditions); 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); James W. Ely, Jr. & David J. Bodenhamer, *Regionalism and American Legal History: The Southern Experience,* 39 VAND. L. REV. 539 (1986).

other parts of the South; (3) and a novel "good cause" model of open carry that originated in Massachusetts but quickly spread to other parts of the nation. By the end of the nineteenth century, the Massachusetts good cause model had become the dominant paradigm. This model expanded gun rights far beyond traditional English law, but did so in a manner consistent with American law's veneration for the idea of well-regulated liberty. It provided a flexible approach to deal with the problems posed by the proliferation of cheap, reliable, and easily concealed handguns. Balancing liberty and order, particularly in an era where modern policing and the administrative state were not yet formed, posed unique challenges for regulating firearms in a nation where gun ownership was far more widespread than in England.[13] Understanding this complex history is therefore essential to applying *Heller*'s historical framework.[14]

At the time *Heller* was decided, there was relatively little scholarship on the history of firearms regulation.[15] Given this fact, it is not surprising that the *Heller* majority focused primarily on a string of antebellum Southern cases grappling with the implications of the first modern-style weapons-control laws.[16] Firearms had been regulated in America since the colonial era, but as recent post-*Heller* scholarship has forcefully demonstrated, America did not have an interpersonal gun violence problem until the early nineteenth century, when the market revolution, rising democratization, and the growing individualism of the new nation's culture created America's first gun violence crisis.[17] Southern states took the lead in passing the first regulations aimed primarily at limiting access to weapons that had little value in promoting the goal of supporting a well-regulated militia.[18] Southern courts divided over how to reconcile these new gun-control laws with the right to bear arms enshrined in their state constitutions.[19] Some Southern judges adopted a militia-based interpretation of these gun control laws. This theory afforded full constitutional protection to a narrow subset of weapons

13. There is a vast literature on the rise of the American administrative state. For a useful overview, see Jed H. Shugerman, *The Legitimacy of Administrative Law*, 50 TULSA L. REV. 301 (2015). On patterns of gun ownership in England and America, see generally Kevin M. Sweeney, *Firearms Ownership and Militias in Seventeenth and Eighteenth Century England and America*, *in* A RIGHT TO BEAR ARMS?, *supra* note 5, at 54.

14. On the diversity of early American regulatory models for firearms, see generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013); Ruben & Cornell, *supra* note 7 (arguing that the Massachusetts Model gained traction in other parts of the country); Young v. Hawaii: *Ninth Circuit Panel Holds Open-Carry Law Infringes Core Right to Bear Arms in Public*, *supra* note 5.

15. For an overview of the existing scholarship prior to *Heller*, see SAUL CORNELL & NATHAN KOZUSKANICH, THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON *DISTRICT OF COLUMBIA V. HELLER* 7–20 (2013).

16. *See* District of Columbia. v. Heller, 554 U.S. 570, 586 n.9 (2008).

17. *See generally* RANDOLPH ROTH, AMERICAN HOMICIDE 15, 300, 352 (2009).

18. For examples of Southern-style concealed-carry laws, see An Act Against Carrying Concealed Weapons, and Going Armed in Public Places in an Unnecessary Manner, 1813 La. Acts 172; 1856 Ark. Laws 381–82.

19. For a discussion of the relationship between changes in gun culture and gun regulation, see generally SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2006).

necessary for a well-regulated militia. All other weapons were treated as ordinary property subject to the police power of the states. The *Heller* Court rejected the militia-based interpretation, thereby elevating the more individualistic view of gun rights advanced by other Southern courts. This new robust understanding of the scope of the right to bear arms was rooted in a distinctive form of Southern gun-rights exceptionalism and was not representative of broader patterns of law in early America.[20]

Heller's heavy reliance on a single strain of antebellum Southern jurisprudence prompted new scholarly interest in discovering what was going on in other regions of the nation. As is often the case in historical writing, the existence of silences and gaps in the historical record spurs new innovative scholarship.[21] In the case of the history of gun regulation, this impetus to dig deeper into the record of firearms law resulted in the discovery of a previously hidden body of evidence. Excavating this buried history was facilitated by the development of more powerful digital tools that made it possible to unearth a large body of historical evidence largely invisible to the Supreme Court at the time *Heller* was decided.[22]

These sources included a host of statutory restrictions and a body of inherited common law constraints on armed travel. This new trove of material responded to *Heller*'s call for further historical research and was radically different from the first generation of Second Amendment scholarship. Instead of framing a research agenda based on the ideological categories of the modern gun debate—whether the Second Amendment is an individual or collective right—the new empirical turn in Second Amendment scholarship followed *Heller*'s injunction to explore the history of gun regulation in detail.[23] This second generation of scholarship starts with the assumption that the holders of the right were individuals, not states, and the focus has shifted to the scope of the protected right.[24] The new empirical paradigm that has emerged since *Heller* has vindicated the suggestion made by then Judge Brett Kavanaugh in a dissent filed while serving on the D.C. Circuit about the potential scope of firearms regulation permissible under a

20. *See Heller*, 554 U.S. at 586 n.9 (citing to the more libertarian line of Southern cases); *see generally* Ruben & Cornell, *supra* note 7.

21. For a classic mediation on historical method, see generally E. H. CARR, WHAT IS HISTORY? (1961). For a more recent study, see generally ALLAN MEGILL ET AL., HISTORICAL KNOWLEDGE, HISTORICAL ERROR: A CONTEMPORARY GUIDE TO PRACTICE (2007).

22. *See, e.g.*, Eric M. Ruben & Darrell A. H. Miller, *Preface: The Second Generation of Second Amendment Law & Policy*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 1, 5–9.

23. *See id.* at 1 ("That first generation [of Second Amendment scholarship] focused on a single question: Does the Second Amendment protect an individual right to keep and bear arms for self-defense, or a collective right connected to the maintenance of a well-regulated militia?"). For a good example of the limits of first-generation scholarship, see the premature synthesis offered by Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995), which proclaims the debate over before it had actually begun. In fact, Reynolds's account was neither critical nor a particularly comprehensive guide. On the continuing persistence of anachronism and presentism in Second Amendment scholarship and its failure to adhere to accepted standards of scholarly debate and legal historical inquiry, see generally Cornell, *supra* note 9.

24. *See* Ruben & Miller, *supra* note 22, at 4–6.

"history, text, and tradition" approach.[25] Kavanaugh argued that a jurisprudence drawing on *Heller*'s "text, history, and tradition" analytical framework might offer evidence for a more robust approach to firearms regulation, not less.[26] Nor should this intuition be all that surprising: a variety of gun regulations have coexisted with the Second Amendment right and various state constitutional analogs for more than two centuries. Rather than embody an anti-government libertarianism, the dominant view of the Founding generation was steeped in a social contractarian theory and venerated ideas of well-regulated liberty. According to this view, liberty was always balanced against the necessity of preserving the peace and promoting the public good.[27]

Gun regulation in the decades after the adoption of the Second Amendment did not wither away, but rather intensified.[28] The new empiricism in post-*Heller* Second Amendment scholarship has revealed the prismatic nature of early American firearms law.[29] Indeed, this fact serves as further vindication of the genius of the Founding generation's commitment to federalism. By allowing the individual states to continue to exercise their robust police powers, the new federal system was able to accommodate the growing nation's diverse approaches to firearms regulation.[30] During the vigorous public debate over ratification, the importance of federalism and state police power was recognized by both Federalists and Anti-Federalists. Indeed, this core belief was one of the few points that there was broad agreement on in an otherwise fierce and divisive debate. Although the arch-Federalist Tench Coxe and the ardent Anti-Federalist author Brutus opposed one another on virtually every major issue discussed during ratification, both authors believed that individual states would continue to regulate matters of internal police, including criminal laws.[31] Thus, Brutus declared that "it ought to be left to the state governments to provide for the protection and defence [sic] of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other . . . ."[32] Federalist Tench Coxe did not dispute this point, but underscored it when he wrote: "The

25. *See* Heller v. District of Columbia, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

26. *See id.* ("Indeed, governments appear to have more flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny.").

27. *See generally* Campbell, *supra* note 8.

28. *See generally* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004).

29. *See generally, e.g.*, Ruben & Miller, *supra* note 22.

30. On the centrality of federalism to the Founding era's conception of rights, see generally GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S (2019).

31. *Compare* Brutus, *Essays of Brutus*, *in* 2 THE COMPLETE ANTIFEDERALIST 358, 400–05 (Herbert J. Storing ed., 1981), *with* Tench Coxe, *A Freeman*, PA. GAZETTE, Jan. 23, 1788, *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS, 1787–1788, at 88 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

32. Brutus, *supra* note 31, at 401.

states will regulate and administer the criminal law, exclusively of Congress."[33] Under their views, the individual states' police power would not be diminished under the new Constitution: rather, states would continue to legislate on all matters "such as unlicensed public houses, nuisances, and many other things of the like nature."[34] The efforts of modern gun-rights libertarians to impose a vision of liberty rooted in Southern slavery's legal system is thus antithetical to one of the central compromises that made the Constitution possible: the recognition that the new federal government would not usurp the individual state's police powers.[35] Indeed, the antebellum judges Scalia lauded in *Heller* were balancing the scope of state police power against the liberty interest of gun owners in light of changes in both firearms technology and the growing level of violence in American culture. Whatever one thinks about the jurisprudential foundation for Scalia's belief that there was an expiration date on legislative authority to engage in balancing exercises in this area, *Heller* clearly sanctions forms of interest balancing as long as those decisions are historically grounded in early American law or practice.

One of the most important contributions to the new empirical model of the Second Amendment is the examination of the previously neglected role of the common law.[36] No principle was more central to this legal framework than the concept of the peace. Balancing the right to enjoy the peace against the liberty interest of gun owners is not a modern invention, it is itself part of the original conception of the right to bear arms and was widely embraced by judges, lawyers, legislators, and many Americans in the Founding era.[37]

The primary enforcers and conservators of the peace in both England and early America were local justices of the peace. These individuals, typically prominent and respected men in the local community, had broad and far-reaching powers that included the ability to preemptively disarm anyone who posed a potential threat to the peace.[38] The concept of the peace has been all but lost in modern American legal thought. Liberty in modern law has been framed in largely negative terms, as a check on government power. In modern rights theory, obligations are typically owed to rights holders, but in the Founding era, rights holders themselves had legal obligations connected to the exercise of rights.[39] English

33. Coxe, *supra* note 31, at 95–96.

34. *Id.*

35. *See* LEONARD & CORNELL, *supra* note 30, at 36.

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

37. *See* Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 11, 14.

38. *See* Dietrich Oberwittler, *Crime and Authority in Eighteenth Century England: Law Enforcement on the Local Level*, 15 HIST. SOC. RES./*HISTORISCHE SOZIALFORSCHUNG* 3, 9 (1990) ("In order to learn something about everyday crime and law enforcement, it is the work of the justices of the peace (or magistrates, as they were synonymously called) to which one must turn.").

39. For a trenchant critique of the libertarian vision of rights at the Founding, see Campbell, *supra* note 8. There is a huge philosophical literature on modern legal rights. For a good summary of the sprawling debates over rights, see Kenneth Campbell, *Legal Rights*, STAN. ENCYCLOPEDIA OF PHIL.

subjects and American citizens had a legal responsibility to assist in preserving and maintaining the peace. The examples of armed travel cited by modern libertarians invariably turn out to be part of a set of well-recognized exceptions to the general ban on armed travel designed to preserve the peace.[40] Ironically, interpreting the Second Amendment without reference to the peace enacts a perverse form of living constitutionalism, one clothed in an originalist veneer, but one deeply at odds with the text, history, and tradition of the right to keep and bear arms. Protecting this right and paying no heed to its implications for the peace would have been incomprehensible to Founding-era Americans, and therefore it makes no sense today. Thus, fidelity to the original Second Amendment means protecting the peace as much as it means protecting a right to bear arms.[41]

This Article proceeds as follows. Part II explains the common law concept of the peace and shows that armed travel was not a fundamental right in England before the Founding. Part III traces the evolution of common law notions of the peace during the Founding and early Republic, showing how regional diversity in firearms legislation eventually gave way to a consensus based on the Massachusetts good cause model by the end of the nineteenth century. Part IV concludes by affirming the need to recognize the diversity of early American legal culture and the importance of understanding the dynamic nature of historical change in this formative period of American constitutional development. To be faithful to *Heller*'s turn to history, future Second Amendment jurisprudence will need to approach that history with greater sophistication.

II
THE KING'S PEACE, THE STATUTE OF NORTHAMPTON, AND ENGLISH LIMITS ON THE RIGHT TO CARRY ARMS

Prior to *Heller*, there was relatively little interest among English scholars on how gun rights featured in the broader history of the common law. This neglect allowed a number of misconceptions to gain currency among a group of libertarian activists and their allies in academia. Indeed, as the distinguished English historian Tim Harris noted: "The 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

ARCHIVE (Nov. 4, 2017), https://plato.stanford.edu/archives/win2017/entries/legal-rights/ [https://perma.cc/L88D-5KJK].

40. *See infra* notes 50–53 and accompanying text.

41. For good introductions to the originalism debate, see generally, for example, Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 722–24 (2011); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 373 (2013). On originalism and the necessity of historical translation, see generally Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015).

arms."[42] Malcolm posited that arms possession and carrying was a fundamental right that Americans inherited from England—this claim was foundational for a theory that came to be known as the "Standard Model" thesis. It would be difficult to overstate the influence of her thesis on the emergence of a modern libertarian interpretation of the Second Amendment.[43] Despite the fact that most English historians reject Malcolm's revisionist account of the English past,[44] Malcolm has studiously avoided engaging with the many substantive critiques of her work and has instead simply repeated her earlier discredited claims or cited the work of other gun-rights advocates as scholarly authority. In short, outside of a narrow group of libertarian scholars and gun-rights activists, support for Malcolm's thesis has collapsed.[45]

Under English law, the monarchy and the English state enjoyed a monopoly on violence so that any subject arming themselves—outside of a clear list of exceptions—was an encroachment on royal power and hence a violation of English law. Sir William Blackstone's *Commentaries* captured this feature of English law: "[A]ll offenses are either against the King's Peace or his crown and dignity."[46] Therefore, it followed that any "affront to that power, and breaches of those rights, are immediate offenses against [the King.]"[47]

A key piece of legislation to enforce the King's Peace was the Statute of Northampton, which prohibited appearing armed before representatives of the King's authority and expressly banned traveling armed at "Fairs, Markets, or elsewhere . . . ."[48] Thus, the basic legal framework of English law created by the

42. Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, *in* A RIGHT TO BEAR ARMS?, *supra* note 5, at 23. For works challenging Malcolm's claims about gun ownership and usage in England, see generally, for example, LOIS SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND 169–70 (2016); Priya Satia, *Who Had Guns in Eighteenth Century Britain?*, *in* A RIGHT TO BEAR ARMS?, *supra* note 5, at 37.

43. *See, e.g.*, 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 (2012) at 1795 (describing how "Standard Model writers fell into line as they imported Malcolm's research and conclusions into their own writings"). For Malcolm's influence on the Standard Model, see MALCOLM, *supra* note 6; Reynolds, *supra* note 23.

44. *See generally* Harris, *supra* note 42.

45. For example, in her contribution to this symposium, Malcolm cites the National Rifle Association's lawyer Stephen Halbrook as a reliable scholarly authority, despite the fact that his work has been repeatedly discredited. *Compare* Joyce Lee Malcolm, *The Right to Carry Your Gun Outside: A Snapshot History*, 83 LAW & CONTEMP. PROBS. no. 3, 2020, at 195, *with* Harris, *supra* note 42, at 24–27 (detailing how Halbrook's interpretation of the Statute of Northampton and early modern English law rests on a perfect storm of historical errors). Further, Malcolm's view is not consistent with core principles of English criminal law and English constitutional theory. *See* Guyora Binder & Robert Weisberg, *What Is Criminal Law About?*, 114 MICH. L. REV. 1173, 1183 (2016).

46. 1 WILLIAM BLACKSTONE, COMMENTARIES *258, 338.

47. *Id.* 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).

48. Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.). Over the ensuing decades, Parliament reenacted the statute's prohibition on carrying weapons in public at least twice. *See, e.g.*, 20 Rich. 2, c. 1 (1396) (Eng.); 7 Rich. 2, c. 13 (1383) (Eng.). On the importance of the Statute of Northampton to maintaining the peace, see generally 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).

Statute of Northampton clearly excluded firearms from both sensitive places such as courts, and crowded public spaces such as fairs and markets. It is also important to note that the law recognized the common law crime of affray as a separate violation of the King's Peace. The crime of affray was defined in relation to the peace. Riding armed terrorized the King's subjects and therefore violated the peace. The terror at the core of the crime of affray did not require any intentional act, or menacing behavior, to run afoul of the law; the mere act of arming itself was sufficient to trigger criminal prosecution because such actions were themselves a rebuke to the King's majesty and a usurpation of the sovereign's monopoly on violence.[49]

There were a small number of well-recognized exemptions to the general ban on armed travel embodied in the Statute of Northampton, which were acknowledged by virtually every popular legal writer and learned legal treatise published in England.[50] These exceptions aimed to facilitate community-based forms of law enforcement that preserved the King's Peace. Accordingly, one might arm oneself to put down riots, rebellions, or join the "hue and cry."[51] The text of the statute makes clear that the prohibition was general. Traveling armed was limited to cases where such action was necessary to preserve the King's Peace.[52] Strange as this concept might be to modern Americans, it makes perfect historical sense if one understands the way community-based law enforcement functioned in early modern England.[53] The common law developed to meet the needs of a preindustrial agrarian society. At common law, if one had a reasonable fear of attack, the law required one to seek out a justice of the peace and bind the threatening individual with a peace bond.[54] Every gloss on the Statute of Northampton published in English legal commentaries between the Glorious Revolution (1688) and American Independence (1776) underscored that this was the primary mechanism for enforcing the peace.[55] William Hawkins's *Pleas to the*

49. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49; J.P. GENT, A NEW GUIDE FOR CONSTABLES, HEAD-BOROUGHS, TYTHINGMEN, CHURCHWARDENS 13–14 (London, Richard & Edward Atkins 1709); CHARLES JAMES, A NEW AND ENLARGED MILITARY DICTIONARY (London, T. Egerton 1802).

50. For a good example, see WILLIAM HAWKINS, A SUMMARY OF THE CROWN-LAW BY WAY OF ABRIDGMENT OF SERJEANT HAWKINS'S PLEAS OF THE CROWN 155–63 (London, E. & R. Nutt 1728). For a systematic survey of this literature, see generally Cornell, *supra* note 37.

51. *See, e.g.*, SIR JOHN COMYNS, 4 A DIGEST OF THE LAW OF ENGLAND 467 (London, A. Strahan 1822). Traditionally, the arms used to meet this public responsibility were determined by social position so that during much of this period ownership of firearms was limited to members of the gentry. *See generally* SCHWOERER, *supra* note 42, at 162–63; Satia, *supra* note 42, at 48 n.3. The principle was established by the Statute of Winchester. *See* Henry Summerson, *The Enforcement of the Statute of Winchester, 1285–1327*, 13 J. LEGAL HIST. 232 (1992).

52. Cornell, *supra* note 37.

53. For a discussion of the evolution of Anglo-American law and ideas of self-defense, see Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 85 (showing how Anglo-American law's evolving understanding of self-defense was tied to changes in conceptions of government and sovereignty). On community-based policing, see generally STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, 1550–1640 (2002).

54. *See* HINDLE, *supra* note 53, at 97–113.

55. *See* Cornell, *supra* note 37, at 24.

Crown offers one of the clearest explanations of how this idea functioned under English law. "A Man cannot excuse the wearing [of] such Armour in Publick," he wrote, "by alledging [sic] that such a one threatened him, and that he wears it for the Safety of his Person from his Assault."[56] The appropriate response was to have the person posing a threat disarmed and placed under a peace bond. This imposition of a financial burden on offenders was intended to deter future infractions,[57] and was available to any person in the community who felt threatened by the individual.[58] The common law also entrusted broad powers to enforce the peace to justices of the peace and constables. Any justice of the peace or constable had the power to detain, disarm, or imprison individuals traveling armed and then have the offender bound over to the peace.[59] Thus, peace bonds were used by members of the community and officers of the crown to enforce the peace. Taken together, these broad powers of enforcing the peace were the foundation for community-based law enforcement in an era before the rise of modern police forces. Violation of the terms of the bond not only resulted in forfeiture of the bond, but could trigger the imposition of a more onerous bond and could also result in further criminal sanctions, including imprisonment.[60]

Under English law, individuals did not have a right to respond with deadly force when attacked, but rather were obligated to retreat to the wall before resisting violence with deadly force.[61] English common law also differentiated between attacks in populous areas where individuals could seek help, and other areas where an individual was beyond the King's Peace and could therefore legally resort to deadly force.[62] Accordingly, the claim that there was a fundamental right to carry arms in public in early modern England makes no legal sense given the assumptions at the core of English constitutional theory and criminal law.

Another error in libertarian interpretations of English law stems from reading modern *mens rea* requirements into a period of English criminal law where the requisite criminal intent defining the illegal behavior was inferred from the prohibited act, not discerned by an inquiry into the subjective state of the mind

56. HAWKINS, *supra* note 50, at 135–36.

57. Joel B. Samaha, *The Recognizance in Elizabethan Law Enforcement*, 25 AM. J. LEGAL HIST. 189, 198–201 (1981).

58. *Id.*

59. HINDLE, *supra* note 53, at 99–100 (describing the way sureties of the peace and good behavior were used to both punish and preempt anti-social behavior). Hindle notes that traveling armed was one of the categories of anti-social behavior that this system was designed to prevent. *See id.*

60. *See* MICHAEL DALTON, THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 264 (London, William Rawlins & Samuel Roycroft 1690) ("[I]f he hath broken (or forfeited) his Recognizance by breach of the Peace, the Justice of Peace may and ought to bind him anew, and by better Sureties, for the safety of the person in danger . . . .").

61. On the duty to retreat, see 4 WILLIAM BLACKSTONE, COMMENTARIES *184–85; EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 55–56 (London, A. Crooke 1669).

62. *See* GILES JACOB, THE LAWS OF APPEALS AND MURDER 47 (1719) (differentiating between "Highway" and "Town" for the purposes of self-defense).

of the person charged with a violation of the law.[63] Although Malcolm and other libertarian gun-rights advocates cite Michael Dalton's influential legal guide—*The Country Justice*—which was particularly popular in the American colonies, they ignore the clear textual evidence he presents that contradicts their claims about a freestanding right to travel armed.[64] Dalton summarized the limits on armed travel under English law in unambiguous terms: those who "go or ride armed offensively, or with an unusual Manner of Servants or Attendants" were per se "accounted to be an affray, and fear of the People and a means of the breach of the peace . . . ."[65] As Dalton's text made clear, 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. The legal logic of this conclusion was clearly explained by Joseph Keble, author of another popular legal guide at that time:

> Yet may an Affray be, without word or blow given; as if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike a fear upon others that be not armed as he is; and therefore both the Statutes of Northampton made against wearing Armour, do speak of it.[66]

Dalton and Keble recognized that arming outside of a narrow list of legally sanctioned exceptions established an asymmetry of power, which produced the terror to the people that disturbed the peace.

Another fact about English law that seems odd to many modern lawyers and judges is rooted in the relationship between class and arms in England. Among the privileges enjoyed by members of the English gentry was the ability to travel armed without violating the Statute of Northampton.[67] Members of the elite did not violate the King's Peace when they traveled armed because their actions did not produce a "terror to the people."[68] The fact that English elites could travel armed without fear of provoking a terror did not mean that others without wealth or high social status could claim the same exemption based on their individual

63. Compare the historical account in GUYORA BINDER, CRIMINAL LAW 140–41 (2016), with the erroneous claims made by Halbrook described in Harris, *supra* note 42.

64. Joyce Lee Malcolm's treatment of Dalton ignores the limits on armed travel in his influential guide for justices of the peace. *See* Malcolm, *supra* note 45, at 197.

65. DALTON, *supra* note 60, at 263–64.

66. JOSEPH KEBLE, AN ASSISTANCE TO JUSTICES OF THE PEACE, FOR THE EASIER PERFORMANCE OF THEIR DUTY 147 (London, W. Rawlins 1683).

67. *See* RICHARD BURN, 1 THE JUSTICE OF THE PEACE, AND PARISH OFFICER 13 (London, Henry Lintot, 2d ed. 1756) ("And it is holden upon these words, that no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute, by wearing common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.").

68. The notion that there was a general freestanding right to armed travel for ordinary Britons, as Malcolm alleged, is a modern invention that is not rooted in historical reality. *See generally* Harris, *supra* note 42, at 23; Satia, *supra* note 42.

circumstances. The exemption was a categorical privilege of class and rank, not a contextual judgment made by officers of the crown on a case-by-case basis.[69]

Understanding the way class shaped English law regarding firearms is essential to interpreting the most important legal case on the meaning of the Statute of Northampton, *Sir John Knight's Case.*[70] For libertarians, *Sir John Knight's Case* demonstrates that peaceable carry was well-established by the Glorious Revolution era.[71] English historian Tim Harris offers a more accurate account of the case, one that contradicts the anachronistic interpretation proffered by libertarian scholars:

> [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.[72]

As Harris notes, the Lord Chief Justice's comments about desuetude described the legal situation of members of the *gentry elite* and was not a general claim about English law. The Chief Justice also noted 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. The Chief Justice could hardly have made this claim if he thought Knight's behavior was perfectly legal. It is true that Knight's jury refused to convict him, but this act of jury nullification was not a reflection of widely recognized English legal principles.[73] Instead, it reflected the bitter political and religious conflicts England experienced in the years immediately before the Glorious Revolution.[74] Knight had stoked anti-Catholic feeling in the city of Bristol, and the local jury, sharing his prejudices and political sympathies, refused to convict him.[75] Conspiracy theories involving Catholic plots were rife in this period of English history.[76] Yet, despite being acquitted by a sympathetic jury

69. Prominent libertarian legal scholar Eugene Volokh erroneously argues that this class-based privilege became a constitutional right in America. *See* FIREARMS LAW, *supra* note 4, at 101; Volokh, *supra* note 6, at 100–01. This false claim was invented by modern gun-rights advocates and is not supported by the history, but it continues to be recycled by libertarians and their allies in law reviews. *See* Charles, *supra* note 9, at 393.

70. (1686) 87 Eng. Rep. 75 (KB) (Eng.).

71. *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 223 (2018) ("[T]he Statute of Northampton was widely ignored, and it was interpreted to apply only to carrying in *male animo*—not to carrying for lawful defense."); Malcolm, *supra* note 45, at 199–200. This tendentious and flawed reading of *Sir John Knight's Case* has crept into several recent federal court opinions. *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 457–58 (7th Cir. 2019) (Barrett, J., dissenting); Young v. Hawaii, 896 F.3d 1044, 1064 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019); Wrenn v. District of Columbia, 864 F.3d 650, 660 (D.C. Cir. 2017); Peruta v. Cty. of San Diego, 824 F.3d 919, 931 (9th Cir. 2016) (en banc); Moore v. Madigan, 708 F.3d 933, 936–37 (7th Cir. 2012).

72. Harris, *supra* note 42, at 25 (emphasis added).

73. *See id.* at 27.

74. *See generally id*.

75. *See id*. at 27.

76. *See id*. at 30–32.

who shared Knight's political and religious leanings, the Chief Justice bound Knight over with a peace bond, the only punishment available under law given the jury's decision.[77]

Furthermore, the Chief Justice averred that Knight's actions were a per se violation of the King's Peace because they implied that "the King [was] not able or willing to protect his subjects."[78] *Sir John Knight's Case* does not support the notion that a robust right to carry arms existed under English law; rather, it contradicts this claim.

The 1780 London Gordon riots offer another example of how the libertarian view misinterprets the evidence, reading it in light of libertarian ideals at odds with the history. To support her theory about the English right to travel armed, for example, Malcolm quotes this observation by the Recorder of London, the city's chief lawyer:

> It seems, indeed, to be considered, by the ancient laws of the kingdom, not only a right, but a duty; for all the subjects of the realm, who are able to bear arms, are bound to be ready at all times, to assist the sheriff, and other civil magistrates, in the execution of the law and the preservation of the public peace.[79]

However, when properly contextualized, this evidence does not demonstrate a broad right to have arms in public: it demonstrates the opposite. What Malcolm fails to mention is that this observation regarded the standard exception to the rule on armed travel that required subjects to assist crown agents in putting down riots and maintaining the peace. This obligation did not confer a freestanding right to carry arms. Subjects were expected to turn out with whatever weapons they were legally entitled to possess to further this goal. The Gordon Riots example is the exception to the rule, not the rule.

Finally, the libertarian view reads developments from later English law in the nineteenth century into earlier periods of English history. For example, the key text for Malcolm is the nineteenth-century English case, *Rex v. George Dewhurst and Others*.[80] Although the case affirmed that "[a] man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business,"[81] this view reflected a dramatically changed understanding of English law and gun culture in the period after the French Revolution.[82] In response to the rising levels of social unrest and the growing threat posed by Napoleonic France, England abandoned its older gun culture and embraced a new pro-gun legal ideology.[83] Rather than aiming to

77. *See id*. at 27.

78. (1686) 87 Eng. Rep. 75 (KB) (Eng.).

79. Malcolm mistakenly interprets this quote from WILLIAM BLIZARD, DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS 59–60 (London, Baker & Galabin 1785) as asserting a broad individual right to have arms for personal protection. Malcolm, *supra* note 45, at 205.

80. *See id.* at 205–06.

81. Rex v. Dewhurst, 1 State Trials, N.S. 529, 601–02 (1820) (Eng.).

82. *See* Satia, *supra* note 42, at 44.

83. *Id.*

limit access to firearms to avoid arming the mob, English policy embraced the necessity of a well-armed citizenry as a means of staving off popular radicalism and the threat of foreign invasion.[84] Prime Minister William Pitt the Younger stated unequivocally in 1803 that English firearms law had adapted to the realities of a more dangerous world by adopting a new attitude toward gun ownership. "[T]here was a time," he wrote, "when it would have been dangerous to entrust arms with a great portion of the people of this country."[85] Yet, confronted by new threats at home and abroad, Pitt concluded "that time is now past."[86] In the century and a half after the Glorious Revolution, English gun culture and law was radically and irrevocably transformed. Ignoring these changes and reading backwards later developments into an earlier period is a profound historical error.[87]

III

THE AMERICAN ABSORPTION OF THE COMMON LAW

There were strong continuities between earlier English law and colonial American law on the issue of public carry. James Davis, author of an influential American justice of the peace manual published shortly before the American Revolution, reiterated the continuing importance of the Statute of Northampton in the colonies. His account of the limits on armed travel echoed earlier English writers:

> 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.[88]

As had been true under English law, armed travel in populous areas was prohibited.[89]

The most important consequence of the American Revolution was the transformation of the King's Peace into a new republicanized legal idea: the

84. *Id.*

85. 3 THE PARLIAMENTARY REGISTER; OR HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF LORDS AND COMMONS 774–75 (London, Oriental Press 1804).

86. *Id.*

87. On chronological fallacies in historical interpretation, see DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 160–63 (1970).

88. JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 13 (Newbern, James Davis 1774).

89. Neither the text of the Statute of Northampton nor subsequent legal commentary support the idea that guns were only prohibited in sensitive places. *Cf.* Kopel & Greenlee, *supra* note 71, at 292 (mistakenly asserting that the Statute of Northampton's prohibitions on armed travel in public analogized to *Heller*'s limits on arms in sensitive places). Fairs and markets were the quintessential public spaces in early modern England, almost the exact opposite of "sensitive places." Markets were not only centers of commerce, but they were often the place in which royal proclamations were typically posted. *See* Chris R. Kyle*, Monarch and Marketplace: Proclamations as News in Early Modern England*, 78 HUNTINGTON LIBR. Q. 771 (2015). The proper analogy to sensitive places would be the Statute of Northampton's prohibition on coming armed before the King's servants and courts.

people's peace.[90] As one early justice of the peace manual published after the adoption of the Second Amendment noted: "The term, peace, denotes that condition of the body politic, in which no person suffers, or has just cause to fear any injury . . . ."[91] Understanding the absorption and development of the common law, including the concept of the peace, is absolutely central to reconstructing the legal framework for the regulation of firearms in the early American Republic.[92] Furthermore, it is vital to recognize that this process of absorption and Americanization was exceedingly complex. The common law did not evolve in a uniform fashion across different jurisdictions. Each state adopted its own variant of the common law, but despite the powerful forces of localism, clear regional patterns also emerged in early American law. One of the most important historical forces shaping this process of transformation was the institution of slavery.[93]

The *Heller* Court focused primarily on a string of antebellum Southern cases in evaluating the scope of the Second Amendment's protections,[94] and did not account for the regional differences in Founding-era firearms legislation.[95] Setting aside the moral issues of developing modern firearms jurisprudence on models created by slave-owning judges, there is an additional problem with *Heller*'s exclusive focus on Southern case law: Southern gun rights exceptionalism. *Heller* erroneously concluded that this exceptional model of permissive gun carrying was the norm and not the exception in American law during the Founding era and early American Republic.[96]

Rather than supporting the libertarian understanding of expansive public carry reflected in *Heller*, a model that was rooted in the anomalous conditions of the Slave South, the dominant model in early America law emerged outside of the South in Massachusetts. It adapted the traditional common law framework in light of the American experience and Enlightenment-inspired legal reforms.[97] Shortly after the adoption of the Second Amendment, Massachusetts enacted its own version of the Statute of Northampton. Although the Massachusetts version

90. *See generally* LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (2009).

91. JOSEPH BACKUS, THE JUSTICE OF THE PEACE 23 (Hartford, B. & J. Russell 1816).

92. On the transplantation of English models of peacekeeping to colonial America, see generally Alfred L. Brophy, *For the Preservation of the King's Peace and Justice: Community and English Law in Sussex County, Pennsylvania, 1682–1696*, 40 AM. J. LEGAL HIST. 167 (1996).

93. *See* ELLEN H. PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC 9 (2011).

94. *See* District of Columbia v. Heller, 554 U.S. 570, 585 n.9 (2008).

95. While the Court acknowledged that the history of regulation was vital to illuminating the scope of the right, it did not undertake the necessary and laborious historical research to excavate that history. *See id.* at 626 ("[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment . . . .").

96. *See id.*

97. On the tensions between traditional common law and Enlightenment efforts to rationalize and systematize the law, see generally SUSANNA L. BLUMENTHAL, LAW AND THE MODERN MIND: CONSCIOUSNESS AND RESPONSIBILITY IN AMERICAN LEGAL CULTURE (2016).

borrowed some phrases from common law, the Massachusetts legislature opted to rewrite the law in terms more accessible to ordinary readers in the new American republic. The new act as a whole emulated the glosses on this ancient English law that had become common in popular legal guides. The language was clear and forceful: it outlawed anyone who "shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth."[98] The act specifically distinguished riding armed offensively from the separate crimes of affray, riot, or disturbing the peace. Armed travel was thus a per se violation of the statute.

One of the most difficult problems modern courts face in applying *Heller*'s historical framework is the unfamiliar nature of common law terminology and legal concepts. Discomfort with this sometimes archaic language has even prompted some courts to derisively suggest that texts written in the language of Chaucer's age can hardly matter to American law after independence.[99] Although this language does sound unfamiliar to modern courts and legal scholars, it was not strange to early American judges, justices of the peace, and legislators. Courts honoring *Heller* must look to those historical sources to understand how legal texts, including the Second Amendment and its state level analogs, would have been interpreted.

The Massachusetts version's use of the phrases "armed offensively" and "fear or terror of the good citizens"—borrowed from the Statute of Northampton—tracked closely the traditional common law usage of these terms.[100] In modern America, guns are often described as defensive weapons, but this was not true under English common law. Guns were always offensive weapons; defensive weapons were a separate category that included shields and armor.[101] Similarly, modern law rests on notions of *mens rea* that were alien to the common law. There was no requirement to discern the specific psychological state or the subjective intent of an individual carrying a gun: the common law model inferred the requisite intent from the illegal action itself.[102] Thus, reading the Massachusetts prohibition on armed travel as allowing peaceful defensive carry and only forbidding aggressive armed carry—the preferred reading of libertarians—is not only contrary to the text, it effectively effaces the entire

98. 1795 Mass. Acts 436.

99. For a good example of this problematic reading of the history in recent federal cases, see *supra* note 71.

100. Statutory construction in this era was steeped in common law modes of legal analysis. For a useful summary, see ZEPHANIAH SWIFT, 1 A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 11 (1822).

101. Under English law, firearms were always treated as offensive weapons, but the law also acknowledged that even ordinary objects could in some circumstances be used as offensive weapons. *See* HAWKINS, *supra* note 50, at 227.

102. Under common law, the requisite criminal intent "was presumed from the performance of the unlawful act." BINDER, *supra* note 63, at 141. For additional analysis of this history, particularly as it relates to Blackstone, see generally Simon Stern, *Blackstone's Criminal Law: Common-Law Harmonization and Legislative Reform*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 61 (Markus D. Dubber ed., 2014).

concept of the peace and the role that justices of the peace and constables played in preserving the peace. In reality, the libertarian claim that surety of the peace laws effectively allowed individuals to carry arms, unless a specific individual came forward to demand a peace bond, turns Founding-era history on its head. The purpose of these laws was to achieve the opposite goal: limit armed travel in public to a narrow range of exceptions.[103]

Most states recognized that the common law, as adapted by American courts prior to the Revolution, was part of American law.[104] One of the most dramatic statements of this principle occurred in the Massachusetts case *Commonwealth v. Leach*.[105] Rather than dismiss English history as irrelevant, the court expressly affirmed that the statutes creating the office of the justice of the peace dating from the reign of Edward III, and bestowing extensive powers on that office, had been absorbed into the common law of the Commonwealth.[106] This view was echoed in the influential legal guidebook *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."[107] Making sense of the role of the peace therefore requires understanding the broad powers justices of the peace and constables had to enforce the peace, including powers to preemptively disarm individuals and impose a variety of peace bonds.[108] Rather than dismiss the Statute of Northampton and its legal progeny as shrouded in the cobwebs of history, or as antiquated legal principles appropriate to "Chaucer's fourteenth century England"[109] but not early America, it is important to understand that American legislators and judges were steeped in legal culture that was shaped by common law concepts and modes of reasoning.

Acknowledging the importance of America's common law inheritance does not mean that law remained frozen in time. The decades after the American Revolution up until the period of Jacksonian democracy were marked by profound legal change. In particular, this was a period when legal commentators and legislatures contemplated ways of codifying and updating many aspects of

103. For examples of libertarian scholarship erroneously asserting a right of peaceful armed travel, see *supra* note 4 and accompanying text. For courts that have accepted this erroneous account, see *supra* note 71 and accompanying text.

104. On the absorption of the common law into colonial America, see generally WILLIAM NELSON, 1–4 THE COMMON LAW IN COLONIAL AMERICA (2008–2018); KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM (2011).

105. 1 Mass. 59 (1804).

106. *See id.* at 60–61.

107. JOHN C. B. DAVIS, THE MASSACHUSETTS JUSTICE 1 (Worcester, W. Lazell 1847).

108. *Id.*

109. Young v. Hawaii, 896 F.3d 1044, 1064 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

American law, including the individual states' criminal codes.[110] Although comprehensive efforts to systematize American law fell far short of a complete overhaul, efforts to streamline and update various areas of the law, including criminal law, were successful in many states, including in Massachusetts.[111]

Massachusetts's revised law prohibiting public carry that was implemented during this period introduced a key change that departed from the common law: it recognized a good cause exception to the traditional common law ban on armed travel. Under common law, there was no right to arm oneself preemptively, even in situations where one faced an imminent threat.[112] The common law required one to seek out a justice of the peace and bind over the threatening individual to a surety. Moreover, it assumed that the community-based law enforcement model that empowered local justices of the peace would be able to preempt threats by simply disarming a potentially dangerous person.[113] The new Massachusetts Model recognized that this might not be sufficient to protect individuals in all circumstances and added another option: if one had a reasonable fear of imminent harm, one might now arm oneself.[114] The development of this reasonable threat exception for armed self-defense reflected the impact of Enlightenment ideals on legal reform. This change also reflected the norms and ideals of the more individualistic, democratic, and market-oriented world of Jacksonian America.[115] By including a good cause exception, Massachusetts broke with traditional common law and in so doing expanded both the concept of gun rights and the scope of legal self-defense. It also pointed the way toward the development of "stand your ground" laws.

The new, more expansive, conception of gun rights and self-defense that emerged in Massachusetts still fell well short of the more aggressive "stand your ground" conception that would emerge later in the nineteenth century.[116] Nor was the new model a complete repudiation of the common law's efforts to limit the ability of individuals to use deadly force. Absent a reasonable fear, one still had a duty to retreat or seek help if it was available.[117] The new law also did not

110. For a recent assessment of the appeal and ultimate failure of American codification, see Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 498–527 (2000).

111. For Massachusetts-style laws, see 1852 Del. Laws 733; MICH. REV. STAT. ch. 162, § 16, *reprinted in* THE REVISED STATUTES OF THE STATE OF MICHIGAN 690, 692 (1846); 1847 Va. Acts 127, 129.

112. *See* 1836 Mass. Acts 529–30, 750. The revised Massachusetts criminal code gave individuals a right to approach a justice of a peace for sureties and carried forward the authority of peace officers to bind over individuals who traveled armed in violation of the statute.

113. *See supra* notes 54–60 and accompanying text.

114. *See* Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1719–20 (2012).

115. On gun culture in Jacksonian America, see CORNELL, *supra* note 19, at 137–67. On the general impact of the Market Revolution on American law, see KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 67–129 (1989).

116. On the origins of the stand your ground principle in American law, see generally RICHARD. M. BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1994).

117. *See* 1836 Mass. Acts 529–30, 750.

diminish the considerable powers of justices of the peace, who continued to be the primary enforcers of the peace, and who retained the power to bind individuals with sureties if they posed a potential threat to public safety.[118] Further, some aspects of earlier community-based policing remained available to members of the community: anyone who felt threatened by an individual could seek out a justice of the peace to impose sureties.[119] In this sense, the new Massachusetts Model reformed and modernized, but did not entirely efface every feature of, the older common law tradition. Given these facts, it is difficult to credit the anachronistic interpretation proffered by modern libertarians who have argued such American surety laws functioned as a de facto license to carry, allowing anyone to travel armed as long as they did so peacefully.[120] Although a variant of this interpretation emerged in some antebellum Southern jurisdictions—places where a more libertarian model of public carry gained judicial notice—it was not how the Massachusetts Model was understood by leading legal commentators at the time.[121]

The best exposition of the legal import of the revised Massachusetts law occurred in a grand jury charge delivered by the distinguished Massachusetts jurist Peter Oxenbridge Thacher: "In our own Commonwealth [of Massachusetts], 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."[122] Rather than countenance such practices, Thacher reminded members of the grand jury that the law, not individuals arming themselves, was the appropriate means to preserve ordered liberty in a republic.[123] His summary of the scope of the Massachusetts regulatory scheme was deemed sufficiently important to merit publication, a fact that highlights its significance. Indeed, a short section laying out the limits on armed travel was excerpted from the larger grand jury charge and reprinted in the press as a separate article.[124]

Thacher was a revered figure in the Massachusetts bar and a leading authority on interpreting the state's criminal law.[125] The publication of a book containing a

118. *See id.*

119. On early history of peace bonds and good behavior bonds and the persistence of this tradition in early America, see generally EDWARDS, *supra* note 90.

120. *See, e.g.*, FIREARMS LAW, *supra* note 4.

121. Libertarian scholars and the *Young* majority read antebellum law through the lens of *State v. Huntly*, a case that reflected the views of pro-slavery Southern judges, and was not the legal norm outside of some parts of the Slave South. *Compare* Young v. Hawaii, 896 F.3d 1044, 1066 (9th Cir. 2019) (citing State v. Huntly, 25 N.C. 418 (1843)), *with* Ruben & Cornell, *supra* note 7.

122. PETER OXENBRIDGE THACHER, TO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF THE TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON ON MONDAY, DECEMBER 5TH, A.D. 1836, AND ON MONDAY, MARCH 13TH, A.D. 1837, at 27 (Boston, Dutton & Wentworth 1837).

123. *See id.* at 27–31.

124. *Judge Thacher's Charges*, CHRISTIAN REG. & BOS. OBSERVER, June 10, 1837, at 91.

125. Libertarian scholars have recognized the serious problem Thacher poses and have attempted to diminish his importance by minimizing and tarnishing Thacher's reputation. Thus, the libertarian authors

selection of his grand jury charges and trials was lauded by members of the legal community as a noteworthy occasion in American criminal jurisprudence.[126] *The American Review*, an influential Whig magazine, singled out this volume with effusive praise, commenting that the judge's "high character as a magistrate 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."[127] Thacher's interpretation of his own state's law on firearms was unambiguous: there was no right of peaceful armed travel absent a reasonable threat.[128]

Nor was Thacher's grand jury charge the only example of a contemporary commentary that discussed the limits on armed travel in Massachusetts. "Have not our legislature forbidden, and ought not every legislature," another newspaper essayist wrote, traveling "armed with pistols, swords, daggers, bowie-knives or other offensive and dangerous weapons."[129] Legislation in this area was a proper and natural exercise of the state's robust police power. Indeed, any argument to the contrary was both "unfounded and alarming."[130]

The Massachusetts Model of good cause requirements for armed travel was not an outlier among American jurisdictions, but it was widely emulated and became the dominant approach to public carry prior to the Civil War.[131] During the Reconstruction era, Massachusetts's influence expanded further and even gained traction in the South, effectively supplanting the more libertarian model that slave-owning judges had championed in the decades before the Civil War. The centrality of the Massachusetts Model during Reconstruction was evident in a decision rendered by the Republican-controlled Texas Supreme Court in *English v. State*.[132] The Court confidently affirmed that Massachusetts-style laws were "not peculiar to our own State."[133] Indeed, it concluded that "it [was] safe

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of *Firearms Law* falsely claim that grand jury charges in the early Republic were mere symbolic occasions with little legal significance and therefore Thacher's views are not probative. *See* FIREARMS LAW, *supra* note 4, at 79–80. In fact, the opposite was the case. Grand jury charges were formal legal occasions, and were an integral part of the jury system, and important civic occasions in which leading judges educated the public about the meaning of the law. For relevant studies on the culture of grand jury charges, see DENNIS HALE, THE JURY IN AMERICA: TRIUMPH AND DECLINE 93–98 (2016); Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1754 (2003).

126. 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).

127. *See* 3 THE AMERICAN REVIEW: A WHIG JOURNAL OF POLITICS, LITERATURE, ART, AND SCIENCE 222–23 (George H. Colton ed., N.Y., Wiley & Putnam 1846).

128. *See* THACHER, *supra* note 122.

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

130. *Id.*

131. For examples of laws that borrowed language from the Massachusetts Model and limited public carry to situations where an individual had a good cause to fear imminent attack, see, for example, 1857 D.C. Rev. Code 570; 1852 Del. Laws 333; 1840 Me. Stat. 709; MICH. REV. STAT. ch. 162, § 16, *reprinted in* THE REVISED STATUTES OF THE STATE OF MICHIGAN 690, 692 (1846); 1847 Va. Acts 127.

132. 35 Tex. 473 (1871).

133. *Id.* at 479.

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."[134] Even after the adoption of the Fourteenth Amendment, the court reasoned that good cause, Massachusetts-style, laws were entirely consistent with protections for the right to bear arms.[135] In the view of the Texas Supreme Court, the Massachusetts good cause model—not the Southern libertarian interpretation relied on in *Heller*—had become the prevailing view in American law.

The same conclusion was reached by the editors of the influential legal reference work, *The American and English Encyclopedia of Law,* a popular and comprehensive multi-volume legal text published at the end of the nineteenth century.[136] The *Encyclopedia*'s entry on the laws covering carrying firearms in public adopted the same interpretation as the highest court of Texas. The editors confidently asserted that:

> The statutes of some of the States have made it an offence to carry weapons concealed about the body, while others prohibit the simple carrying of weapons, whether they are concealed or not. Such statutes have been held not to conflict with the constitutional right of the people of the United States to keep and bear arms.[137]

IV
CONCLUSION

The turn to text, history, and tradition as a means of adjudicating Second Amendment claims asks much of judges. First, courts must decide between two opposing narratives about Anglo-American legal history.[138] Gun-rights advocates have advanced a libertarian narrative that mischaracterizes English common law and treats American law as if Southern gun-rights exceptionalism were a national norm and not a regional anomaly. Alternatively, courts have been presented with a new historical consensus supported by both English and American legal historians. According to this view, there was no right to public carry at common

134. *Id.*

135. For a discussion of this case in the context of Reconstruction, see Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 113–17 (2016).

136. *See* 3 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 411–13 (Northport, E. Thompson 1887).

137. *Id.* at 408. For a review praising this compendium as an indispensable guide for practicing lawyers and scholars alike, see *Review: American and English Encyclopedia of Law*, 42 CENT. L.J. 400 (1896). This had been the view of the influential jurist John Forrest Dillon in his review of firearms law as well. *See* John Forrest Dillon, *The Right to Keep and Bear Arms for Public and Private Defense*, 1 CENT. L.J. 259 (1874) (arguing that state police power allowed restrictions on public carry as long as an express or implied exception existed for cases where there was a reason to fear imminent harm).

138. A third civic paradigm in which public carry was limited to militia-related activity emerged in some parts of the South. However, some have argued that this paradigm, even broadly construed, appears to be precluded by *Heller*. *See* Kanter v. Barr, 919 F.3d 437, 463 (7th Cir. 2019) (Barrett, J., dissenting) ("*Heller*, however, expressly rejects the argument that the Second Amendment protects a purely civic right." (internal citation omitted)); Michael 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, 609–10 (2012).

law. Moreover, this model acknowledges the role of diversity and change in American legal history. The existence of a common law inheritance did not mean that different jurisdictions evolved in lockstep. Rather, the common law fragmented and fostered the emergence of distinctive regional gun cultures and regulatory schemes. A permissive Southern model and a more limited good cause model developed by the era of the Civil War. By the end of the nineteenth century, the good cause model had triumphed over the permissive Southern model. The Massachusetts Model expanded gun rights beyond the narrow protections afforded under English common law, but this expansion was tempered by a continuing recognition of the need to protect the peace. The balance it struck between liberty and order was one that most Americans would have recognized as familiar and is one that courts ought to honor in future Second Amendment jurisprudence.

At a minimum, federal courts evaluating text, history, an tradition in future gun cases will need to heed Justice Scalia's admonition regarding the dangers of confirmation bias and the selective use of evidence, a practice where judges and advocates treat history as an exercise in "look[ing] over the heads of the crowd and pick[ing] out your friends."[139] In evaluating history, courts will need to accept that American law did not speak with a single voice on the scope of the right to travel armed in public. Claims that there was a broad right to public carry at English common law and that the South's permissive open-carry regime enjoyed hegemonic sway in early America—the claims at the root of the libertarian account of the history of gun regulation—are demonstrably false. If history is to have a role to play in the future of Second Amendment jurisprudence, it is important to get the history right.

139. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 36 (Amy Gutmann ed., 1997).