

Fordham Urban Law Journal

Volume 39
Number 5 *Symposium - Gun Control and the
Second Amendment: Development and
Controversies in the Wake of District of
Columbia v. Heller and McDonald v. Chicago*


Article 3

March 2016

The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities

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Recommended Citation

Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from
Historical Realities*, 39 Fordham Urb. L.J. 1695 (2012).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss5/3>

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THE RIGHT TO CARRY FIREARMS OUTSIDE OF THE HOME: SEPARATING HISTORICAL MYTHS FROM HISTORICAL REALITIES

*Saul Cornell**

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INTRODUCTION

Emboldened by their victory in *Heller*,¹ gun rights advocates are waging a relentless campaign to strike down what little remains of the nation’s relatively anemic gun control regime.² The *Heller* opinion itself is also partly responsible for generating a seemingly limitless

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

2. On modern gun rights gun culture, see JOAN BURBICK, *GUN SHOW NATION: GUN CULTURE AND AMERICAN DEMOCRACY* (2006); ABIGAIL A. KOHN, *SHOOTERS: MYTHS AND REALITIES OF AMERICAN GUN CULTURES* (2005); ROBERT J. SPITZER, *THE POLITICS OF GUN GONTROL* (4th ed. 2008); ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011).

parade of new lawsuits.³ Legal scholars from across the ideological spectrum have attacked the controversial five-to-four decision, both for its revisionist rewriting of constitutional history and for its poor judicial craftsmanship.⁴ The opinion raised more questions than it answered and left lower courts scrambling to decipher what was prohibited by *Heller*, if anything, short of a total ban on handguns.⁵ The decision articulated no theory of judicial scrutiny, provided no black letter rules, and failed to create any categories of analysis to guide judges. Instead, it left the courts with an incomplete laundry list of presumptively lawful regulations to serve as a model of what remained legal.⁶ In *United States v. Masciandaro*, Judge J. Harvie Wilkinson aptly summarized the problems that *Heller*'s poor judicial craftsmanship wrought: "This case underscores the dilemma faced by lower courts in the post-*Heller* world: how far to push *Heller* beyond its undisputed core holding."⁷

The first section of this Article examines the continuing relevance of history in the post-*Heller* era. The second section focuses on conceptions of the right to bear arms and the right to carry in the Founding era. Apart from service in militia, there is little evidence of a broad constitutional consensus on a right to carry arms in public. The third section analyzes some of the myths and realities about early American gun regulation. The fourth section locates the legal ideal of traveling armed in public in a distinctively southern tradition that was a minority strain within Antebellum law. The final section of this Article explores the alternative theory of robust arms regulation that emerged by the era of the Fourteenth Amendment and became the dominant tradition in American law. The existence of this regulatory

3. *Post Heller Litigation Summary*, LAW CENTER TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/category/second-amendment/> (last updated Nov. 7, 2012).

4. For a lucid critique of *Heller* from the right, see J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009). For an equally trenchant critique from the political Left, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

5. See, e.g., *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012) (purchasing firearms in another state); *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011) (possession of firearm by domestic violence misdemeanants); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011) (domestic violence misdemeanants); *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (undocumented immigrants); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) (possession of firearm with obliterated serial number); *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) (felons).

6. *Heller*, 554 U.S. at 626–27.

7. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

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tradition has remained hidden from modern scholars and courts because support for high levels of gun regulation was so pervasive outside of the South that few of these laws were ever challenged in court.

I. HISTORY AND THE FUTURE OF GUN REGULATION: HELLER'S LEGACY

Rather than close the book on historical argument, *Heller* appears to have done the opposite. The court stated this point succinctly in *United States v. Masciandaro*: “[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context.”⁸ Unfortunately, judges are in the unenviable position of evaluating the complex and contradictory historical evidence paraded before them. Separating historical myths from historical realities, distinguishing historical fact from error, and disentangling law office history from rigorous historical scholarship are serious problems for the courts in this area of the law.⁹

One of the most controversial issues to arise in the wake of *Heller* is the right to carry firearms outside of the home. This issue is

8. *Id.* at 470. Courts are not just divided over how to weigh particular types of historical evidence, but there is some disagreement over which period of history is relevant to the various types of Second Amendment claims being made. Should the courts focus on Founding era materials, post-enactment sources, or evidence from the era of the Fourteenth Amendment? Justice Scalia employed late nineteenth century sources to interpret Founding era approaches to preambles, an approach that only underscores *Heller's* intellectual incoherence. For additional discussion of *Heller's* many temporal oddities, see Siegel, *supra* note 4, and Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 639 (2008). For a more charitable reading of *Heller* that attempts to bring some order to this question, see Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012).

9. On the problems of Second Amendment “law office history” and historical myths clouding Second Amendment discussions, see *infra* note 112 and accompanying text. Rostron offers some thoughtful comments on the inherent difficulty of using history to resolve modern issues such as the scope of Second Amendment protections for those convicted of domestic violence misdemeanors:

Exploring how American society viewed domestic violence in the Founding era might be a fascinating topic for a doctoral dissertation, but it would undoubtedly be a challenging undertaking for judges, and ultimately a pointless one because the historical record on an issue of such complexity undoubtedly contains much to support many different views. Judges simply will be disappointed if they hope to find specific and clear historical evidence about the Founding generation's attitude toward the rights of domestic abusers.

Rostron, *supra* note 8, at 751–52 (citations omitted).

currently being litigated in the Fourth Circuit and a decision may well be rendered by the time this Article is published.¹⁰ *Masciandaro* reveals the problems that *Heller* has created. In *Masciandaro*, the defendant was arrested for possessing a loaded firearm in a national park.¹¹ The court applied an intermediate scrutiny test and found that the statute in question, which prohibited loaded firearms in national parks, easily passed constitutional muster.¹² The government's interest was important and the means chosen to effectuate this goal were substantially related to that interest.¹³ Although the three-judge panel agreed on this point, there was substantial disagreement over the scope of *Heller's* holding regarding the right to bear arms outside of the home.¹⁴ In *Masciandaro*, the majority refused to wade into this question. Judge Wilkinson and Judge Duffy embraced a minimalist reading of *Heller*, counseling judicial restraint, particularly on this crucial question:

There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation.¹⁵

Judges Wilkinson and Duffy took no position on this issue, but their argument implicitly suggested that one could make a plausible case that *Heller's* holding established no right to carry firearms outside the home. Judge Niemeyer, by contrast, argued that *Heller* did assert the existence of a right beyond the home:

Consistent with the historical understanding of the right to keep and bear arms outside the home, the *Heller* Court's description of its actual holding also implies that a broader right exists. The Court stated that its holding applies to the home, where the need "for defense of self, family, and property *is most acute*," suggesting that

10. The notion that *Heller* ought to be read to include a right to carry outside of the home has been most fully developed in two cases decided in the Fourth Circuit. See *United States v. Weaver*, No. 2:09-cr-00222, 2012 U.S. Dist. LEXIS 29613 (S.D. W. Va. Mar. 7, 2012); *Woollard v. Sheridan*, No. L-10-2068, 2012 U.S. Dist. LEXIS 28498 (D. Md. Mar. 2, 2012). An appeal in the latter case was being briefed at the time that this Article went to press.

11. *Masciandaro*, 638 F.3d at 459.

12. *Id.* at 473.

13. *Id.*

14. *Id.* at 469.

15. *Id.* at 475 (Wilkinson, J., concurring).

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some form of the right applies where that need is not “most acute.” Further, when the Court acknowledged that the Second Amendment right was not unlimited, it listed as examples of regulations that were presumptively lawful, those “laws forbidding the carrying of firearms in sensitive places such as *schools and government buildings*.” If the Second Amendment right were confined to self-defense *in the home*, the Court would not have needed to express a reservation for “sensitive places” outside of the home.¹⁶

The logic of Judge Niemeyer’s argument seems especially weak when read against the actual beliefs and practices that the American legal tradition demonstrates. The assertion that the need for self-defense is most acute in the home implies nothing about the existence of a right to self-defense outside the home. Even under *Heller*’s flawed version of history, one plausibly could argue that the Founders decided to constitutionalize the right only in the home. Self-defense beyond the home implicates far broader questions of public safety. It makes historical sense that the Founding generation decided to leave the resolutions of these difficult questions to the more flexible standards afforded by the common law and the public policy preferences of individual legislatures. The fact that the Founding generation needed weapons to train and hunt also has little bearing on how these weapons might have been used outside of the home because pistols were not typically part of the standard weaponry of the militia. Finally, the fact that some states and localities chose to ban carrying in sensitive places while others chose to enact broad bans only underscores that gun regulation in American history reflects the diversity of the American historical experience.¹⁷

II. THE SCOPE OF THE RIGHT TO BEAR ARMS IN THE FOUNDING ERA

Virginia was the first state to draft a new Constitution and Declaration of Rights. George Mason, the primary architect of the Virginia Declaration of Rights, was a leading patriot and took a major

16. *Id.* at 468 (internal citations omitted). See the discussion *infra* Part IV for specific examples of different types of arms regulation.

17. For a discussion of pistol ownership in the founding era, see *infra* note 81 and accompanying text. On the militia’s standard armaments, muskets and rifles, see discussion *infra* notes 66–93 and accompanying text. On regulation, see *infra* notes 66–83 and accompanying text.

role in the creation of the new state's militia.¹⁸ An early advocate for colonial independence, he became an outspoken champion of the militia. Mason urged his fellow citizens to enact a law to put the colony's militia in a state of readiness for possible war with Britain. Mason's vision of the militia invoked traditional Whig ideas.¹⁹ On January 17, 1775, Mason prepared this set of resolutions for the Fairfax County Committee of Safety, an important institution responsible for coordinating Virginia's military efforts:

Resolved, That this Committee do concur in opinion with the Provincial Committee of the Province of *Maryland*, that a well regulated Militia, composed of gentlemen freeholders, and other freemen, is the natural strength and only stable security of a free Government.²⁰

Mason's emphasis on the need for the militia to be composed of property holders reflected a view common among members of Virginia's gentry elite that it was dangerous to arm the "rabble."²¹ Without the guidance of gentlemen, an armed population might easily become a mob rather than a well-regulated militia. The radicalism of the revolution pushed Mason and other Virginians to embrace a more inclusive conception of the militia.²² The language that Virginia eventually adopted asserted that the militia was "composed of the body of the people," a formulation that reflected the more democratic ethos associated with Revolutionary ideology. When the committee charged with producing a declaration of rights revised Mason's original draft, they settled on the following language:

18. SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 18–20* (2006) [hereinafter CORNELL, *A WELL-REGULATED MILITIA*].

19. Traditional Whig views of the militia may be found in the writings of the Commonwealth tradition. See 3 JAMES BURGH, *POLITICAL DISQUISITIONS* 400–05 (Philadelphia, 1775); ANDREW FLETCHER, *A DISCOURSE OF GOVERNMENT WITH RELATION TO MILITIAS* 40–41, 44–47 (Edinburgh, 1698); ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* Ch. 2 (London, 1698); JOHN TOLAND, *THE MILITIA REFORM'D* 16, 46–47 (London, 1695). See generally JOHN TRENCHARD, *AN ARGUMENT SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY* (London, 1697).

20. 1 GEORGE MASON, *Fairfax County Committee of Safety Proceedings*, in *THE PAPERS OF GEORGE MASON* 212 (Robert A. Rutland ed., 1970).

21. CORNELL, *WELL-REGULATED MILITIA*, *supra* note 18, at 18–19.

22. See CORNELL, *A WELL-REGULATED MILITIA*, *supra* note 18, at 18–20. See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992) (discussing the radicalism of the Revolution).

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That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.²³

Virginia's Declaration of Rights made no mention of the right to bear arms or a right of self-defense.²⁴ The absence of such language did not mean that Virginians did not esteem the right of self-defense; rather, it merely underscored that they believed such a right was adequately protected under the common law.²⁵ The militia focus of Mason's language troubled Thomas Jefferson, one of the most forward-looking and innovative legal thinkers in the Old Dominion.²⁶ Jefferson proposed his own alternative to Mason's language, which included a more expansive statement of the right of individuals to keep and use firearms.²⁷ Jefferson first proposed that "no freeman shall be debarred the use of arms" but decided to revise his proposal to limit the exercise of this right.²⁸ Under Jefferson's revised formulation, the right was confined to an individual's home or lands.²⁹ His revised proposal suggested that the Virginia Declaration of Rights include language asserting that "no freeman shall be debarred the use of arms [within his own lands or tenements]."³⁰ Jefferson obviously disagreed with the convention and sought to constitutionalize the common law right of self-defense, but his proposal was not enacted. His failed proposal, limiting the right to arms to the home, mirrors the right that the majority asserted in *Heller*.³¹

23. 1 GEORGE MASON, *Final Draft of the Virginia Declaration of Rights*, in THE PAPERS OF GEORGE MASON, *supra* note 20, at 288; *see also* 1 GEORGE MASON, *Fairfax County Militia Plan "for Embodying the People"*, in THE PAPERS OF GEORGE MASON, *supra* note 20, at 215 [hereinafter MASON, *Fairfax County Militia Plan*]. Mason noted that the volunteer companies were an expedient until "a regular and proper Militia law for the Defense of the Country shall be enacted by the Legislature of this Colony." *Id.* at 216; *see also* 1 GEORGE MASON, *Virginia Declaration of Rights*, in THE PAPERS OF GEORGE MASON, *supra* note 20, at 274–76.

24. *See* VA. CONST. of 1776.

25. *See* CORNELL, A WELL-REGULATED MILITIA, *supra* note 18, at 26–30.

26. 1 THE PAPERS OF THOMAS JEFFERSON 344 (Julian P. Boyd ed., 1950).

27. *See id.* at 353.

28. *Id.*

29. *See id.* at 353, 363.

30. *Id.*

31. *See id.*; *see also* District of Columbia v. Heller, 554 U.S. 570, 575–76 (2008).

Virginia's Constitution was crafted by members of a planter elite who were often compared to the great leaders of the Roman Republic, men such as Brutus or Cato. Pennsylvania's Constitution, the first to expressly protect a right to bear arms, owed far more to plebeian ideas than to patrician ones.³² The framers of Pennsylvania's Constitution were men of humble origins who spoke on behalf of the laboring classes and the industrious middling sorts, such as tradesmen and small farmers.³³ One prominent group that took a leading role in crafting the Pennsylvania Constitution hailed from the western part of the state. These men were animated by long-standing grievances against the eastern Quaker elite who had dominated the legislature for most of the colonial period. For more than a decade prior to American independence, backcountry Pennsylvanians pressed for a militia law to help them protect their communities against threats from Indians along the frontier.³⁴ The Quaker-dominated assembly rebuffed these appeals, preferring to negotiate, not fight, with the Native population.³⁵ The most notorious incident in this decade-long struggle was the Paxton Boys' Uprising, the massacre of a group of defenseless Conestoga Indians by backcountry Pennsylvanians in 1763.³⁶ *The Apology of the Paxton Volunteers* framed their grievances against the Pennsylvania government in the following terms:

When we applied to the Government for Relief, the far greater part of our Assembly were Quakers, some of whom made light of our Sufferings & plead Conscience, so that they could neither take Arms in Defense of themselves or their Country, nor form a Militia law to oblige the Inhabitants to arm.³⁷

32. For a discussion of the popular plebeian radicalism of Pennsylvania's constitutional tradition, see CORNELL, *A WELL-REGULATED MILITIA*, *supra* note 18, at 20–23.

33. The best historical account of the Pennsylvania arms bearing clause is found in Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041, 1044–46 (2007).

34. Brief for Historians on Early American Legal, Constitutional and Pennsylvania History as Amici Curiae Supporting Respondent, City of Chicago at 13–14, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 59031.

35. *See id.* at 15.

36. *See* KEVIN KENNY, *PEACEABLE KINGDOM LOST: THE PAXTON BOYS AND THE DESTRUCTION OF WILLIAM PENN'S HOLY EXPERIMENT* 140–71 (2009).

37. *The Apology of the Paxton Volunteers*, in *THE PAXTON PAPERS* 187 (John R. Dunbar ed., 1764).

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The text of the Paxton apology anticipated the language eventually included by Pennsylvanians in their Declaration of Rights, which asserted that the people had a right to “bear arms in defence of themselves and the state.”³⁸ There is no evidence from the Revolutionary era that Pennsylvanians were concerned about threats to the common-law right of individual self-defense. The Quaker-dominated legislature had not attempted to disarm backcountry inhabitants, nor had it passed laws that prevented them from defending their homes against intruders.³⁹ What the assembly refused to do was enact a militia law or provide arms for frontier communities to mount a concerted collective defense, including retaliatory raids on Indian communities.⁴⁰ The language eventually incorporated into the Pennsylvania Declaration of Rights reflected this bitter struggle over public safety, and had little to do with public concern over an individual right to keep arms for self-protection.⁴¹ The first discussion of the right to bear arms in Pennsylvania’s Declaration of Rights linked this to an obligation to support public defense.⁴² It also set a pattern for other states by noting the need to balance the right to bear arms against the equally important right not to be forced to bear arms.⁴³ This latter right was vital to religious pacifists opposed to bearing arms, including Quakers and Mennonites. Thus, the first clause to deal with the right to bear arms declared that:

[E]very member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man’s property can be justly taken from him, or applied to public uses, without his consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will

38. PA. CONST. of 1776, art. XIII.

39. Brief for Thirty-Four Professional Historians and Legal Historians as Amici Curiae Supporting Respondents at 11, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 59025.

40. *See id.* at 13.

41. *See id.* at 17–22.

42. *See* PA. CONST. of 1776, art. VIII.

43. *See generally* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012) (discussing the significance of this neglected side of the right to bear arms debate).

pay such equivalent: Nor are the people bound by any laws but such as they have in like manner assented, to for their common good.⁴⁴

By including a right to bear arms and a right not to be forced to bear arms, the Pennsylvania Declaration of Rights struck a compromise position between the opposing demands of the backcountry residents and the pacifists. Only after asserting the civic obligation to bear arms did the Constitution then affirm:

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination, to, and governed by, the civil power.⁴⁵

As was invariably true in most Revolutionary-era constitutions, the right to bear arms was also set against the danger posed by standing armies, a juxtaposition that only accentuated the military character of the right. Pennsylvania's Constitution dealt with the private use of arms in a separate context.⁴⁶ The Pennsylvania Constitution explicitly protected the right to hunt in a separate provision from the right to bear arms.⁴⁷ In contrast to England, where game laws made hunting the exclusive province of the wealthy, Pennsylvania provided its citizens with the "liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property."⁴⁸ The formulation of this right implied a right of government regulation, since hunting might be limited as to time, place, and manner. Still, protecting the right of all citizens to hunt made clear an opposition to the kinds of restrictions that the English game laws codified and that were used to effectively disarm a significant portion of the English population.⁴⁹

44. PA. CONST. of 1776, Declaration of Rights, para. 13, *reprinted in* CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 78 (London, 1782); *see also* Kozuskanich, *supra* note 33, at 1065. Kozuskanich also deals with anachronistic modern gun rights readings of this text.

45. PA. CONST. of 1776, art. XIII.

46. *See id.*, art. VIII.

47. *See id.* § 43.

48. *Id.*

49. *See* Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. COLLOQUY 406, 407-08 (2009).

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Modern gun rights advocates read Pennsylvania's arms bearing provision as protecting an individual right, rewriting the text so that the phrase "bear arms in defense of themselves" is synonymous with the phrase "bear arms in defense of himself."⁵⁰ While the latter individualistic formulation of the right gained currency in many places in the nineteenth century, it did not gain broad acceptance in state constitutions in the Founding era.⁵¹ Yet, even if one accepted the anachronistic reading of Pennsylvania's Constitution, it is hard to justify using it as a model of Founding era constitutionalism. The Pennsylvania Constitution of 1776 broke with nearly every standard practice in America's emerging constitutional culture. Pennsylvania rejected a unicameral legislature and a unitary executive, instead entrusting aspects of judicial review to the Council of Censors, a body charged with preserving the Constitution inviolate.⁵² Pennsylvania's Constitution was controversial from its inception. John Adams wrote, "Good God! The people of Pennsylvania in seven years will be glad to petition the Crown of Britain for reconciliation in order to be delivered from the tyranny of their new Constitution."⁵³

Neither Virginia nor Pennsylvania expressly protected a right to "keep and bear arms."⁵⁴ The first state to introduce this language into American law was Massachusetts. The 1780 Constitution adopted by the State declared that:

50. See *District of Columbia v. Heller*, 554 U.S. 570, 601 (2008).

51. Supporters of the individual rights reading of the 1776 Pennsylvania Constitution have been unable to identify any contemporary evidence that this was the dominant understanding of its framers or the general understanding of Pennsylvanians. Instead, they have used James Wilson's comments on the 1790 Constitution as the basis for reconstructing the meaning of the earlier document. Not only did two different bodies draft these provisions, but they structured and worded them differently. Thus, the earlier provision links the right to bear arms with the traditional Whig attack on standing armies. The latter provision clearly separates the two ideas into separate provisions. It is also not entirely clear how typical Wilson's thinking was on this question. Albert Gallatin, another member of the 1790 convention, framed the right in rather different terms, giving it a more clearly military reading. Nor do Pennsylvania courts appear to have seen this provision as having constitutionalized the common law right of self-defense. For further discussion and analysis of this controversy and the relevant sources, see Kozuskanich, *supra* note 33. On the changing language of the arms bearing provisions of state constitutions, see CORNELL, *A WELL-REGULATED MILITIA*, *supra* note 18.

52. See PA. CONST. of 1776.

53. William Pencak, *The Promise of the Revolution, 1750-1800*, in *PENNSYLVANIA: A HISTORY OF THE COMMONWEALTH* 121 (William Pencak & Randal Miller eds., 2002) (quoting John Adams).

54. See *generally* VA. CONST. of 1776; PA. CONST. of 1776.

The people have a right to keep and to bear arms for the common defence. And as in time of peace armies are dangerous to liberty they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.⁵⁵

The convention's inclusion of the word "keep" built on an assumption implicit in the state's militia statute, which had been enacted in the colonial era.⁵⁶ Apart from the poor, most white male citizens were required to outfit themselves with military-quality weapons.⁵⁷ As was true for virtually every state's militia laws, muskets, not pistols, were the legally designated weapon of the militia. The only exception to this were the horsemen's pistols required of dragoons and other mounted units.⁵⁸

One of most remarkable features of the framing and ratification of the Massachusetts Constitution was the decision to submit the draft constitution to the towns for comment. These responses provide a rare glimpse into popular constitutional ideas in the Founding era, including ideas about armed self-defense.⁵⁹ Although individual towns produced dozens of detailed responses to the proposed constitution and identified many flaws in the new frame of government, the right to keep and bear arms did not prompt extensive commentary. The response of the western town of Williamsburgh, however, faulted the constitution's exclusive focus on common defense and proposed the following alternative: "1st that we esteem it an essential privilege to keep Arms in Our houses for Our Own Defence and while we Continue honest and Lawfull Subjects of Government we Ought Never to be deprived of them."⁶⁰

This alternative formulation clearly frames the right in terms similar to *Heller's* core right of self-defense in the home.⁶¹ This limited formulation of the right was also evidenced in the language

55. MASS CONST. of 1780, pt. 1, art. XVII, in THE POPULAR SOURCES OF POLITICAL AUTHORITY 446 (Oscar Handlin & Mary Handlin eds., 1966).

56. CORNELL, WELL-REGULATED MILITIA, *supra* note 18, at 12.

57. For a discussion of colonial militia laws, see *id.* at 14–17.

58. For a good example from the era of the Second Amendment, see *An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts (1793)*, reprinted in ACTS AND RESOLVES PASSED BY THE GENERAL COURT 294 (Wright & Potter Printing Co. 1895) [hereinafter *Massachusetts Act*].

59. See generally *supra* note 55 and accompanying text.

60. *Town of Williamsburgh (1780)*, in THE POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 55, at 624.

61. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

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chosen by Samuel Adams in his proposed amendment submitted to, but ultimately rejected by, the Massachusetts Ratification Convention.⁶² Similar to the town of Williamsburgh, Adams defined the contours of the right in terms of an individual right for one's own defense.⁶³

Although there is little doubt that Adams and other Americans believed they had a legal right to defend their homes with deadly force if necessary, there is no evidence that there was broad legal consensus that states needed to constitutionalize the protection of this right outside of the home.⁶⁴ Balancing the needs of public safety against the exercise of this right was something best left to the individual state legislatures.⁶⁵

III. GUN REGULATION IN THE FOUNDING ERA AND EARLY REPUBLIC: MYTHS AND REALITIES

It is important to recognize that the Founding generation had little trouble accepting that one might have different legal standards for the use of arms within the home and in public. Thomas Jefferson's legal thoughts provide yet another example of this type of legal double standard for arms. In a bill he wrote to deal with poaching, Jefferson included a provision restricting the ability to travel armed with a musket outside of the context of militia activity.⁶⁶ The proposed law penalized any poacher who "bear[s] a gun out of his inclosed ground, unless whilst performing military duty."⁶⁷ The purpose of the statute was to make legal distinctions between the different levels of regulation appropriate to the use of firearms in different contexts.⁶⁸ In public, militia weapons enjoyed greater legal protection than

62. *See id.* at 601.

63. *See id.*; *see also* *Town of Williamsburgh (1780)*, *supra* note 60, at 624.

64. Even if one canvassed the most expansive statements of the right from the ratification debates, none of these can plausibly be read to justify traveling armed. In this regard, the language proposed by Samuel Adams, which implicates a home-based right, is instructive. *See* sources cited *supra*, note 63. Even accepting *Heller's* dubious claims that the phrase "bear arms" simply meant to carry a gun and had no connection to the militia, one could easily imagine that the right to carry such a gun did not extend beyond the home, which is precisely the conception defended by Jefferson, Adams, and the residents of Williamsburgh.

65. *See* discussions of Brutus and Tench Coxe, *infra* Part III, and the idea of federalism embodied in the United States Constitution. *See* U.S. CONST. amend. X.

66. Thomas Jefferson, A Bill for Preservation of Deer, *in* 2 THE PAPERS OF THOMAS JEFFERSON 444 (Julian P. Boyd ed., 1950).

67. *Id.*

68. *Id.*

pistols and other non-military weapons. All weapons, even those owned for militia purposes, were subject to police power regulation.⁶⁹

Although there were hundreds of essays published both for and against the Constitution, the subject of hunting and the right of self-defense outside the home produced little commentary.⁷⁰ Indeed, there is pretty strong evidence that Federalists and Anti-Federalists each saw these issues as matters best left to the state legislatures.⁷¹ Although Federalist Tench Coxe and the Anti-Federalist author Brutus agreed on few things, they were in complete agreement on this issue. Brutus made this point expressly when he wrote, “[I]t ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other”⁷² Federalist Tench Coxe echoed this understanding, writing that “[t]he states will regulate and administer the criminal law, *exclusively of Congress*.”⁷³ The police power of the states would not be diminished under the new Constitution and the individual states would continue to legislate on all matters “such as unlicensed public houses, nuisances, and many other things of the like nature.”⁷⁴

Although individual laws varied, a number of states expressly provided that weapons owned in relation to militia service were exempt from seizure in any legal proceedings for debt or delinquent

69. There is broad consensus among professional historians on this point. *See, e.g.*, Brief for Thirty-Four Professional Historians and Legal Historians as Amici Curiae Supporting Respondents at 5–12, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 59025, at *4–6. The distinguished Massachusetts judge George Thatcher wrote about the right to use arms in analogous terms and recognized the breadth of the state’s police power in this area. *See* Saul Cornell, *The Original Meaning Of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 161 (2007). Thatcher’s thinking has been largely ignored by judges and legal scholars but merits closer attention. *See id.* For a more detailed discussion of Thatcher, see Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. COLLOQUY 227 (2011).

70. *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000).

71. *See* discussion *infra* text accompanying notes 71–74.

72. BRUTUS, ESSAYS OF BRUTUS VII, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 358, 400–05 (Herbert J. Storing ed., 1981).

73. Tench Coxe, *A Freeman*, PA. GAZETTE, Jan. 23, 1788, *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 82 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

74. *Id.*

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taxes.⁷⁵ The treatment in a Philadelphia edition of the *Conductor Generalis*, a guidebook for justices of the peace, sheriffs, and constables devoted a long section to goods which were subject to a “distress for rent” action.⁷⁶ Although tradesmen’s tools were exempt, no provision was made for firearms, apart from muskets and rifles owned by militiamen.⁷⁷ A comparable guide written for sheriffs and tax collectors residing in Maine, published more than three decades later, evidenced a similar rule.⁷⁸ While clothes, bibles, schoolbooks, and tools necessary for a trade were exempt, the only firearms accorded this privilege were those of the militia.⁷⁹ As *The Maine Civil Officer* put it, “[e]very citizen enrolled, and providing himself with the arms, ammunition, and accoutrements required by law, shall hold the same exempt from all suits, distresses, execution or sale for debts, or for the payment of taxes.”⁸⁰

Patterns of gun ownership in the Founding era also help account for the very different legal protections accorded ordinary pistols and militia weapons.⁸¹ Americans owned many more long guns and the

75. THE CONDUCTOR GENERALIS, OR, THE OFFICE, DUTY, AND AUTHORITY OF THE JUSTICES OF THE PEACE 142 (1792).

76. *Id.* at 142-43.

77. *Id.* at 142.

78. JEREMIAH PERLEY, THE MAINE CIVIL OFFICER OR THE POWERS AND DUTIES OF SHERIFFS, CORONERS, CONSTABLES, AND COLLECTORS OF TAXES 29-30 (1825). The statute describing this legal exemption was passed in 1792. For similar discussions from a New Jersey guide from the same period, see JAMES EWING, A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE 70 (1832).

79. *See* PERLEY, *supra* note 78, at 29-30.

80. *Id.*

81. The question of exactly how well-armed Americans were in the eighteenth century has been an explosive one. No serious scholar now accepts the discredited argument of Michael Bellesiles that Americans were poorly armed. *See generally* MICHAEL BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000). For devastating critiques of his thesis, see Ira D. Gruber, *Of Arms and Men: Arming America and Military History*, 59 WM. & MARY Q. 217 (2002); James Lindgren & Justin Lee Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777 (2002); Gloria L. Main, *Many Things Forgotten: The Use of Probate Records in Arming America*, 59 WM. & MARY Q. 211 (2002); Randolph Roth, *Guns, Gun Culture, and Homicide: The Relationship between Firearms, the Uses of Firearms, and Interpersonal Violence*, 59 WM. & MARY Q. 223 (2002). Among the many blunders made by Bellesiles, he failed to distinguish between pistols and long guns. In an important new study of the patterns of arms ownership in the eighteenth century, Amherst College social historian Kevin Sweeney notes that pistols constituted a small fraction of the weapons owned by Americans in the Founding era. Americans clearly preferred long guns over hand guns. *See* Kevin Sweeney, *Firearms and Colonial Militias*, in *THE SECOND AMENDMENT ON TRIAL:*

law bestowed additional constitutional and legal protections on such weapons, including a right to travel to muster and train with these weapons, recognizing the utility of these weapons for militia activity.⁸² Yet, it is worth noting that even these militia weapons were subject to reasonable police power regulations.⁸³

The notion that the use of militia weapons outside of the home enjoyed even greater protection than the use of pistols outside of the home makes perfect sense given the language of the Second Amendment. Although *Heller* held that self-defense in the home was one core value enshrined in the Second Amendment, it is hard to dispute that the Amendment also protects the goal of arming the militia.⁸⁴ Because pistols had little value in hunting and were not standard equipment for ordinary militiamen, it made sense to carve out a broader right to travel with a musket or a rifle since these weapons were needed for training and suitable for hunting.⁸⁵ Although one might travel with a musket to muster, the state could prohibit traveling with a loaded weapon or discharging a weapon on a muster day without permission.⁸⁶

It is easy to mischaracterize the Founding era's recognition that militia weapons might be used in public with a broad right to carry arms. Michael O'Shea, a gun rights scholar, makes this error in his gloss on a well-known passage from the Virginia jurist, St. George Tucker.⁸⁷ In his discussion of the law of treason, Tucker commented on the right to carry a musket in his home state of Virginia. Tucker noted that simply carrying *military weapons* in Virginia did not imply

CRITICAL ESSAYS ON DISTRICT OF COLUMBIA V. HELLER (forthcoming 2013) [copy on file with author].

82. See sources cited *supra* note 81.

83. See *Massachusetts Act*, *supra* note 58, at 380; see also *District of Columbia v. Heller*, 554 U.S. 570, 633–34 (2008).

84. U.S. CONST. amend. II.

85. See *An Act Concerning the Militia* § 120, 1866 Mass. Acts 197 (“A soldier who unnecessarily or without order from a superior officer comes to any parade with his musket, rifle or pistol loaded with ball, slug or shot, or so loads the same while on parade, or unnecessarily or without order from a superior officer discharges the same when going to, or returning from or upon parade, shall forfeit not less than five nor more than twenty dollars.”); *An Act for the Regulating, Training and Arraying of the Militia*, pt. 11, 1778 N.J. Laws 45; *An Act for Forming and Regulating the Militia Within this State, and for Repealing All the Laws Heretofore Made for that Purpose* § 7, 1786 N.H. Laws 409.

86. See *generally* 1785 Va. Acts 9.

87. See Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms: Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 637 (2012).

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any treasonous intent, a fact that marked a departure from English precedents. O'Shea ignores the clear military context of Tucker's discussion, eliding the difference between a right to carry militia weapons outside of the home and the right to carry a pistol for self-defense. Tucker's discussion of this issue responded to the prosecution of Fries's Rebellion in Pennsylvania.⁸⁸ Tucker took exception to Judge Samuel Chase's use of English legal authorities in construing the meaning of treason.⁸⁹ Tucker noted that in contrast to English law, the mere possession and use of military style weapons did not provide grounds for a treason prosecution in Virginia:

But ought that circumstances of itself [array with military weapons], 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, than an European fine gentleman without his sword by his side.⁹⁰

Tucker's remarks are easily taken out of context and misinterpreted, so it is worth taking the time to highlight exactly what he claimed. The first point to recognize is that Tucker was talking about the use of military weapons by citizens who would have been members of the eighteenth-century militia.⁹¹ Tucker is quite clear that muskets and rifles, not pistols, are protected by this constitutional right.⁹² Second, Tucker himself notes that this expansive conception of a constitutional right to carry military weapons in public was not universally acknowledged by all judges at the time. Justice Chase certainly did not share Tucker's views and the successful prosecution of the rebels in both the Whiskey Rebellion and Fries's Rebellion demonstrate that Tucker's views were not the norm outside of Virginia.⁹³

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

89. 5 ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA*, app. B at 14 (Phila., William Young Birch & Abraham Small 1803) [hereinafter TUCKER, *BLACKSTONE'S COMMENTARIES*].

90. *Id.*

91. *See id.*

92. *See id.*

93. *See id.*

In *Masciandaro*, Judge Niemeyer noted the Second Amendment not only protected self-defense but also had to be read with its militia purpose in mind:

Moreover, the right to keep and bear arms was found to have been understood to exist not only for self-defense, but also for membership in a militia and for hunting, neither of which is a home-bound activity. Indeed, one aspect of the right, as historically understood, was “to secure the ideal of a *citizen* militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”⁹⁴

Judge Niemeyer extrapolates a right to carry a firearm from an unquestioned historical assumption about the way the militia functioned. Niemeyer seems to assume that one would have needed to travel with a loaded gun to participate in the militia and effectuate the Second Amendment’s militia purpose. Yet, in the case of the Second Amendment, historical facts and mythology are often at odds with one another. In fact, states regulated the exercise of this right in a robust manner, including prohibiting militiamen from traveling with a loaded weapon to muster or parade.⁹⁵ These types of regulations were uncontroversial exercises of the state’s police powers.⁹⁶

Finally, one must reckon with the common law constraints on the use of firearms in the Founding era and early republic. The Statute of Northampton instructed individuals to “bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets.”⁹⁷ Modern scholars are divided over how to interpret the application of this statute in early American law. In the view of Daryl Miller and Patrick Charles, the Statute of Northampton prohibited

94. *United States v. Masciandaro*, 638 F.3d 458, 468 (2011) (Niemeyer, J., concurring) (internal citations omitted).

95. *See, e.g.*, STATUTES OF THE STATE OF NEW JERSEY 765 (Trenton, Phillips & Bogswell 1847); *see also* THE REVISED STATUTES OF THE STATE OF NEW HAMPSHIRE 161 (Concord, John F. Brown 1851). Note that “parade” in this context is an essential part of the muster, in which weapons are inspected and fines levied. *See generally* 5 Military Affairs AMERICAN STATE PAPERS. DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, FROM THE FIRST SESSION OF THE TWENTY-SECOND TO THE FIRST SESSION OF THE TWENTY-FOURTH CONGRESS, INCLUSIVE: COMMENCING MARCH 15, 1832, AND ENDING JANUARY 5, 1836 451-2 (Asbury Dickins & John W. Forney eds., Gales & Seaton 1860).

96. WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 1-51 (1996).

97. Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.), *available at* http://press-pubs.uchicago.edu/founders/print_documents/amendIIs1.html.

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armed travel.⁹⁸ Eugene Volokh, a leading academic champion of gun rights, rejects this view. He argues that this “Statute was understood by the Framers as covering only those circumstances where carrying arms was unusual and therefore terrifying.”⁹⁹ Volokh cites the interpretation of this statute by Sir William Hawkins, an important English legal commentator familiar to lawyers in the Founding era.¹⁰⁰ Hawkins formulation of this statute’s prohibition cast the prohibition in terms of traveling with unusual and dangerous weapons.¹⁰¹ This formulation was slightly different than Sir William Blackstone’s gloss on the law. Blackstone did not describe the crime of affray in terms of traveling with “dangerous and unusual weapons,” but described the statute’s prohibition in terms of carrying “dangerous or unusual weapons.”¹⁰² The Founders were familiar with both English commentators and it seems likely that there may have been a range of views on interpreting this question.¹⁰³

It is easy for legal scholars and judges to lose sight of the social, cultural, and political contexts in which early American weapons regulations were enacted. Founding era public policy on firearms had several objectives: disarm dangerous and disloyal groups, provide for the safe storage of gunpowder and firearms, and arm and regulate the militia.¹⁰⁴ Interpersonal violence, including gun violence, simply was not a problem in the Founding era that warranted much attention and therefore produced no legislation.¹⁰⁵ Times change, and the law

98. See Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 8 (2012); Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1317 (2009).

99. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009).

100. *See id.*

101. *Id.* Hawkins clearly believed one might not travel with offensive weapons. Defensive use of weapons in the home was clearly protected, but it is not clear how far this right extended beyond the home for the ordinary person. Hawkins expressly noted that “persons of quality,” a term that signified elite status and class rank, were not subject to arms restrictions in public. Thus, the right that Hawkins defined seems narrow, not expansive in scope. *Id.*

102. 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49 (1803).

103. St. George Tucker quotes both authors as good authority on the common law, but also notes that the common law had been modified in each of the American states. *See* 1 TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 89, at *409.

104. For a discussion of early American gun regulation, see Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 491–505 (2004).

105. With the notable exception of laws addressing dueling, see An Act for the Punishing and Preventing of Duelling, 1719 Mass. Acts 135.

changes with them.¹⁰⁶ As cheaper and more reliable handguns proliferated in large numbers and society underwent a host of profound social and economic changes in the early decades of the nineteenth century, handguns and knives gradually became a social problem.¹⁰⁷ In response to a growing perception that these easily-concealable weapons posed a serious threat to public safety, a number of states passed the first modern-style weapons control laws.¹⁰⁸ These laws triggered the first cases testing the scope of the constitutional right to keep and bear arms under state law.¹⁰⁹ For the first time in American history, courts were faced with deciding this issue: was the constitutional right to bear arms implicated when one armed oneself with a pistol or a knife outside of the home?¹¹⁰

In *Masciandaro*, Judge Niemeyer relied on Eugene Volokh's framework for implementing *Heller*.¹¹¹ Unfortunately, this framework rests on a number of questionable historical assumptions and claims. In particular, the contention that the "pre-Civil War American legal practice of treating open carrying of weapons as not only legal but constitutionally protected" rests more on historical mythology and a highly selective reading of the evidence than it does on sound historical research.¹¹² In reality, Antebellum case law on the

106. See generally RANDOLPH ROTH, AMERICAN HOMICIDE (2009).

107. See CORNELL, A WELL-REGULATED MILITIA, *supra* note 18, at 137–50.

108. See *infra* notes 114–16 and accompanying text.

109. See *infra* notes 115–17 and accompanying text.

110. See *id.*

111. United States v. Masciandaro, 638 F.3d 458, 468 (4th Cir. 2011).

112. Eugene Volokh, *The First and Second Amendments*, *supra* note 99, at 102; see also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1516-17, 1522-23 (2009) [hereinafter Volokh, *Implementing*]. To illustrate this view, Volokh quotes Willie Nelson's *Pancho & Lefty*. See *id.* at 1523 n.331 (quoting WILLIE NELSON, PANCHO & LEFTY (Sony Records 1990)). Volokh acknowledges that "this is a modern source, of course, but one that also captures well the 1800s sentiments." *Id.* The song was actually written by Townes Van Zandt, who first recorded it on his 1972 album, THE LATE GREAT TOWNES VAN ZANDT. Without diminishing the artistry of Willie Nelson, or the song's actual author, Townes Van Zandt, I think it is fair to say that the source tells us more about historical myth, than reality. Volokh's inability to distinguish between myth and reality ought to raise additional concerns about his analysis. For a brilliant exploration of such myths, including the appropriation of some aspects of the Mexican revolutionary figure Pancho Villa's life by American artists and entertainers, see RICHARD SLOTKIN, GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA (1998). If the song in part draws inspiration from Pancho Villa, it would be evidence for a twentieth century mythology, not a mythology associated with the 1800s. For additional analysis of how Volokh's questionable forays into law office history led the Supreme Court astray in *Heller*, see Saul Cornell, *Heller, New Originalism, and Law Office*

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right to bear arms was deeply divided on the scope of the right.¹¹³ There was a spectrum that ran from the libertarian view elaborated in *Bliss v. Commonwealth*¹¹⁴ to the more limited right described in *Buzzard v. State*.¹¹⁵ The Fourteenth Amendment largely resolved the division among southern Antebellum courts evidenced by this split. By the time the Fourteenth Amendment was adopted, most legal commentators viewed *Buzzard*, not *Bliss*, as the orthodox view.¹¹⁶

Legal scholarship is most trustworthy when focused on traditional doctrinal analysis. Yet, narrow doctrinalism can obscure other important legal and historical sources, particularly if one focuses exclusively on cases and ignores legislation. In areas of the law in which a broad constitutional consensus existed and laws were not challenged there would not be any body of case law to consult. If one looks at legal scholarship on the right to bear arms, one of the most striking omissions is any attention to the law outside of the South.¹¹⁷ Indeed, nearly all of the Antebellum gun cases, with a few notable exceptions, were decided in Southern courts by judges who were typically pro-slavery.¹¹⁸ This fact merits closer scrutiny.¹¹⁹

History: "Meet the New Boss, Same as the Old Boss," 56 UCLA L. REV. 1095, 1111–12 (2009) and David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 154 n.96 (2004).

113. See *infra* notes 120–29 and accompanying text.

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

115. *State v. Buzzard*, 4 Ark. 18, 27 (1842).

116. For a discussion of the spectrum of antebellum jurisprudence and case law, see Saul Cornell & Justin Florence, *The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?*, 50 SANTA CLARA L. REV. 1043, 1052–53 (2010). Compare *Bliss*, 12 Ky. 90 (declaring that Kentucky's concealed-weapons ban conflicted with the state constitution), *superseded by state constitutional amendment*, KY. CONST. of 1850 art. XIII, § 25, with *Buzzard*, 4 Ark. at 27 (upholding arms regulation statute against constitutional challenge). Volokh argues that in the aftermath of *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), legal ideas and norms in the 1860s and 1870s are probative in evaluating contemporary gun regulations. See Volokh, *Implementing*, *supra* note 112, at 1524. For the opposing view, see Rostron, *supra* note 8.

117. For a good illustration of the problems of narrow doctrinalism, see generally Volokh, *Implementing*, *supra* note 112, and O'Shea, *supra* note 87, at 623–41.

118. The most important counterexamples from non-southern sources are a trio of Indiana cases: *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833); *Walls v. State*, 7 Blackf. 572 (Ind. 1845); *State v. Duzan*, 6 Blackf. 31 (Ind. 1841). Of course, southern migration into Indiana may well account for these developments. As historian Nicole Etcheson observes, "forty-four percent of such Hoosiers, thirty-five percent of such Illinoisans, and nineteen percent of such Ohioans were reported born in the Upland South. Since the southerners were the first migrants into these states, these figures disguise an even larger southern presence because the children and grandchildren of

IV. THE PISTOL AND THE LASH: SLAVERY AND THE PERMISSIVE RIGHT TO CARRY

It is not surprising that the vast majority of the early cases testing the limits and scope of the right to bear arms were Southern. By the 1820s, the Antebellum South was the most violent region in the new nation.¹²⁰ Indeed, the South's homicide rates were more than double that of the North's most populous cities, New York and Philadelphia.¹²¹ Given the much higher homicide rates in the South, it is not surprising that this region led the way in passing the first modern style gun control laws.¹²²

Southern violence prompted extensive commentary by contemporaries and was put to effective use by abolitionists who linked this culture of violence to the brutality of slavery.¹²³ Two particular symbols became emblems of the violence of the South: the pistol and the lash.¹²⁴ The importance of these cultural associations is vividly captured in this cartoon from *The American Anti-Slavery Almanac* (1840)¹²⁵:

southerners were counted as born in Ohio, Indiana, or Illinois." Nicole Etcheson, *Manliness and the Political Culture of the Old Northwest, 1790-1860*, 15 J. EARLY REP. 59, 60 n.2 (1995).

119. I would like to thank Professor Al Brophy of the University of North Carolina School of Law for suggesting this line of inquiry to me.

120. See ROTH, *supra* note 106. Urban areas also experienced a rise in the use of weapons. See ERIC H. MONKKONEN, *MURDER IN NEW YORK CITY* (2001); see also Joshua Stein, *Privatizing Violence: A Transformation in the Jurisprudence of Assault*, 30 LAW & HIST. REV. 423, 445 (2012) (noting that in the three decades between 1810 and 1840 assaults rose dramatically as did the likelihood that such assaults would involve a weapon).

121. See ROTH, *supra* note 106.

122. On Southern violence, see DICKSON D. BRUCE, JR., *VIOLENCE AND CULTURE IN THE ANTEBELLUM SOUTH* (1979) and BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* (1982).

123. See generally Bruce, *supra* note 122.

124. *Id.*

125. *Our Peculiar Domestic Institutions, reprinted in THE AMERICAN ANTI-SLAVERY ALMANAC* 25 (New York, Am. Anti-Slavery Soc'y 1840), available at <http://digitalgallery.nypl.org/nypldigital/dgkeysearchdetail.cfm?imageID=413034>.

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The scene depicted in the image melds together multiple examples of southern brutality. In the distance, a cockfight draws a large crowd seeking the titillation provided by blood sport. A gambling dispute turned deadly occupies the center of the picture. On one side of the image, two gentlemen are about to fire on one another in a duel and a cruel southern master prepares to whip a young slave. The fact that the South was the most violent region of the new nation ought to give scholars and judges pause before looking to this region for constitutional guidelines on how to interpret the meaning of the right to bear arms in the post-*Heller* era.

If one looks closely at the foundation for Professor Volokh's claim about the right to carry, it consists of a single and quite remarkable statement by the Richmond Grand Jury published in 1820.¹²⁶ The Grand Jury denounced the pernicious practice of carrying concealed weapons, while affirming the right to carry arms openly.

On Wearing Concealed Arms

We, the Grand Jury for the city of Richmond, at August Court, 1820, do not believe it to be inconsistent with our duty to animadvert upon any practice which, in our opinion, may be attended with consequences dangerous to the peace and good order of society. We have observed, with regret, the very numerous instances of stabbing, which have of late years occurred, and which have been owing in most cases to the practice which has so frequently prevailed, of wearing dirks: Armed in secret, and

126. See Volokh, *Implementing*, *supra* note 112.

emboldened by the possession of these deadly weapons, how frequently have disputes been carried to extremities, which might otherwise have been either amicably adjusted, or attended with no serious consequences to the parties engaged.

The Grand Jury would not recommend any legislative interference with what they conceive to be one of the most essential privileges of freemen, the right of carrying arms: But we feel it our duty publicly to express our abhorrence of a practice which it becomes all good citizens to frown upon with contempt, and to endeavor to suppress. We consider the practice of carrying arms secreted, in cases where no personal attack can reasonably be apprehended, to be infinitely more reprehensible than even the act of stabbing, if committed during a sudden affray, in the heat of passion, where the party was not previously armed for the purpose.¹²⁷

The idea that one might ban concealed carry if one allowed open carry did garner support in *Nunn v. State*, but there is little evidence that this case was understood to be a controlling precedent in the South, and it was certainly not viewed in this way by the era of the Fourteenth Amendment.¹²⁸ In *Hill v. State*, Georgia's Supreme Court rejected *Nunn* and asserted that it was "at a loss to follow the line of thought that extends the guarantee . . . to the right to carry pistols, dirks, Bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day."¹²⁹ Moreover, *Nunn* had no impact outside of the South. Indeed, scholarship on the right to bear arms had been strangely silent about legal ideas and practices in these other areas of the nation, which included the vast majority of the free population.

127. *On Wearing Concealed Arms*, DAILY NAT'L INTELLIGENCER, Sept. 9, 1820, at 2.

128. *Nunn v. State*, 1 Ga. 243, 243 (1846). For the pro-slavery beliefs of Judge Lumpkin, the author of the *Nunn* decision, see Mason W. Stephenson & D. Grier Stephenson, Jr., "To Protect and Defend": *Joseph Henry Lumpkin, The Supreme Court of Georgia, and Slavery*, 25 EMORY L.J. 579, 582-86 (1976). For a discussion of how the antebellum tradition was interpreted during the era of the Fourteenth Amendment, see Cornell & Florence, *supra* note 116, at 1066-69. For good examples of other antebellum models, see generally *Aymette v. State*, 21 Tenn. 154 (1840) and *State v. Buzzard*, 4 Ark. 18 (1842).

129. *Hill v. State*, 53 Ga. 472, 474 (1874) (rejecting the logic of *Nunn*, but assuming *arguendo* that the law in question was constitutional even if *Nunn* were correctly decided).

2012] *THE RIGHT TO CARRY FIREARMS OUTSIDE* 1719**V. NO RIGHT TO CARRY: THE EMERGENCE AND SPREAD OF THE MASSACHUSETTS MODEL**

Outside of the South, a robust model of weapons regulation emerged and gained widespread acceptance. Prohibitions on concealed carry were one type of regulation.¹³⁰ A number of states and localities adapted the Statute of Northampton's prohibition on traveling armed, rewriting it in terms that made clear that one cannot travel with offensive weapons.¹³¹ Laws of this type weren't the only prohibitions on traveling armed. States enacted bans on the use of arms in sensitive places.¹³² Finally, some states and localities enacted

130. *See, e.g.*, WASH. REV. CODE § 929 (1881) ("If any person shall carry upon his person any concealed weapon . . . [he] shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined . . . or imprisoned . . . not more than thirty days . . ."); 1883 WIS. SESS. LAWS 713 ("To regulate or prohibit the carrying or wearing by any person under his clothes, or concealed about his person, of any pistol or colt, or slung shot, or cross knuckles, or knuckles of lead, brass or other metal, or bowie knife, dirk knife, or dirk or dagger, or any other dangerous or deadly weapon; and to provide for the confiscation or sale of such weapon.").

131. There are many examples of laws prohibiting offensively arming oneself. *See* 1849 Cal. Stat. 245 ("[I]f any person shall have upon him any pistol, gun, knife, dirk, bludgeon, or other offensive weapon, with intent to assault any person, every such person, on conviction, shall be fined not more than one hundred dollars or imprisoned in the County Jail not more than three months."); 19 Del. Laws 733 (1852) ("Any justice of the peace may also cause to be arrested . . . all who go armed offensively to the terror of the people, or are otherwise disorderly and dangerous.").

132. *See* 1870 La. Acts 61 ("[I]t shall be unlawful for any person to carry any gun, pistol, bowie-knife or other dangerous weapon, concealed or unconcealed, on any day of election during the hours the polls are open, or on any day of registration or revision of registration, within a distance of one-half mile of any place of registration or revision of registration; any person violating the provisions of this section shall be deemed guilty of a misdemeanor."); 1870 Tex. Gen. Laws 63 ("[I]f any person shall go into any church or religious assembly, any school room or other place where persons are assembled for educational, literary or scientific purposes, or into a ballroom, social party or other social gathering composed of ladies and gentlemen, or to any election precinct on the day or days of any election, where any portion of the people of this State are collected to vote at any election, or to any other place where people may be assembled to muster or to perform any other public duty, or any other public assembly, and shall have about his person a bowie knife, dirk or butcher knife, or fire-arms, whether known as a six shooter, gun or pistol of any kind, such person so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than fifty or more than five hundred dollars, at the discretion of the court or jury trying the same . . ."); 1878 Va. Acts 37 ("If any person carrying any gun, pistol, bowie-knife, dagger, or other dangerous weapon, to any place of worship while a meeting for religious purposes is being held at such place, or without good and sufficient cause therefor, shall carry any such weapon on Sunday at any place other than his own premises, shall be fined not less than twenty dollars."); 1859 Wash. Sess. Laws 489 ("Every person who shall convey into any penitentiary, jail or house of correction, or house of reformation, any disguise, or any

even more sweeping regulations, including complete bans on traveling armed. In 1835, Massachusetts passed a sweeping law that effectively prohibited the right to travel armed.

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.¹³³

The respected jurist Peter Oxenbridge Thacher commented on this law in a grand jury charge that drew praise in the contemporary press.¹³⁴ According to this model, one might ban open and concealed carry, as long as one allowed an exception for cases in which an individual had a reasonable fear of imminent violence.¹³⁵

Volokh is correct that bans on concealed weapons were uncontroversial. It is therefore hardly surprising that Thacher shared the dominant cultural view of the day regarding the practice of arming oneself with concealed weapons. Such a practice was cowardly, if not dastardly. This did not mean that one had a right to carry openly. The alternative to concealed carry was not open carry, but rigorous enforcement of the law, which forbade arming oneself except in unusual situations. Thacher's grand jury charge was emphatic about the limited nature of this right:

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. Where the practice of wearing secret arms prevails, it indicates either that the

instrument, tool, weapon or other thing, adapted to or useful in aiding any prisoner there lawfully committed or detained, to make escape . . . shall, on conviction thereof, be imprisoned . . .”).

133. 1835 Mass. Acts 750.

134. See 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, DECEMBER 5TH, A.D. 1836 AND ON MONDAY, MARCH 13TH, A.D. 27-28 (1837). The section of the grand jury charge dealing with traveling armed was excerpted and reprinted in *Judge Thacher's Charges*, CHRISTIAN REGISTER & BOSTON OBSERVER, June 10, 1837, at 91. For additional discussion of the Massachusetts model, see ELISHA HAMMOND, A PRACTICAL TREATISE; OR AN ABRIDGEMENT OF THE LAW APPERTAINING TO THE OFFICE OF JUSTICE OF THE PEACE; AND ALSO RELATING TO THE PRACTICE IN JUSTICES' COURTS, IN CIVIL AND CRIMINAL MATTERS, WITH APPROPRIATE FORMS OF PRACTICE 184-86 (1841).

135. See sources cited *supra* note 130.

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laws are bad; or that they are not executed with vigor; or, at least, it proves want of confidence in their protection. It often leads to the sudden commission of acts of atrocious injury; and induces the individual to rely for defence on himself, rather than on society. But how vain and impotent is the power of a single arm, however skilled in the science of defence, to protect its possessor from the many evil persons who infest society. The possession of a concealed dagger is apt to produce an elation of mind, which raises itself above the dictates both of prudence and law. The possessor, stimulated by a sensitive notion of honor, and constituting himself the sole judge of his rights, may suddenly commit a deed, for which a life of penitence will hardly, even in his own estimation, atone. When you survey the society to which you belong, and consider the various wants of its members;—their numbers, their variety of occupation and character,—their conflicting interests and wants . . . what is it, permit me to ask, preserves the common peace and safety? I know of no answer, but THE LAW.¹³⁶

Thacher's account of the Massachusetts law prohibiting the right to carry arms unambiguously interprets this law as a broad ban on the use of arms in public. In Massachusetts and those states emulating its model, the scope of the right to arm oneself defensively outside of the home was extremely limited.¹³⁷ Thacher believed that the state could ban all carrying of firearms, as long as there was an affirmative legal defense available allowing an exception when there was a clear and tangible threat to justify arming oneself defensively.¹³⁸ Demonstrating a reasonable fear, it is important to note, imposed a high legal standard. In *State v. Duke*, the Supreme Court of Texas upheld a comprehensive ban on traveling armed.¹³⁹ Texas law also defined the standard of reasonableness in the following way:

Any person charged under the first Section of this Act, who may offer to prove by way of defense, that he was in danger of an attack on his person, or unlawful interference with his property, shall be required to show that such danger was immediate and pressing, and was of such a nature as to alarm a person of ordinary courage; and that the arms so carried were borne openly, and not concealed beneath the clothing; and if it shall appear that this danger had its

136. *Judge Thacher's Charges*, *supra* note 134, at 91.

137. *See* sources cited *infra* note 141.

138. *See id.*

139. *See State v. Duke*, 42 Tex. 455, 459 (1874).

origin in a difficulty first commenced by the accused, it shall not be considered a legal defense.¹⁴⁰

The case also drew a clear line between the use of arms within the home and the use of them in public. The former enjoyed far greater protection than the latter. Thus, even in the region of the nation with the most permissive attitude toward the right to carry, a more stringent and limited conception of this right had emerged by the era of the Fourteenth Amendment.

Outside of the South, the limited right to carry pioneered by Massachusetts was emulated by a number of states. A similar legal standard emerged in Maine, Delaware, The District of Columbia, Wisconsin, Pennsylvania, Oregon, and Minnesota.¹⁴¹ Rather than demonstrate a consensus on a right to open carry, the historical record demonstrates that outside of the slave South, a radically different and far more limited conception of the right to travel armed emerged. Indeed, by the era of the Fourteenth Amendment, this more limited model had also gained legislative approval and judicial support in parts of the South.¹⁴² To assert this right, one had to be able to demonstrate clear evidence of a reasonable fear of imminent

140. *Id.* at 457.

141. See 19 DEL. LAWS 733 (1852); D.C. Code § 16 (1857) (“If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person”); ME. REV. STAT. tit. 12 § 16 (1840) (“Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without a reasonable cause to fear an assault on himself”); WIS. STAT. § 16 (1857) (“If any person shall go armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person”); JOHN PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TWENTY-FIRST DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE 250 (9th ed., 1862) (“If any person, not being an officer on duty in the military or naval service of the state or of the United States, shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence”); THE STATUTES OF OREGON, ENACTED, AND CONTINUED IN FORCE, BY THE LEGISLATIVE ASSEMBLY 243 (1855); GEORGE B. YOUNG, THE GENERAL STATUTES OF THE STATE OF MINNESOTA, AS AMENDED BY SUBSEQUENT LEGISLATION, WITH WHICH ARE INCORPORATED ALL GENERAL LAWS OF THE STATE IN FORCE AT THE CLOSE OF THE LEGISLATIVE SESSION OF 1878 629 (St. Paul, 1879) (“Whoever goes armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapons, without reasonable cause to fear an assault or other injury or violence to his person”). For a discussion of these laws in the context of the Statute of Northampton, see Charles, *supra* note 98.

142. See, e.g., *Duke*, 42 Tex. 455.

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danger before one might legally arm oneself.¹⁴³ The notion of a strong tradition of a right to carry outside of the home rests on a set of historical myths and a highly selective reading of the evidence. The only persuasive evidence for a strong tradition of permissive open carry is limited to the slave South.

There is little consensus among judges and scholars about how to interpret the Constitution. Even among those who profess to be supporters of originalism, there is considerable disagreement over originalist methodology. In *Heller*, the Supreme Court seemed to gesture toward the new originalism and its focus on public meaning. In *McDonald*, however, the same five-person majority embraced aspects of traditional originalism and its emphasis on discerning the intent of the Framers of the Fourteenth Amendment.¹⁴⁴ The scholarly debate over the merits and flaws in originalist methodology is voluminous. Even accepting the Court's inconsistent and, at times, incoherent originalist methodology, there is simply no compelling historical evidence of a broad legal consensus on a right to carry non-militia weapons outside of the home. Indeed, there is considerable evidence suggesting that a legal consensus had emerged outside of the South that no such right existed. The available evidence strongly suggests that laws restricting the use of firearms outside of the home were the legal norm.¹⁴⁵

143. These statutes clearly use common law approaches to remedy the evil the legislature perceived. These laws banned a dangerous practice, but acknowledged an exception by allowing individuals to arm themselves in cases where there was a reasonable fear of imminent danger. The enforcement mechanism also relies on a common law model: surety of peace. In an age before modern police forces, when most Americans lived in smaller rural communities, and there was no modern regulatory or administrative state, adopting this common law approach would have seemed quite natural to legislatures, constables, and judges. This fact was reflected in guidebooks written for justices of the peace and constables. See, e.g., HAMMOND, *supra* note 134; see also NOVAK, *supra* note 96, at 235-48 (generally discussing the common law's conception of regulation and enforcement); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880* (1989) (demonstrating that peace bonds were an essential means of criminal justice enforcement in the era before professional police forces and the rise of the modern administrative state).

144. See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

145. On methodological and interpretive issues relevant to original intent originalism, see *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Jack N. Rakove ed., 1990) and Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989). On New Originalism, see Randy E. Barnett, *An Originalism For Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002); and Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y

This conclusion should hardly come as a shock to anyone familiar with the history of Reconstruction. Indeed, Reconstruction-era Republicans were strong supporters of generally applicable and racially neutral gun regulations, including in some cases, bans on traveling armed and bans on handguns. Gun regulation in the years after the adoption of the Fourteenth Amendment became stricter, not looser.¹⁴⁶ The idea that American law recognized a right to carry firearms in public is more supported by a Hollywood myth of the “wild west” than historical reality.¹⁴⁷ Even in Dodge City, that epitome of the Wild West, gun carrying was prohibited.¹⁴⁸

The eminent jurist John Forrest Dillon, analyzed the importance of the reasonable threat exception to broad restrictions.¹⁴⁹ In a series of essays published in the *Central Law Journal* in 1874, Dillon explored the complex legacy of American jurisprudence on the issue of the

599 (2004). Another variant of this theory, semantic originalism, focuses on linguistic meaning, sometimes described as sentence meaning, timeless meaning, or semantic meaning. See, e.g., Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009). Finally, a less popular alternative suggests using the Founders interpretive methods. See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007). Recent critiques of New Originalism include Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5 (2011); and Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008).

146. See Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615 (2006). While gun rights advocates have attempted to portray Reconstruction-era Republicans as radical gun rights advocates, the historical reality is far more complex. Abolitionists were divided over the legitimacy of armed self-defense. Antebellum abolitionism existed along a spectrum that ran from John Brown's insurrectionary theory to Quaker pacifism. Reconstruction-era Republicans were also heirs to the antebellum Whig ideal of the well-regulated state. See also Cornell & Florence, *supra* note 116, at 1060 (discussing evidence of Reconstruction-era support for racially neutral gun regulations intended to promote public safety).

147. See Winkler, *supra* note 2, at 165.

148. Slotkin, *supra* note 112. On restrictions in the “wild west,” see Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876) and 1876 Wyo. Comp. Laws 52, § 1 (prohibiting anyone from “bear[ing] upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village.”).

149. Volokh, *supra* note 99. Judge Niemeyer and Judge Legg in the Fourth Circuit may have erred in putting too much faith in Volokh's version of the past. See *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., concurring); *Woollard v. Sheridan*, No. L-10-2068, 2012 U.S. Dist. LEXIS 28498, at *16-17 (D. Md. Mar. 2, 2012).

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right to bear arms, the right of self-defense, and the right to carry.¹⁵⁰ Dillon's views were similar to those of another celebrated legal theorist of this era, Joel Prentiss Bishop.¹⁵¹ Both men acknowledged that the law had to balance the legitimate rights of individual self-defense against the needs of public safety.¹⁵² Dillon's discussion of this issue was especially thoughtful. Drawing on a recent case, *Andrews v. State*, he concluded, "every good citizen is bound to yield his preference as to the means [of self-defense] to be used, to the demands of the public good."¹⁵³ The state's compelling interest in promoting public safety did not alter the fact that there "are circumstances under which to disarm a citizen would be to leave his life at the mercy of treacherous and plotting enemy."¹⁵⁴ Dillon's solution to this dilemma was not permissive open carry. He turned to a common law rule that had been absorbed into the Massachusetts statute prohibiting traveling armed.¹⁵⁵ If one armed oneself contrary to a legal prohibition and a genuine threat existed, and "[i]f such a state of facts were clearly proven," he opined, it would "clearly be said to fall within that class of cases in which the previously existing common law interpolates exceptions upon subsequently enacted statutes."¹⁵⁶ Dillon concluded that as far as the right to carry went, states might regulate this practice and prohibit it entirely as long as the common law self-defense exception was recognized. Dillon's summary of the state of the law in the era of the Fourteenth Amendment is hard to reconcile with the views of pro-gun scholars such as Volokh and O'Shea. "Every state," Dillon wrote, "has power to regulate the bearing of arms in such manner as it may see fit, or to restrain it altogether."¹⁵⁷

150. John Forrest Dillon, *The Right to Keep and Bear Arms for Public and Private Defense*, 1 CENT. L.J. 259 (1874).

151. See generally JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW (7th ed. 1882).

152. See *id.*; see also Dillon, *supra* note 149.

153. *Andrews v. State*, 50 Tenn. 165, 188 (1871).

154. Dillon, *supra* note 149, at 286.

155. See *id.*; see also OR. REV. STAT. § 16.17 (1855).

156. See Dillon, *supra* note 149, at 286.

157. See Dillon, *supra* note 149, at 296; see also BISHOP, *supra* note 150.

**CONCLUSION: THE PAST AND FUTURE OF THE RIGHT TO CARRY
ARMS OUTSIDE THE HOME**

In attempting to fashion a workable firearms jurisprudence in the post-*Heller* era, judges are likely to continue to consult history, and therefore face all of the problems that have been identified by *Heller's* critics on the left and right.¹⁵⁸ The claim that there was a broad consensus in Antebellum law on a right to carry openly mistakenly equates a distinctively Southern tradition of permissive carry with the existence of a larger constitutional consensus on this question.¹⁵⁹ The dominant legal tradition in America was not open carry, but quite the opposite. A broad range of restrictions on the use of arms in public, including bans on the right to carry in public, emerged in the decades after the adoption of the Second Amendment. Rather than look to the slave South as the foundation for crafting “an analytical framework” for the post-*Heller* era, judges would do better to look to the North and the Massachusetts model. Robust regulation, including bans on traveling armed, are clearly constitutional and consistent with *Heller's* recognition of long standing historical traditions of arms regulation in America.¹⁶⁰

158. For a discussion of the problems with courts ignoring professional historians in favor of advocacy scholarship, see Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 272-73 (2008) and Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 38–40.

159. See *Nunn v. State*, 1 Ga. 243 (1846).

160. See *Woollard v. Sheridan*, No. L-10-2068, 2012 U.S. Dist. LEXIS 28498 (D. Md. Mar. 2, 2012) (targeting a law derivative of the Massachusetts model); see also MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (West 2011) (“[T]he Secretary shall issue a permit within a reasonable time to a person who the Secretary finds . . . has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.”).