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Constitutional Mischiefs and Constitutional Remedies: Making Sense of Limits on the Right to Keep and Bear Arms in the Founding Era

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CONSTITUTIONAL MISCHIEFS AND CONSTITUTIONAL REMEDIES: MAKING SENSE OF LIMITS ON THE RIGHT TO KEEP AND BEAR ARMS IN THE FOUNDING ERA

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INTRODUCTION

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court adopted a text, history, and tradition modality to adjudicate Second Amendment claims.[1] Lower courts have struggled to apply *Bruen*'s framework and have grappled with the difficulty of evaluating historical sources, competing narratives about the Founding era, silences in the historical record, and the problem of analogizing Founding-era laws to modern statutes.[2] This Article offers some much-needed historical context

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1. 597 U.S. __, 142 S. Ct. 2111 (2022).

2. *See* United States v. Bullock, No. 3:18-CR-165-CWR-FKB, slip op. at 4 (S.D. Miss. June 28, 2023), https://s3.documentcloud.org/documents/23863670/reeves-order.pdf [https://perma.cc/5D3U-F9ZA].

for understanding the interpretive issues posed by *Bruen*, and it offers some insights into the nature of the Founding era's views of gun rights and gun regulation. The key to unlocking the historical meaning of the Second Amendment's text is recovering the interpretive assumptions and methods that lawyers would have used to read the text in 1791 and applying those assumptions to the historical reality Americans faced in the early years of the Republic.[3] In addition to canvassing the statutory history of gun regulation, it is vital to recover the way common law practices, including peace bonds, were used to preserve the peace.[4] Moreover, one must acknowledge the silences in the historical record. These silences are in some cases artifacts of the nature of historical archives and document preservation, and in other instances are a consequence of a dearth of research in this field.[5] Finally, some silences reflect the fact that early America was a pre-industrial and agrarian society and simply did not face many of the gun violence problems that plague modern America.[6] Given these facts, it is not surprising that Founding-era legislatures addressed problems they confronted and did not legislate to remediate problems they could not have foreseen.[7]

Finally, *Bruen*'s methodology requires judges to distinguish between the actual history necessary to understand early American constitutionalism and a series of myths about guns and regulation that were created by later generations to sell novels, movies, and guns themselves.[8] Unfortunately, many of these myths continue to cloud legal discussions of American gun policy and Second Amendment jurisprudence.[9]

This Article situates legal conceptions of the right to keep and bear arms in the context of Founding-era views of rights. Understanding how the

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3. *See* Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 721 (2013).

4. *See generally* Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & CONTEMP. PROBS. 11 (2017) (discussing peace bonds and other common law methods for keeping the peace).

5. *See* ZACHARY M. SCHRAG, THE PRINCETON GUIDE TO HISTORICAL RESEARCH 323 (Peter Dougherty et al. eds., 2021).

6. *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023) (manuscript at 55–61). *See generally* Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 101 (2023).

7. *See* RANDOLPH ROTH, AMERICAN HOMICIDE 56, 315 (2009); *see also* Kevin M. Sweeney, *Firearms Ownership and Militias in Seventeenth and Eighteenth Century England and America*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT (Jennifer Tucker et al. eds., 2019).

8. *See* PAMELA HAAG, THE GUNNING OF AMERICA: BUSINESS AND THE MAKING OF AMERICAN GUN CULTURE 389–97 (2016).

9. *See* RICHARD SLOTKIN, GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA 624–62 (1993); *see also* JOAN BURBICK, GUN SHOW NATION: GUN CULTURE AND AMERICAN DEMOCRACY 189 (2006).

Founding era conceptualized rights more broadly is vital to understanding the centrality of the peace to American law. The generation that wrote the Second Amendment sought to protect liberty and preserve the peace. Although regulation and liberty are often set against one another in modern legal theory, the two concepts were viewed as inextricably linked in Founding-era constitutionalism. Some modern commentators have erroneously treated the Second Amendment's prohibition on infringement of the right to keep and bear arms as essentially synonymous with the First Amendment's bar on abridging the rights it protects. But the Founding generation did not view these two terms as synonymous. Understanding the original meaning of infringement is therefore essential to making sense of *Bruen*.

Context is key to making sense of Founding-era gun regulations. Although it seems hard for many in modern America to fathom, the Founders did not confront an analogous problem to modern gun violence. The Founding generation faced a different problem: too few of the right type of guns needed to arm the militia. Analogies drawn from regulations enacted to deal with these so-called mischiefs pose problems for efforts to evaluate modern laws enacted in a time when there are more guns than people, and where violence and suicide are major public health problems. Drawing analogies from the historical record requires some degree of sophistication. One point emerges clearly from the historical record. The Founders had few constitutional qualms about disarming groups deemed dangerous. Nor did the Founding generation have qualms about disarming non-law-abiding citizens. The disarmament of the Quakers, one of the most peaceful groups in early America, demonstrates that violence was not the exclusive criterion for disarming persons. Finally, modern efforts to analogize the First and Second Amendments rest on a profound misunderstanding of the way the Founding era approached the protection of rights, including the core freedoms protected by the First Amendment.[10]

Not all history has the same value in modern legal inquiries — a point originalists have correctly emphasized. Still, it is nonetheless true that one must get this history right if one adopts an originalist approach to interpreting the Second Amendment.[11] One must canvass the relevant primary sources, secondary literature, and early American jurisprudence to arrive at an understanding of the scope of permissible regulation consistent with the Second Amendment and its various state analogues. It is also vital to understand the limits of the historical record and the silences in it.[12]

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10. *See infra* Part II.
11. *See supra* note 6 and accompanying text.
12. *See infra* Part II.

It is impossible to understand the meaning and scope of Second Amendment protections without understanding the way Americans in the Founding era approached legal questions and rights more generally. Working backward from modern case law and contemporary approaches to rights, as some courts have done, is inconsistent with originalism and precluded by *Bruen.*[13] Reading 18th-century legal texts historically means understanding the relevant background assumptions and interpretive rules used by lawyers, judges, and legislators in the Founding era.[14]

In contrast to most modern lawyers, the members of the First Congress who wrote the words of the Second Amendment and the American people who enacted that text into law were well schooled in English common law ideas.[15] In contrast to modern modes of statutory construction, statutes were read against the common law. One of the Founding era's leading jurists, Connecticut's Zephaniah Swift, summarized the rules of statutory construction guiding Founding-era lawyers:

> The common law is to be regarded in the construction of statutes, and three things are to be considered . . . . The old law, the mischief, and the remedy: that is, how the common law stood at the time of the making of the act; what the mischief was for which the common law did not provide[;] and what remedy the statute had provided for to cure the mischief[;] and the business of the judges is so to construe the act as to suppress the mischief and advance the remedy.[16]

No modern jurist has thought more deeply about the role of common law traditions in American law than Judge Guido Calabresi, whose gloss on the mischief rule is worth quoting at length:

> [T]exts must always be read in context, and context includes not only the whole of the statute (well addressed by the majority), but also the "mischief" the law was enacted to address. This is not the same as legislative history. It is significant that when English courts were not allowed to look at Hansard (the account of the laws' passage through

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13. A number of recent Second Amendment cases involving minors have worked backward from modern views of the rights of minors, typified by cases such as Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). For good illustrations of this backwards approach, see Worth v. Jacobson, No. 21-cv-1348, 2023 WL 3052730 (D. Minn., Apr. 24, 2023); Firearms Pol'y Coal. v. McCraw, 623 F. Supp. 3d 740 (N.D. Tex. 2022); Jones v. Bonta, 34 F.4th 704 (9th Cir. 2022); Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 14 F.4th 322 (4th Cir.), *vacated*, No. 19-2250, 2021 WL 4301564 (4th Cir. 2021); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. __, 142 S. Ct. 2111 (2022).

14. *See* Cornell, *supra* note 3, at 723–33.

15. *See* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 69–116 (2011); *see also* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

16. *See* 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 11 (1822).

> Parliament), they nevertheless could, and frequently did, consider the circumstances because of which a law was introduced and passed. That is, they considered the situational context and mischief. *See Gorris v. Scott*, (1874) 9 L.R. Exch. 125 (Eng.) (refusing to apply an order of the Privy Council to a mischief different from that which prompted the issuance of the order); *see generally Heydon's Case*, (1584) 76 Eng. Rep. 637 (Exch.) 638; 3 Co. Rep. 7a, 7b ("[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . .").[17]

Making sense of the history of regulation means grappling with the mischiefs that Founding-era law sought to remedy and understanding how they differ from those that confront legislators and courts today.[18]

Not every feature of English common law survived the American Revolution, but there were important continuities between English law and the common law in America.[19] Each of the new states, either by statute or judicial decision, adopted multiple aspects of the common law, focusing primarily on those features of English law that had been in effect in the English colonies for generations.[20]

In addition to understanding the role of common law, it is vital to recover the way rights themselves were understood in 1791.[21] Modern debate over the Second Amendment has operated in a profoundly

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17. *See* United States v. Aleynikov, 676 F.3d 71, 82–83 (2d Cir. 2012) (Calabresi, J., concurring). For Calabresi's views on the continuing relevance of common law modes of analysis, see generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

18. For some examples of ahistorical applications of *Bruen*'s method, see generally Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen, *Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023).

19. *See* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 393 (1968); *see also* MD. CONST., DECLARATION OF RTS., art. III. *See generally* Lauren Benton & Kathryn Walker, *Law for the Empire: The Common Law in Colonial America and the Problem of Legal Diversity*, 89 CHI.-KENT L. REV. 937 (2014).

20. *See* 9 JAMES T. MITCHELL & HENRY FLANDERS, STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801 29–30 (1903); *see also* FRANCOIS XAVIER MARTIN, A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 60–61 (1792); Commonwealth v. Leach, 1 Mass. 59, 60 (1804).

21. *See* Dan Edelstein, *Early-Modern Rights Regimes: A Genealogy of Revolutionary Rights*, 3 CRITICAL ANALYSIS L. 221, 233–34 (2016); *see also* GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S, 2 (2019); Victoria Kahn, *Early Modern Rights Talk*, 13 YALE J. L. & HUMANITIES 391, 393 (2001) (discussing how the early modern language of rights incorporated aspects of natural rights and other philosophical traditions). *See generally* Joseph Postell, *Regulation During the American Founding: Achieving Liberalism and Republicanism*, 5 AM. POL. THOUGHT 80 (2016) (examining the importance of regulation to Founding political and constitutional thought).

anachronistic fashion employing a simplistic dichotomy that fits the realities of the modern gun control debate, but has little explanatory power when applied to the 18th century.[22] The modern debate posits that the Second Amendment is either an individual right or a collective right.[23] But, this was not how rights were understood or discussed in 1791.[24] 18th century so-called rights talk operated in a framework that fused together civic republicanism, common law, and social contract theory.[25] Americans in the Founding era talked about alienable and unalienable rights, positive rights and natural rights.[26] One of the most ambitious efforts to formulate a typology for rights was written by one of the era's most respects jurists, St. George Tucker, who divided rights into four different categories: natural, social, civil, and political.[27] Thus, making sense of the original understanding of the right to keep and bear arms and the scope of permissible regulation requires setting aside modern assumptions and recovering a different way of thinking about rights and regulation.

Unalienable rights, such as conscience, were beyond the reach of government, but most other rights were alienable, a term derived from English property law.[28] All rights, including inalienable rights, the small body of rights that could not be alienated after entering civil society, were subject to regulation.[29] Social contract theory, including the Lockean ideas familiar to the Founding generation, recognized the broad scope of government authority to regulate conduct in a manner consistent with the rule of law and the ideals of representative government.[30] According to this view, one exchanged the primitive and typically unfettered rights enjoyed in a state of nature for the more limited, but ultimately more secure, rights

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22. *See* Saul Cornell, *New Paradigm for the Second Amendment*, *22* L. & HIST. REV. 161, 161 (2004).

23. *See* Saul Cornell, *"Half Cocked": The Persistence of Anachronism and Presentism in the Academic Debate Over the Second Amendment*, 106 J. CRIM. L. & CRIMINOLOGY 203, 206 (2016).

24. *See id.* (noting that the Second Amendment was not understood in terms of the simple dichotomies that have shaped modern debate over the right to bear arms); *see also* Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 L. & CONTEMP. PROBS. 31, 32–33 (2020).

25. *See generally* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985).

26. *See* ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 145 n.42 (1803).

27. *See id.*

28. *See* Campbell, *supra* note 24, at 45.

29. *See id.*

30. *See id.* at 34–35.

enjoyed under the rule of law.[31] In this scheme, natural rights could not be abrogated, but this did not mean they were not subject to robust regulation.[32] Indeed, the enjoyment of retained natural rights depended on the political stability and legal certainty provided by government and the rule of law.

Self-defense, often described as the foundation of natural rights more broadly, was virtually unlimited in the state of nature.[33] Individuals traded this conception of the right of self-defense for a more secure variant instantiated in the common law as modified by statute.[34] Thus, in the state of nature there was no duty to retreat when confronted by an aggressor, but under common law individuals faced with a threat had a duty to retreat, except for a few well defined exceptions, most notably the castle doctrine.[35]

Federalist Oliver Ellsworth noted in his important *Landholder* essays published during ratification that liberty was often confused with licentiousness, a threat to freedom as great as tyranny. "[I]n the mouths of some," he wrote, liberty "means any thing, which will enervate a necessary government, excite a jealousy of the rulers who are our own choice, and keep society in confusion for want of a power sufficiently concentered to promote its good."[36]

Nor was this view of rights one held exclusively by Federalists. Sacrificing some measure of one's liberty to promote the public good was deemed essential to the survival of republican government.[37] The Anti-Federalist author who took the name an "Old Whig," made this point forcefully: "[i]f, indeed, government were really strengthened by such surrender" of rights, and "if the body of the people were made more secure, or more happy by the means, we ought to make the sacrifice."[38] Given *Bruen*'s emphasis on using Founding-era firearms statutes for interpreting the scope of permissible regulation today, an appreciation of the mischiefs

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31. *See id.*

32. *See id.*

33. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *126.

34. *See* Guyora Binder, *Homicide*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 702, 710 (Marcus Dubber & Tatjana Hörnle, eds., 2014). On the castle doctrine, see generally RICHARD BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1992).

35. The castle doctrine, the idea that the duty to retreat from aggression that exists in public does not apply to attacks in the home was articulated in *Semayne v. Gresham* (1604) 5 Co Rep 91 ('*Semayne's Case*') ("the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose[.]").

36. Oliver Ellsworth, *A Landholder: The Letters: I–V, VIII*, *in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787–1788, 292 (Colleen A. Sheehan & Gary L. McDowell eds.,1998).

37. *See* Paul Finkelman, *Complete Anti-Federalist*, 70 CORNELL L. REV. 182, 190 (1984).

38. 3 THE COMPLETE ANTI-FEDERALIST 49 (Herbert J. Storing ed., 1981).

Founding-era laws were intended to remedy is vital.[39] Understanding the context in which gun regulations were accomplished through common law mechanisms, and not statutory regulation, is therefore indispensable in implementing *Bruen*'s approach.[40]

I. WELL REGULATED LIBERTY AND THE PRESERVATION OF THE PEACE

No legal principle was more important to the common law than the concept of the peace.[41] As one early American justice of the peace manual noted: "the term peace, denotes the condition of the body politic, in which no person suffers, or has just cause to fear any injury[.]"[42] Blackstone, a leading source of early American views about English law, opined that the common law "hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society."[43] Any approach to the Second Amendment that ignores the importance of the peace to Founding-era constitutional and legal thought is therefore profoundly anachronistic.[44]

Early American constitutionalism not only drew on common law but built on Lockean social contract theory, a fact evident in many early state constitutions.[45] Thus, Pennsylvania, the first state to assert a right to bear arms, also unambiguously preceded the statement of that principal with an assertion closely tracking Locke: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."[46] The right of self-defense and property rights were each viewed as fundamental, inalienable, and foundational in the Founding era.[47]

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39. *See generally* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

40. The mischief rule was advanced in *Heydon's Case* (1584) 76 E.R. 637. For Blackstone's articulation of the rule, see BLACKSTONE, *supra* note 33, at *61. The relevance of common law modes of statutory construction to interpreting antebellum law, including the mischief rule, is clearly articulated in ZEPHANIAH, *supra* note 16, at 11.

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

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

43. BLACKSTONE, *supra* note 33, *349.

44. *See generally* EDWARDS, *supra* note 41.

45. *See generally* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (Rita Kimber & Robert Kimber trans.,1980).

46. 5 FEDERAL AND STATE CONSTITUTIONS 3082–83, (Francis Newton Thorpe ed., 1909) (reprinting Pennsylvania Constitution Art. IX). *See generally* ADAMS, *supra* note 45.

47. *See* Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO J. L. & PUB. POL'Y 568, 577 (2017).

Although the right associated with property and self-defense could not be alienated (a term that was itself derived from English property law), both rights were subject to regulation.[48]

Finally, it is impossible to understand Founding-era law without some appreciation for the continuing importance of Whig republican ideas, including the notion of civic virtue. Few Americans envisioned America becoming a Christian Sparta. Among Federalists, however, including those who feared that "[e]nlightened statesmen will not always be at the helm" of the new American republic, there was a recognition that some level of virtue was necessary for liberty and republicanism to flourish.[49] Thus, James Madison reminded delegates to the Virginia ratification convention of this fact:

> I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us?–If there be not, we are in a wretched situation. No theoretical checks– no form of Government, can render us secure. To suppose that any form of Government will secure liberty or happiness without any virtue in the people, is a chimerical idea.[50]

Consider a series of toasts by Vermonters offered up the very same year that the Second Amendment was written and enacted. Of the 14 toasts on this occasion, four expressly invoked the idea of virtue as indispensable to American republicanism. One toast praised the militia of Vermont by declaring "may military genius aid the virtue of citizens — and the virtues of citizens dignify military genius."[51] The notion that one can understand 18th-century views of the right to bear arms without some appreciation for the role of virtue in Founding-era Constitutional thought is, as Madison correctly noted, chimerical. The real question is not the relevance of virtue to American Constitutional thought in this period, but rather how one can translate this 18th-century ideal in terms that make sense today.[52] In the context of the Second Amendment, does virtue mean non-violent, law abiding, or something else?

American law, in the Founding era, was not committed to a modern libertarian ethos opposed to regulation, it sought to protect a different ideal, ordered liberty. Rights and regulation are often cast as antithetical in the modern gun debate, but the Founding generation saw the two goals as

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48. *See* Postell, *supra* note 21, at 92 (examining the importance of regulation to Founding political and constitutional thought).

49. THE FEDERALIST NO. 10 (James Madison).

50. James Madison, Speech in the Virginia Convention 4 (June 20, 1788).

51. *Bennington, January 17*, N.Y. J. & PATRIOTIC REGISTER, Feb. 3, 1791.

52. *See generally* Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015).

complimentary.[53] The key insight derived from taking the Founding-era conceptions of rights seriously and applying the original understanding of the Founding era's conception of liberty is the recognition that regulation and liberty are both hard wired into the Amendment's text.[54] The inclusion of rights guarantees in Founding era constitutional texts was not meant to place them beyond the scope of legislative control.[55]

Rather than limiting rights, regulation was the essential means of preserving rights, including self-defense.[56] As one patriotic revolutionary era orator observed, almost a decade after the adoption of the Constitution: "True liberty consists, not in having *no government*, not in a *destitution of all law*, but in our having an equal voice in the formation and execution of the laws, according as they effect [*sic*] our persons and property."[57] By allowing individuals to participate in politics and enact laws aimed at promoting the health, safety, and well-being of the people, liberty flourished.

"Constitutional rights," Justice Scalia wrote in *Heller*, "are enshrined with the scope they were thought to have when the people adopted them[.]"[58] The most basic right of all in Founding-era constitutionalism was the right of the people to regulate their own internal police.[59] Although modern lawyers and jurists are accustomed to thinking of state police power, the Founding

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53. *See generally* LEONARD & CORNELL, *supra* note 21, at 2.

54. *See generally* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998) (examining neo-Roman theories of free citizens and how it impacted the development of political theory in England); THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND (Barry Alan Shain ed., 2007) (discussing how the Founding generation approached rights, including the republican model of protecting rights by representation); Kahn, *supra* note 21 (discussing how the early modern language of rights incorporated aspects of natural rights and other philosophical traditions); *see also* Edelstein, *supra* note 21, at 233–34.

55. Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928*, 55 U.C. DAVIS L. REV. 2545, 2551 (2022); *see* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 527 (2019) ("The point of retaining natural rights," originalist scholar Jud Campbell reminds us "was not to make certain aspects of natural liberty immune from governmental regulation. Rather, retained natural rights were aspects of natural liberty that could be restricted only with just cause and only with consent of the body politic.") (emphasis in original); *see generally* Cornell, *supra* note 22, at 206.

56. *See generally* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85 (2017).

57. Joseph Russell, *An Oration; Pronounced in Princeton, Massachusetts, on the Anniversary of American Independence, July 4, 1799*, OXFORD TEXT ARCHIVE 7 (July 4, 1799) (text available in the Evans Early American Imprint Collection), https://ota.bodleian.ox.ac.uk/repository/xmlui/bitstream/handle/20.500.12024/N27201/N27201.html?sequence=5&isAllowed=y [https://perma.cc/2DTB-RXJX].

58. District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008). *See generally* Christopher Tomlins, *Necessities of State: Police, Sovereignty, and the Constitution*, 20 J. POL'Y HIST. 47 (2008).

59. *See generally* Aaron T. Knapp, *The Judicialization of Police*, 2 CRITICAL ANALYSIS L. 64 (2015) (explaining the transformation of the Founding era's ideas about a "police right" into the more familiar concept of "police power"); Tomlins, *supra* note 58, at 47.

generation viewed this concept as a right, not a power. The first state constitutions clearly articulated such a right — including it alongside more familiar rights.[60] Pennsylvania's Constitution framed this estimable right succinctly: "That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."[61] Although Justice Scalia's observation on the scope of the right to bear arms has figured prominently in recent Second Amendment jurisprudence, the equally important right of the people to regulate their internal police has not been similarly acknowledged by many lower courts. The history of gun regulation in the decades after the right to bear arms was codified in both the first state constitutions and the federal bill of rights underscores this key point. The right to bear arms was seldom interpreted, outside of a few outlier cases in the slavery South, as precluding robust regulation of arms and gun powder.[62]

II. THE ORIGINAL UNDERSTANDING OF INFRINGEMENT

Despite invocations of the importance of text, courts have consistently misread the plain language of the text of the Second Amendment. In *Bruen*, Justice Thomas wrote that the Second Amendment issued an "unqualified command."[63] A stop sign is an example of an unqualified command. It is puzzling that anyone reading the text of the Second Amendment would conclude that it reads like a stop sign, effectively prohibiting we the people from passing laws to deal with the ravages of gun violence. To support his dubious claim, Thomas did not cite any evidence from the Founding era but offered a short footnote to a celebrated modern First Amendment case that had nothing to do with guns or the Second Amendment.[64] Citing the First Amendment to support claims about the Second Amendment has become common among gun rights advocates and their allies on the bench and in the

60. *See* PA. CONST., ch. I, art. III; MD. CONST. art. IV; N.C. CONST. art. I, § 3; VT. CONST. art. V.

61. PA. CONST., ch. I, art. II.

62. This asymmetry is not only inconsistent with Founding-era conceptions of law and constitutionalism, but also not consistent with *Heller*, a point that Chief Justice Roberts and Justice Kavanaugh have each asserted in their interpretations of *Heller* and subsequent jurisprudence. In short, an asymmetrical approach to gun rights and regulation, favoring the former over the latter is precluded by *Heller* and not consistent with *Bruen*'s focus on text, history, and tradition.

63. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2126 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

64. *Id.*

legal academy.[65] Yet, text, history, and tradition offer little support for treating the First and Second Amendments the same way.

The two amendments share little in common in terms of their language and structure. Crucially, the First Amendment speaks of "abridging," a term that Founding-era dictionaries define as reduction or diminishment.[66] The same dictionaries make clear that infringe was not a synonym for abridge. Infringement did not mean diminish, it meant destroy or break. So, while the First Amendment precluded regulation that diminishes the rights it protects, the Second Amendment sets up a different metric. The people themselves, acting through their legislatures, may regulate the right to keep and bear arms, provided they do not destroy it or render it nugatory.

Even more troubling, the argument made by Justice Thomas for his unqualified command theory of the Second Amendment is not supported by the case law he cites.[67] Getting the history wrong is bad, but misquoting and misreading landmark modern cases is an order of magnitude worse. Rather than accept that the First Amendment is an unqualified command, the Court in *Konigsberg v. State Bar of California* concluded that even this venerated right was not unlimited in scope; this case is a textbook example of the theory of interest balancing that *Bruen* expressly rejected.[68] Rather than confirm his theory, his own evidence, drawn from modern case law rather than Founding-era sources, undercuts his argument.

Founding-era dictionaries make it clear that "abridge" and "infringe" were not synonymous. Richard Burn's influential 18th-century legal dictionary illustrated the concept of infringement by discussing the differences between the anarchic liberty associated with the state of nature and the well-regulated liberty associated with civil society and the rule of law.[69] Liberty, according to Burns, was not identical to the so-called wild and savage liberty of the state of nature.[70] True liberty, by contrast, only existed when individuals created civil society and enacted laws and regulations that promoted *ordered* liberty.[71] Regulation was therefore not understood to be an "infringement"

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65. *See generally* David Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014). *But see generally* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012) (critiquing this approach); Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 TEX. L. REV. 137 (2013).

66. U.S. CONST. amend. I; MARGIE BURNS, COMMON SENSE IN THE SECOND AMENDMENT: EIGHTEENTH-CENTURY ENGLISH AND THE U.S. BILL OF RIGHTS 11–12 (2020).

67. *See Bruen*, 142 S. Ct. at 2125–26, 2129–30.

68. 366 U.S. 36, 72 (1961).

69. 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY: INTENDED FOR GENERAL USE, AS WELL AS FOR GENTLEMEN OF THE PROFESSION 436–38 (1792).

70. *Id.*

71. *Id.*

of the right to bear arms, but rather the necessary foundation for the proper exercise of that right as required by the concept of ordered liberty.[72] In short, when read with the Founding era's interpretive assumptions and legal definitions in mind, the text of the two Amendments set up very different frameworks for thinking about the rights they protect. Members of the Founding generation would have understood that legislatures could regulate the *conduct* protected by the Second Amendment and comparable state arms bearing provisions if such regulations did not negate the underlying *right*. In fact, without robust regulation of arms, it would have been impossible to implement the Second Amendment and its state analogues.[73] In keeping with the clear public meaning of the Second Amendment's text and comparable state provisions, early American governments enacted laws to preserve the rights of law-abiding citizens to keep and bear arms and promote the equally vital goals of promoting public safety.[74]

There was broad agreement among the Founding generation that prior restraints on publication were prohibited by the First Amendment and its various state analogues.[75] By contrast, a variety of prior restraints were permissible on the right to keep and bear arms.[76] The most important example of these restraints were the many loyalty oaths imposed on citizens that led to widespread disarmament of Loyalists and others.[77] Failing to sign such oaths did not abrogate core First Amendment-type freedoms, but they did impact the right to bear arms.[78] The differences between the regulation of speech and arms bearing in the Founding era were significant. Government could not compel speech, but the many militia laws make it clear that government could force individuals to bear arms, another profound difference between the First and Second Amendments.[79]

III. REGULATING ARMS IN AN ERA OF RELATIVE GUN SCARCITY AND LOW LEVELS OF GUN HOMICIDE

Although it is hard for many modern Americans to grasp, there was no comparable societal ill to the modern gun violence problem for Americans to solve in the era of the Second Amendment. A combination of factors —

72. *Id.*

73. *See* Cornell, *supra* note 55, at 2591.

74. *Id.* at 2554–55, 2569.

75. *See* Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 234–36 (1999).

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

including the nature of firearms technology and the realities of living life in small, face-to-face, and mostly homogenous rural communities that typified many parts of early America — militated against the development of such a problem.[80] In contrast to modern America, homicide was not the problem that government gun policy needed to address at the time of the Second Amendment.[81]

Much of the post-*Bruen* writing about the Second Amendment, from judges, lawyers, and gun rights activists both in and out of the legal academy, succumbs to the "fallacy of presumptive continuity."[82] It assumes that the Founding generation must have been concerned with the same problems that confront modern Americans: gun violence.[83] The Second Amendment and comparable state arms-bearing provisions enacted in the Founding era responded to the concerns of American's dealing with 18th-century issues, not an epidemic of gun violence.

The specter of gun violence hovers over today's debate of the Second Amendment, but recent historical scholarship has demonstrated that this was not the case in the Founding era. Gun homicide, mass shootings, and suicide, the three forms of gun violence that dominate the modern gun debate, were simply not problems for those who enacted the Second Amendment. Historian Randy Roth's work on homicide is critical in this regard.[84] Roth's pioneering research demonstrates that guns were not the weapon of choice for those with evil intent in the Founding era. Black powder, muzzle-loading weapons, were too unreliable and took too long to load to make them effective tools of homicide and most crimes of passion. Given this fact it is easy to understand why modern discussions of guns and individual self-defense were so rare in Founding-era public debate. More importantly, it is vital to understand silences in the historical record. Simply compiling a spreadsheet of gun laws from the Founding era, as one federal judge requested, tells us only part of the story because one must also understand the silences in the record, which are vital to implementing *Bruen*'s framework.[85]

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80. *See* ROTH, *supra* note 7, at 56, 315; *see generally* Darrell A. H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. DAVIS L. REV. 2495 (2022).

81. *See* ROTH, *supra* note 7, at 56, 315; *see generally* Miller & Tucker, *supra* note 80.

82. DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 154 (1970).

83. *See id.*

84. *See generally* ROTH, *supra* note 7.

85. *See generally* Terry Cook, *The Archive(s) Is a Foreign Country: Historians, Archivists, and the Changing Archival Landscape*, 74 AM. ARCHIVIST 600 (2011); *Miller v. Becerra*, COURTLISTENER (Sept. 30, 2023), https://www.courtlistener.com/docket/16069141/miller-v-becerra/ [https://perma.cc/5H8W-72EF] ("Minute Entry for proceedings held before Judge Roger T. Benitez: Status Conference

If homicide was not the primary motivation for adopting early arms bearing provisions, what fears and hopes did shape those debates? The first point to recognize is that most of the first state constitutions did not even include arms bearing provisions.[86] In fact, fears of standing armies, civilian control of the militia, and the need for a well-regulated militia appeared more frequently than the right to bear arms in these early constitutional texts.[87] When the right to bear arms was expressly protected, states also typically affirmed a right to not bear arms. This last right has largely disappeared from the modern debate over arms bearing even though it was among the most widely discussed issues pertaining to the arms bearing in the Founding era.[88]

The original understanding of the right to keep and bear arms responded to the realities of colonists who were living on the edge of the British empire, surrounded by rival European powers and powerful Indian nations[89] committed to protecting their land against further colonial settler encroachment. Additionally, guns were vital to maintain the system of chattel slavery in much of America.[90] Thus, colonial gun culture and gun regulations were dominated by these public policy imperatives, not modern

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held on 12/12/2022. The state defendants shall create, and the plaintiffs shall meet and confer regarding, a survey or spreadsheet of relevant statutes, laws, or regulations in chronological order. The listing shall begin at the time of the adoption of the Second Amendment and continue through twenty years after the Fourteenth Amendment. For each cited statute/law/regulation, the survey shall provide: (a) the date of enactment; (b) the enacting state, territory, or locality; (c) a description of what was restricted (e.g., dirks, daggers, metal knuckles, storage of gunpowder or cartridges, or use regulations); (d) what it was that the law or regulation restricted; (e) what type of weapon was being restricted (e.g., knife, Bowie Knife, stiletto, metal knuckles, pistols, rifles); (f) if and when the law was repealed and whether it was replaced; (g) whether the regulation was reviewed by a court and the outcome of the courts review (with case citation). Defendants may create a second survey covering a time period following that of the first list. If opposing parties cannot agree on the inclusion of a particular entry on the survey, the disagreement shall be indicated and described on a separate list. The survey list shall be filed within 30 days. Parties may file a brief up to 25 pages within 30 days thereafter focusing on relevant analogs.").

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

87. *See id.*

88. *See* Joseph Blocher, *The Right Not to Keep or Bear Arms*, *64* STAN. L. REV. 1, 48 (2012).

89. The terms used to describe the tribal populations of North America follows the usage recommended by legal historian Gregory Ablavsky, who offers this sage advice: "the term 'Indian' as a term of art for individuals either historically labeled as 'Indians' by Anglo-Americans or, in the present, legally defined as 'Indian' by the federal government." Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1028 n.1 (2018). By contrast, "the term 'Native' to describe the indigenous peoples of North America and their descendants" is best applied to these peoples in all other contexts. *Id.*

90. *See* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 308, 335 (1998).

style gun violence. In the idiom of the Founding era, the so-called mischiefs to be remedied were controlling the enslaved population, arming for the internecine warfare with Indian Nations, and collective defense in preparation for inter-imperial warfare triggered by the geopolitical struggles among England, France, and Spain.[91] A well-regulated, well-armed, and well-disciplined colonial militia was vital to the survival of colonial Americans living on the margins of the British empire. In an age without police forces, where Britain's navy and army were not readily available to deal with sudden threats to the peace, a well-regulated militia was indispensable to colonial safety.[92]

The American Revolution did not eliminate slavery in the plantation South, nor did it reduce the ongoing conflict with Indian nations, but it did reduce some, but certainly not all, of the pressure posed by the geopolitical rivalries of the colonial era.[93] France had been neutralized in Quebec, but Spain's extended empire still threatened America's southern border.[94] Still, the creation of a new nation-state with the capacity to raise an army and draw on state militias when necessary solved one of the military problems of the colonial era.[95]

Solving one of the problems faced by colonists, this created a new threat in the eyes of many. The creation of a more powerful central government with the powers to tax and raise an army was a two-edged sword. A federal army and federal control over the militia prompted alarm among those fearful of ceding too much power to a distant government too far removed from the people and the local elites in control of state politics.[96] A new issue confronted the nation: how to maintain the balance of power in the new federal system created by the Constitution.[97]

Although the militia's future prompted considerable commentary during ratification, there was little discussion of the right that animates modern debates over the Second Amendment: individual self-defense. The absence of such discussions did not mean Americans did not value this ancient right entrenched in the common law. Nor did it mean that American law made no

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91. *See* Brian DeLay, *The Myth of Continuity in American Gun Culture* 16, 17, 79–83 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4546050 [https://perma.cc/TUS4-4KQX] (analyzing how the precariousness of colonial life led Americans to arm themselves at higher levels than Britons in other parts of the United Kingdom).

92. *See id.* at 16 n.62.

93. *See id.* at 13–17, 79–83.

94. *See id.* at 13–17.

95. *See generally* MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE 1783–1867 (2014).

96. *See* Cornell, *supra* note 75, at 234.

97. *See* DeLay, *supra* note 91, at 88; *see generally* LEONARD & CORNELL, *supra* note 21.

provision to protect this estimable right. Independence did not fundamentally alter the scope or importance of the common law right of self-defense, a retained natural right that had been modified by English law over the course of a millennium. Indeed, the legal understanding of this right was so well established in Anglo-American law that John Adams was able to use it as the basis for his defense of the soldiers accused of homicide in the Boston Massacre case.[98] Despite the fact that Adams faced a hostile jury in a venue that was intensely anti-British, he won acquittals based on this venerated English legal doctrine.[99] The conflation of the right to bear arms and the common law right of self-defense remains a serious problem in modern Second Amendment scholarship and jurisprudence. By failing to situate the Founders' understanding of the right to keep and bear arms in the context of 18th-century social contract theory and the common law view of self-defense, modern gun rights ideology has consistently misinterpreted the Second Amendment and its state analogs.[100]

Recent historical research has illuminated the nature of Founding-era gun culture and the history of regulation.[101] There was no analogue to the types of gun violence that plague modern America.[102] The generation that wrote and enacted the Second Amendment and the analogous provisions in state constitutions faced a problem quite unalike the one modern legislatures face. Today, America confronts a firearms market that is awash with guns. The range of weapons available, their lethality, and relative reliability would have astonished the Founding generation. The black powder muzzle loading weapons that predominated in the era of the Second Amendment thus share few features with today's guns. Founding-era consumer preferences are also dissimilar from modern America. Government policies in the Founding era did not need to discourage the acquisition of especially lethal guns. The Founders faced an altogether different problem. At the time of the Second Amendment, Americans wanted guns useful to life in an agrarian society where most families were farmers. Nobody bayoneted turkeys, and a pair of polished dueling pistols were of limited utility for anyone outside of a small

98. *See generally* HILLER B. ZOBEL, THE BOSTON MASSACRE (1970).

99. *See generally* STEPHEN G. KURTZ, *Adams' Argument for the Defense in* 3 THE ADAMS PAPERS: LEGAL PAPERS OF JOHN ADAMS, CASES 63 AND 64: THE BOSTON MASSACRE TRIALS CHRON. 242–70 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

100. *See* Campbell, *supra* note 24, at 48–51. *See generally* Cornell, *supra* note 23. As Reva Siegel notes, "[t]here is more evidence in the majority opinion establishing the existence of a common law right of self defense than there is demonstrating that such a right was constitutionalized by the Second Amendment's eighteenth-century ratifiers." Reva Siegel, Heller *and Originalism's Dead Hand*, 56 UCLA L. REV. 1399, 1415 (2019).

101. *See* Miller & Tucker, *supra* note 80, at 2509.

102. *See* ROTH, *supra* note 7, at 56, 315.

elite group of wealthy, powerful, and influential men, as the tragic fate of Alexander Hamilton so vividly illustrates.[103]

The ongoing problem of arming the militia persisted during the Founding era. A census of state militias during Jefferson's presidency revealed that less than half the militia-eligible population owned a working military-quality musket.[104] The problem Americans faced at the time of the Second Amendment was not too many guns, but too many of the wrong type of guns. Americans were far better armed than their British ancestors, but the guns most Americans owned and desired were those most useful for life in an agrarian society: fowling pieces and light hunting muskets with only limited utility on the battlefield.

Limits of Founding-era firearms technology also militated against the use of guns as tools of impulsive violence. Gun policy in the Founding era reflected these social, economic, and technological realities, and accordingly, one must approach any analogies drawn from this period's regulations with some caution when applying them to a modern heterogenous industrial society capable of producing a bewildering assortment of firearms whose lethality would have been almost unimaginable to the Founding generation.[105] Put another way, laws created for a society without much of a gun violence problem enacted at a time of relative gun scarcity have limited value in illuminating the challenges Americans face today.

It is worth recalling that sheriffs, constables, and other agents responsible for enforcing the peace did not carry firearms in the Founding era.[106] Even after the creation of modern-style police forces in the next century, no city routinely armed their officers with firearms. The Boston police force on the eve of the Civil War owned fewer than ten pistols.[107]

Modern gun rights ideology has inverted Founding-era thought. Today, gun rights advocates claim individual gun ownership is the foundation for the right to bear arms and makes it possible to have an armed population.[108] In the Founding era, the opposite was the case. The need for an armed population meant that individual gun ownership had to be encouraged and

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103. *See id.* at 161, 181.

104. *See* Sweeney, *supra* note 7, at 54–66.

105. *See* Miller & Tucker, *supra* note 80, at 2510–11.

106. *See, e.g.*, Cornell, *supra* note 55, at 2570–91 (discussing Massachusetts and Alabama).

107. *See id.* at 2590.

108. *See* Saul Cornell, *Founding Fantasies vs. Historical Realities in the Second Amendment Debate*, DUKE CTR. FOR FIREARMS L. (July 27, 2023), https://firearmslaw.duke.edu/2023/07/founding-fantasies-vs-historical-realities-in-the-second-amendment-debate/ [https://perma.cc/H6AT-JE7A].

this created an additional self-defense dividend for Americans who were free to use these weapons for any lawful purpose, including self-defense.[109]

In a remarkable address to the Society of Black Friars in New York, Samuel Latham Mitchell, a physician, scientist, and Jeffersonian politician, captured the way many in the Founding era understood the complex connections between the militia and self-defense. Understanding this constitutional logic is essential to accurately reconstruct the historical meaning and scope of the right to bear arms.[110] Mitchell's analysis described America as a well-armed society, a fact that was dictated by the centrality of the militia to American life.[111] Mitchell praised the right of self-defense, but he interpreted it as a dividend that flowed from America's commitment to a well-regulated militia.[112] It is worth considering Mitchell's framing of the way the militia, the right to keep and bear arms, and the right of self-defense were seamlessly integrated in his thinking because it shows how the modern debate has inverted the Founding era's understanding of the connections between these three constitutional ideas:

> The ESTABLISHMENT OF A MILITIA, in which most able bodied and middle aged men are enrolled and furnished with arms, proceeds upon the principle, *that they who are able to govern, are also capable of defending themselves*. The keeping of arms, is, therefore, not only not prohibited, but is positively provided for by law; and these, when procured, shall not rust for want of employ, but shall be brought into use from time to time, that the owner may grow expert in the handling of them. The meeting together of the youth now and then to exercise in arms, and to discipline themselves for reviews . . . only remark the PRUDENCE OF THE PEOPLE is such that government is not afraid of putting arms into their hands, and of encouraging expertness in the use of them. These weapons serve for the defense of the life and property of the individual against the violent or burglarious attacks of thieves, a description of persons happily very small among us. They are ready at hand if need require, to suppress any mob or insurrection, which by the bye is a rare occurrence, that may threaten mischief within the government: and also, by their means security is afforded against foreign incroachment and invasion.[113]

Mitchell's account of the right to keep and bear arms flowed naturally from the necessity of a well-regulated militia. It also tracks the language of the Second Amendment perfectly. *Heller's* backwards interpretation of the

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109. *See id.*

110. *See generally* SAMUEL LATHAM MITCHELL, AN ORATION, PRONOUNCED BEFORE THE SOCIETY OF BLACK FRIARS, AT THEIR ANNIVERSARY FESTIVAL, IN THE CITY OF NEW-YORK, ON MONDAY, THE 11TH OF NOVEMBER (1793).

111. *See id.*

112. *See id.*

113. *Id.* at 27–28.

Amendment's language, literally reading the second clause first, turns Founding-era constitutional thought on its head. Mitchell affirmed that the right of self-defense, the pre-existing right that *Heller* conflated with the right to keep and bear arms, was distinct but the two rights were closely related and reinforced one another.[114]

Independence did add new concerns to the debate over the militia. The role of a well-regulated militia in checking potential over-reach by the federal government and the necessity of drawing on the militia of other states to put down enslaved person rebellions or agrarian insurrections by disgruntled farmers emerged as much more pressing concerns within a decade of the Second Amendment's enactment.[115] Attempting to characterize these pressing public concerns in terms of individual rights or collective rights, the simplistic modern dichotomy that has warped so much modern discussion of the Second Amendment, obscures, more than it illuminates, the original understanding of the right to bear arms.[116] The right asserted by the Second Amendment indisputably belonged to individuals, and it certainly reinforced the longstanding Anglo-American right of individual self-defense, but the main driving force behind the framing and adoption of the Second Amendment remained problems of collective security, not concerns about crime or personal security.

IV. *HELLER*'S COMMON USE TEST: AN INVENTED TRADITION

One of the biggest historical errors in *Heller* was its dubious claim that the right to bear arms was understood to cover all guns in common use in the Founding era.[117] The paramount goal of Founding-era gun laws was to do the exact opposite: force Americans to acquire guns they did not wish to own, but that government desperately needed them to acquire.[118] In marked contrast to today, government policy in the era of the Second Amendment aimed to encourage Americans to buy weapons they did not desire, not discourage them from purchasing guns they did desire.[119] Most Americans in the Founding era did not want military style weapons, they wanted tools for putting food on the table.[120] The firearms most useful for life in agrarian society were not heavy Brown Bess muskets with bayonet mounts, but light

114. For an elaboration of the constitutional logic of Mitchell's analysis, see Cornell, *supra* note 75.

115. *See* DeLay, *supra* note 91, at 33; LEONARD & CORNELL, *supra* note 21.

116. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 497–500 (2004).

117. District of Columbia v. Heller, 554 U.S. 570, 627–28 (2008).

118. Sweeney, *supra* note 7.

119. *See id.*

120. *See id.*

hunting muskets and fowling pieces.[121] Killing pests and hunting were the main concern of farmers, and their choice of firearm reflected these basic facts of life.[122] Indeed, pistols, the quintessential gun that *Heller* protects, were a tiny percentage of the firearms stock at the time of the Second Amendment.[123] Multiple studies have underscored this basic fact: long guns, not handguns, accounted for most arms in circulation.[124]

The source of this confusion about early American gun culture and the erroneous claim that guns in common all enjoyed the same level of legal protection is a poorly documented claim made by Justice Scalia's *Heller* opinion.[125] Scalia thoroughly trashed *United States v. Miller*, the controlling Second Amendment precedent from the New Deal era for its poor history.[126] Despite this fact, Scalia revived one of *Miller's* more egregious errors, rescuing one of its most problematic claims from the dust pile of history.[127] In *Heller*, Scalia claimed, without offering any convincing Founding-era evidence, that all guns in common use were protected by the Second Amendment.[128] This is the opposite of the historical reality that governed arms regulation and policy in the Founding era. Government policy sought to encourage Americans to acquire military quality muskets and punish those who failed to do so.[129]

Thus, militia statutes, one of the most frequently cited sources in modern adjudication, were not evidence of a modern-style rights claim, but were legal obligations imposed on individual households, an effort to transfer the cost of public defense to the people themselves.[130] The many state law provisions gave heightened protection for militia arms, but not the other guns most typically owned by Americans. Contrary to *Heller*'s unsupported claim, all guns were not created equal under state and federal law. In most states, only militia weapons enjoyed the highest level of constitutional protection. Privately owned guns unconnected to militia service were treated as ordinary property, no different than other non-essential home furnishings or furniture. To paraphrase *Bruen*, statutes that treated all guns equally were outliers at the time of the Second Amendment.[131] The table below lists the

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121. *See id.*
122. *See id.*
123. *See id.*
124. *See id.*
125. *See* District of Columbia v. Heller, 554 U.S. 570, 627–28 (2008).
126. *See id.* at 621–25.
127. *See id.* at 627 (citing United States v. Miller, 407 U.S. 174, 179 (1939)).
128. *Id.* at 627–28.
129. Sweeney, *supra* note 7.
130. Saul Cornell, *"Infants" and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record*, 40 YALE L. & POL'Y REV. 1, 18 (2021).
131. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2133, 2156 (2022).

legal treatment of various types of arms in debt proceedings and sales of goods for tax arrears.

FOUNDING-ERA LEGAL PROTECTIONS FOR MILITIA ARMS & PRIVATE GUNS IN DEBT PROCEEDINGS

State	Militia Arms Exempt from Seizure[*]	Private Guns Exempt from Seizure[**]
Connecticut	Yes	Yes
South Carolina	Yes	No
Virginia	Yes	No
Massachusetts	Yes	No
Pennsylvania	Yes	No
Delaware	Yes	No

[*] For examples of militia laws exempting military arms, see ROBERT WATKINS & GEORGE WATKINS, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA: FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1798, INCLUSIVE AND THE PRINCIPLE ACTS OF 1799, App'x no. XLIX, 816–17 (1800) ("And every citizen so enrolled, and providing himself with the arms, ammunition and accoutrements required, as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales for debt or for the payment of taxes."); *accord* Acts and Laws of the State of Connecticut, in America, 432 (1784); 2 LAWS OF THE STATE OF DELAWARE FROM THE FOURTEENTH DAY OF OCTOBER, ONE THOUSAND SEVEN HUNDRED, TO THE EIGHTEENTH DAY OF AUGUST, ONE THOUSAND SEVEN HUNDRED AND NINETY-SEVEN 1137 (1797); 2 Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807, with the Constitutions of the United States of America, and of the Commonwealth, Prefixed, 587 (1793); 3 Laws of the State of New York Passed at the Sessions of the Legislature, ch. 166, 453 (1801); Henry Flanders & James Mitchell, The Statutes at Large of Pennsylvania from 1682 to 1801, app'x XXXIV, 458 (1793); THOMAS HERTY, A DIGEST OF THE LAWS OF MARYLAND, LAWS OF THE DISTRICT OF COLUMBIA 173 (1804); CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE; TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES 258 (1805); WILLIAM PATERSON, LAWS OF THE STATE OF NEW-JERSEY 448 (1800); 2 FRANCOIS-XAVIER MARTIN, THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA 1800 (1804); PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS 55 (1798–1813); JOHN FAUCHERARAUD GRIMKÉ, THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 234 (1790); A Collection of All Such Acts of the General Assembly of Virginia, 290 (1792).

[**] In 1821, Pennsylvania passed an act "[t]o encourage domestic industry, and promote the comfort of the poor." The act sought to identify items essential to family life that ought to be exempt from seizure in debt proceedings. To aid them in formulating such a list the legislature compiled an "abstract of the provisions made by the acts of assembly in several of the states." Although virtually every state singled out militia arms for special enhanced legal protection, only two states extended the same protection to non-militia weapons. JOHN PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE THIRTIETH DAY OF MARCH, ONE THOUSAND EIGHT HUNDRED AND TWENTY-FOUR 270–71 (1824); An Act for Directing and Regulating the Levying and Serving of Executions, 1 PUBLIC STATUTE LAWS OF CONNECTICUT 280 (1808); 1 THE LAWS OF MARYLAND: 1692–1785 105 (1811).

State	Militia Arms Exempt from Seizure*	Private Guns Exempt from Seizure**
New Jersey	Yes	No
New York	Yes	No
Maryland	Yes	Yes
North Carolina	Yes	No
New Hampshire	Yes	No
Georgia	Yes	No
Rhode Island	Yes	No

V. FOUNDING-ERA DISARMAMENT LAWS

Early American governments enjoyed broad power to disarm those who posed a danger to society.[132] But, dangerousness, defined as propensity or potential for violence, was hardly the only reason an individual or a group might be disarmed.[133] Contrary to the claim of modern gun rights advocates, Founding-era disarmament laws were not limited to those who posed physical threats to public safety. Non-law-abiding, and non-violent individuals were also disarmed.[134] Developing a more sophisticated and accurate historical account of Founding-era disarmament laws has taken on a new sense of urgency now that the Supreme Court will consider in *United States v. Rahimi*, a case that involved the disarmament of person under a domestic violence restraining order.[135]

FOUNDING-ERA DISARMAMENT STATUTES: A BASIC TYPOLOGY[136]

Category of Persons Disarmed	Legal Justification	Persons and Groups Disarmed
Dangerous and violent	Public safety	Insurgents, enslaved persons, Indian peoples, Loyalists
Non-Law-Abiding Citizens	Failure to comply with legal obligations,	Quakers

132. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 261–69 (2020) (ignoring the issue of Quaker disarmament, a fact that undercuts his claims about violence being the sole criteria for disarmament).

133. *See id.*

134. *See id.* at 266–67.

135. *See* United States v. Rahimi, 143 S. Ct. 2688, 2023 WL 4278450 (Mem) (June 30, 2023) (granting certiorari).

136. *See* Greenlee, *supra* note 132, at 266–67; *see also infra* Part V.

Category of Persons Disarmed	Legal Justification	Persons and Groups Disarmed
	including taxation or obligation to bear arms in the militia	
Constitutional Outsiders	Individuals who were under legal disabilities because they were not full members of the polity	"[I]diots," "lunatics," free Blacks, mixed race people

In some cases, dangerousness was evidenced by violent action; the best Founding-era example was the insurgents who took up arms against the government of Massachusetts in Shays' Rebellion.[137] Individuals and groups were also disarmed because they posed a potential threat: enslaved persons, members of the various Indian nations, and Loyalists were among the groups who were disarmed because of their potential for violence. Individuals could also be disarmed if they violated surety statutes limiting public carry of firearms.[138] *Bruen* mistakenly described surety laws as a type of de facto license to carry weapons in public.[139] In fact, the statutes functioned in precisely the opposite way. Individuals who violated these laws were disarmed and placed under a peace bond. Violation of the bond not only resulted in forfeiture of the bond but could also result in imprisonment. The erroneous claim that if one paid the bond one could continue to carry is historically false. This claim is contradicted by the plain meaning of the surety laws themselves, and contemporary commentary on the ways these laws functioned by leading early American jurists.[140] Consider the 1795 Massachusetts law prohibiting armed carry outside of a limited set of circumstances. The text does not support the gun rights advocates' claim that the law functioned to allow one to carry arms if one paid the peace bond:

> And it is further enacted by the authority aforesaid, That every Justice of the Peace, within the county for which he may be commissioned, may cause to be staid and arrested, all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth, or such others as may utter any

137. Cornell & DeDino, *supra* note 116, at 507–08.

138. *See generally* Cornell, *supra* note 55.

139. STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, 1550–1640 (2002).

140. *See id.*

> menaces or threatening speeches, and upon view of such Justice, confession of the delinquent, or other legal conviction of any such offence, shall require of the offender to find sureties for his keeping the Peace, and being of the good behavior; and in want thereof, to commit him to prison until he shall comply with such requisition: and may further punish the breach of the Peace in any person that shall assault or strike another, by fine to the Commonwealth, not exceeding twenty shillings, and require sureties as aforesaid, or bind the offender, to appear and answer for his offence, at the next Court of General Sessions of the Peace, as the nature or circumstances of the case may require.[141]

Peace bonds were used against "affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively."[142] The laws also applied to those who "utter any menaces or threatening speeches."[143] If *Bruen*'s reading of the statute were correct and one paid the bond, that would mean that one could continue to riot, break the peace, or utter "menaces or threatening speeches[.]"[144] Such a conclusion is absurd and is not supported by logic, law, or history. Paying a peace bond was not a license to riot or disturb the peace with legal impunity.[145] *Bruen*'s characterization of these surety statutes rests on gun rights mythology, an invented historical tradition manufactured to further gun rights litigation strategically deployed by pro-gun activists and scholars to create a useable past for the *Bruen* court.[146]

Disarmament laws also targeted constitutional outsiders, individuals, and groups who were part of the polity but were treated as second class citizens by the law.[147] Thus, laws disarming groups such as free Black people and those of mixed-race ancestry were only tenuously connected to dangerousness. Nor were these race-based prohibitions limited to the plantation South.[148] Limits on the rights of non-White people to keep or carry arms were found in multiple states.[149]

A propensity for violence or membership in an outsider group were not the only reasons the Founding generation disarmed individuals and groups. "The people" protected by the Second Amendment and its state analogues

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141. An Act for punishing Criminal Offenders, 1795 Mass. Laws 436, ch. 2.

142. *Id.*

143. *Id.*

144. *Id.*

145. For a discussion of the way surety laws worked, see generally Cornell, *supra* note 75.

146. *See generally* Patrick J. Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, 2021 UNIV. ILL. L. REV. ONLINE 195 (2021); Cornell, *supra* note 75.

147. For a discussion of the concept of constitutional outsiders, see LEONARD & CORNELL, *supra* note 21.

148. 1832 Del. Laws 2018, chap. 176 § 1; VINCENNES, IOWA, AN ORDINANCE TO PREVENT NUISANCES § 7 (1820).

149. *See supra* note 146 and accompanying text.

were generally understood to only encompass law-abiding citizens. Multiple Founding-era sources underscore this foundational assumption about the limits on the right to keep and bear arms.

One good illustration of this Constitutional belief appears in the debates over the Massachusetts state constitution in 1780. The state took the unprecedented step of submitting the draft of its constitution to individual towns for consideration and comment. The provision on arm bearing did not prompt extensive commentary, but in one instance, a town did request expanding the scope of protections for this right in the Constitution. Importantly, even this effort to expand the scope of the right limited its application to law abiding citizens: "[W]e esteem it an essential priviledge 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."[150]

Ratification offers additional examples that there was a broad consensus on the limits of the right to keep and bear arms. Across the constitutional spectrum, from radical Anti-Federalists to ardent Federalists, there was agreement that disarming those who were perceived to be dangerous or non-law-abiding was consistent with the right to keep and bear arms. Given the often-contentious nature of the disagreements between these factions during ratification, this level of accord is noteworthy. Perhaps the best-known statement of this view was the *Anti-Federalist Dissent of the Minority of Pennsylvania*, a text H*eller* cited as central to understanding the meaning of arms bearing and its scope.[151] It listed danger and criminality separately as two permissible reasons for disarming individuals: "[N]o law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals[.]"[152] Two other proposed amendments adopted a similar stance.[153] The Massachusetts proposal took a similar position, protecting gun rights for only "peaceable citizens": "And that the said Constitution be never construed to authorize Congress to . . . prevent the people of the United States, *who are peaceable citizens*,

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150. THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 624 (Oscar Handlin & Mary Handlin eds., 1966) (emphasis added).

151. *See* District of Columbia v. Heller, 554 U.S. 570, 604 (2008).

152. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597–98 (Merrill Jensen ed., 1976). The Dissent defended a robust conception of the right to bear arms but noted that individuals could be disarmed "for crimes committed, or real danger of public injury from individuals[.]" *Heller*, 554 U.S. at 658.

153. *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents* (Dec. 12, 1787), *reprinted in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 662, 665, 681 (1971).

from keeping their own arms[.]"[154] And the New Hampshire proposal allowed the disarmament of those who had demonstrated that they were not peaceable by having been part of a rebellion: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion[.]"[155]

One fascinating Federalist discussion of the limits on the right to keep and bear arms took up the Dissent of the Minority's analysis of this issue in some detail. The author of the text, Nicholas Collin, was an ardent Federalist, rector of Philadelphia's Old Swedes' Church, a member of the American Philosophical Society, and a trustee of the University of Pennsylvania.[156] Collin's commentary on the Dissent's arguments has not been widely reprinted in modern documentary editions and so his analysis has not been much discussed in the scholarly debate over the Second Amendment.[157] It is worth quoting it at length because it offers a very clear analysis of why Founding-era disarmament statutes were unproblematic in the eyes of most Americans:

> What is said on this matter, is a sufficient reply to the 12th amend. of the New-Hampshire convention, that congress shall never disarm any citizen, unless such as are or have been in actual rebellion. If, by the acknowledged necessity of suspending the privilege of habeas corpus, a suspected person may be secured, he may much more be disarmed. In such unhappy times it may be very expedient to disarm those, who cannot conveniently be guarded, or whose conduct has been less obnoxious. Indeed to prevent by such a gentle measure, crimes and misery, is at once justice to the nation, and mercy to deluded wretches, who may otherwise, by the instigation of a dark and bloody ringleader, commit many horrid murders, for which they must suffer digan punishments.
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> The minority of Pennsylvania seems to have been desirous of limiting the federal power in these cases; but their conviction of its necessity appears

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154. *See Massachusetts Ratifying Convention* (Jan. 31, 1788), *reprinted in* 2 SCHWARTZ, *supra* note 153, at 675, 681 (emphasis added).

155. Amendments Proposed by the New Hampshire Convention June 21, 1788, *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 17 (Helen E. Veit et al. eds., 1991); *see also* JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1891). In her influential *Kanter* dissent, Amy Comey Barrett explained the constitutional logic of looking at these rejected amendments. *See Kanter v. Barr*, 919 F.3d 437, 456 (7th Cir. 2019) (Barrett, J., dissenting) ("[T]hese three proposals . . . are most helpful taken together as evidence of the scope of [F]ounding-era understandings regarding categorical exclusions from the enjoyment of the right to keep and bear arms.").

156. John Fea, *Nicholas Collin*, *in* ENCYCLOPEDIA OF NEW JERSEY 162 (Maxine N. Lurie & Mark Mappen eds., 2004).

157. THREE NEGLECTED PIECES OF THE DOCUMENTARY HISTORY OF THE CONSTITUTION AND BILL OF RIGHTS: REMARKS ON THE AMENDMENTS TO THE CONSTITUTION BY A FOREIGN SPECTATOR, ESSAYS OF THE CENTINEL, REVIVED, AND EXTRACTS FROM THE VIRGINIA SENATE JOURNAL xii (Stanton Krauss ed., 2019).

> by those very parts of the 3rd and 7th amendments framed in this view, to wit, that no man be deprived of his liberty except by the law of the land, or the judgment of his peers — and that no law shall be passed for disarming the people, or any of them, unless for crimes committed, or real danger of public injury from individuals. The occasional suspension of the above privilege becomes pro tempore the law of the land, and by virtue of it dangerous persons are secured. Insurrections against the federal government are undoubtedly real dangers of public injury, not only from individuals, but great bodies; consequently the laws of the union should be competent for the disarming of both.[158]

Collins endorsed the Dissent's view that the government could disarm the dangerous and other non-law-abiding persons or groups. He also distinguished between emergency powers of disarmament and a more enduring power rooted in the nature of sovereignty itself, a common Federalist argument about many of the powers in the Constitution. This latter power, he noted, was cabined by due process requirements. The emergency powers, by contrast, were more akin to the temporary suspension of habeas corpus in exigent circumstances. Finally, in contrast to Justice Scalia, Collins recognized the legitimacy and necessity of prudential concerns when adjudicating rights claims.[159]

The category of dangerousness was not synonymous with violence; it included other forms of criminal and anti-social behavior that did not involve violence. The case of the Quakers is particularly instructive in this regard. Quakers were one of the most peaceful groups in early America, but they were disarmed during the Founding era because their radical commitment to pacificism led them to refuse taking loyalty oaths or contribute to the costs of public defense by paying taxes or hiring substitutes to serve in the militia. In this sense, Quakers posed a danger, but not because they were potentially violent. Some Quakers refused to pay taxes to support public defense because of their radical pacifism viewed such actions as contributing to "war-like" behavior that violated the Gospel.[160]

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158. Nicholas Collin, *Remarks on the Amendments to the Constitution . . . by a Foreign Spectator*, FEDERAL GAZETTE, AND PHILADELPHIA EVENING POST (PA.) (Nov. 28, 1788).

159. *See id. See generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

160. *See* JACK D. MARIETTA & G.S. ROWE, TROUBLED EXPERIMENT: CRIME & JUSTICE IN PENNSYLVANIA, 1682–1800 50 (2006). *See generally* Jack D. Marietta, *Conscience, the Quaker Community, and the French and Indian War*, 95 PA. MAG. HIST. & BIOGRAPHY 3 (1971); Hermann Wellenreuther, *The Quest for Harmony in a Turbulent World: The Principle of "Love and Unity" in Colonial Pennsylvania Politics*, 107 PA. MAG. HIST. & BIOGRAPHY 537 (1983); Karen Guenther, *A Crisis of Allegiance: Berks County, Pennsylvania Quakers and the War for Independence*, 90 QUAKER HIST. 15 (2001).

Quakers, it is important to note, were not anti-gun in the Founding era.[161] Although the idea of gun-owning or gun-toting Quakers seems somewhat odd, if not jarring, given popular images of Quakers in American culture, Founding-era Quakers had many uses for firearms. Quakers adhered to a Peace Testimony that committed them to avoiding most forms of violence.[162] But Quakers were pacifists, not vegetarians. Members of the Society of Friends not only owned firearms, but Quakers worked as gun smiths, and English Quakers were major participants in arms manufacturing.[163] Quakers might carry a gun in many circumstances without running afoul of their faith, but the one thing Quakers did not do was bear arms.[164] Living in a rural society, guns were important tools for farmers who needed them for pest control and hunting for essential sustenance: neither practice was prohibited by Quaker teaching.[165]

By the time of American Independence, Quakers, and many German "peace churches," had won a religious exemption for bearing arms.[166] Members of these religious sects were not required to serve in the militia, but they were required to contribute to public defense. The German sects accepted this compromise and paid for substitutes to serve in their place in the militia and acknowledged their obligation to pay taxes to support public defense. By contrast, the Quakers objected that any contribution to public defense, paying for substitutes or paying taxes, even if the taxes were used for non-lethal military supplies violated their Peace Testimony.[167]

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161. JAMES EMMETT RYAN, IMAGINARY FRIENDS: REPRESENTING QUAKERS IN AMERICAN CULTURE, 1650–1950 (2009). Popular images of the Society of Friends have often been filtered through a lens provided by the influential Quaker artist Edward Hicks. His series of paintings of the "Peaceable Kingdom" portrays members of the Society of Friends as presiding over an American utopia, a place where the lion literally lay down with the lamb. *See Peaceable Kingdom*, THE METRO. MUSEUM OF ART, https://www.metmuseum.org/art/collection/search/11081 [https://perma.cc/4VYA-32BM] (last visited Oct. 9, 2023).

162. 1782 Pa. Laws 192–93.

163. PRIYA SATIA, EMPIRE OF GUNS: THE VIOLENT MAKING OF THE INDUSTRIAL REVOLUTION 66 (2019).

164. *See* Sweeney, *supra* note 7, at 61–62.

165. Sweeney, *supra* note 7, at 55, 62. Hunting for sport by contrast was viewed as a violation of the Peace Testimony. *See* Saul Cornell, *The Second Amendment Goes to Court* (Nov. 7, 2008), https://origins.osu.edu/article/second-amendment-goes-court [https://perma.cc/3UEM-LEP8].

166. *See generally* Jared S. Burkholder, *Neither 'Kriegerisch' nor 'Quäkerisch': Moravians and the Question of Violence in Eighteenth-Century Pennsylvania*, 12 J. MORAVIAN HIST. 143 (2012); *see also* Richard K. MacMaster, *Neither Whig Nor Tory: The Peace Churches in the American Revolution*, 9 FIDES ET HISTORIA 8 (1977).

167. For a defense of the Quakers' refusal to pay taxes or hire substitutes to take their place in the militia, see *An Address of the People Called Quakers*, PA. EVENING POST, Nov. 7, 1775. For two critical responses to the Quakers' arguments see the opposing remonstrances by citizens of Northern Liberties in Philadelphia and militia privates from Philadelphia in

The situation of the Quakers contradicts the claims of modern gun rights advocates that early American disarmament statutes as exclusively targeting violence. The Quaker examples offers a stark refutation of this claim.[168] In essence, Quakers were disarmed for something akin to tax evasion. Similarly, it would be a serious error to dismiss the significance of the Quaker disarmament as some type of anomalous outlier. Public debate over the meaning and scope of the right to keep and bear arms in the Founding era devoted far more attention to the plight of the Quakers than it did to many of the issues that drive the modern gun debate, most notably the right of self-defense. There was little controversy over the right of self-defense in the Founding era. This right that had long been protected by common law. There was no similar consensus over what to do about the Quakers. Thus, during ratification and the debates over the Second Amendment in the First Congress, the issue of Quakers and their right not to bear arms was far more salient in public debate and attracted far greater notice in the press and legislative debates.[169]

One historical point is beyond dispute: Founding-era disarmament statutes extended well beyond dangerousness, defined as a potentiality for violence. The Quaker example illustrates this indisputable fact: friends in Pennsylvania were disarmed for not paying taxes and failing to meet the most basic obligations of republican citizenship, not because they were violent. If something akin to tax evasion was a legitimate reason to disarm individuals in the Founding era, then the answer to the hypothetical question often posed about modern laws disarming individuals, "Can Martha Stewart and other non-violent criminals today be disarmed without any constitutional obstacle?" is simple and straightforward: yes.[170]

CONCLUSION

It is impossible to construct and evaluate legal analogies without understanding the profound differences separating early America from modern America. In *Bruen*, the Court acknowledged that when novel problems created by firearms are at issue the analysis must reflect this fact: "other cases implicating unprecedented societal concerns or dramatic

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Legislative Acts/Legal Proceedings, THE NEW-YORK GAZETTE AND THE WEEKLY MERCURY, Nov. 20, 1775, at 1, 4.

168. *See supra* note 161 and accompanying text.

169. Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603, 1612–14 (2005).

170. *See* Cornell, *supra* note 108; C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J. L. & PUB. POL'Y 695, 695–97 (2009).

technological changes may require a more nuanced approach."[171] *Bruen* differentiates between cases in which contested regulations are responses to long standing problems and situations in which modern regulations address problems with no clear historical analogues from the Founding era or the era of the Fourteenth Amendment. *Bruen*'s methodology's emphasis on analogical reasoning requires some understanding of the differences between the role that guns played in early America, a sparsely populated pre-industrial and largely agrarian society, and contemporary America, a densely populated, industrial, and highly urbanized world.[172]

The errors that have crept into Second Amendment scholarship and the Supreme Court's trio of gun rights decisions have left lower courts scrambling to apply rules derived from a version of the past that never existed. The current chaos in Second Amendment jurisprudence is in part a result of erroneous claims that have crept into the law review literature and been repeated in amicus briefs filed by gun rights activists and their allies in the legal academy. The time has come to correct these errors and fashion a coherent Second Amendment jurisprudence, one rooted in the real text, history, and tradition, but not bound to the past in an unthinking fashion. Binding modern Americans to a version of the past that never existed has no foundation in history, text, or tradition. The right to regulate is as much an inheritance of the Founding era as the right to keep and bear arms.

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171. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2132 (2022).

172. *See generally* Blocher & Ruben, *supra* note 6.