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Meritless Historical Arguments in Second Amendment Litigation

by MARK ANTHONY FRASSETTO*

Introduction

In 2008, in *District of Columbia v. Heller*, the Supreme Court held for the first time that the Second Amendment protected an individual right to possess firearms for purposes of self-defense.¹ The Court's decision, written by the late Justice Antonin Scalia, was the culmination of a decades-long effort advocating for an individual-rights reading of the Second Amendment and the application of an originalist legal methodology in which rights have a fixed historical meaning.² Specifically, under Justice Scalia's methodology, the fixed meaning of an individual right is the original public understanding, that is, how the right would have been understood by the average informed speaker of the English language at the time of its ratification.³ Justice Scalia's opinion looked at centuries of historical treatises, statutes, and cases to come to the conclusion that the original public

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1. 554 U.S. 570 (2008).

2. Lawrence Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 924 (2009) ("Collectively, the opinions in *Heller* represent the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court."); see also Mark Anthony Frassetto, *The Use and Misuse of History in Second Amendment Litigation*, in *THE RIGHT TO BEAR ARMS: HISTORICAL PERSPECTIVES AND THE DEBATE ON THE 2ND AMENDMENT* (Jennifer Tucker, Bart Hacker & Margaret Vining eds.) (forthcoming 2019).

3. *Heller*, 554 U.S. at 576–77 ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'") (citing *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

meaning of the Second Amendment was to protect an individual right to keep and bear arms rather than a right tied to militia service.⁴

Since *Heller* and the subsequent Supreme Court decision, *McDonald v. City of Chicago*, which incorporated the individual right against the states, Second Amendment litigation and scholarship has focused in large part on questions about the historical understanding of the Second Amendment.⁵ One area where this historical analysis has been especially pronounced is in litigation over the scope of the Second Amendment right outside of the home.⁶ Litigants, amici (including the organization which employs the author of this article), and scholars fiercely debate the meaning of historical statutes, treatises, and cases, arguing about the scope of the right to carry arms outside of the home at the time of the Second and Fourteenth Amendments' ratifications.⁷ These debates address historical statutes, cases, treatises, and other legal sources spanning two countries and several centuries.

Most law review articles attempt to address difficult or hotly contested legal issues. This is not one of those kinds of articles. Rather than address the hard questions about the originalist methodology or the complicated firearms regulatory landscape surrounding the ratification of the Second and Fourteenth Amendments, this article will address the frivolous arguments

4. *Heller*, 554 U.S. at 616. The *Heller* majority's conclusion remains a hotly contested question. It was a sharp break from the Court's previous jurisprudence and the Court split 5-4 in the case. *See also* *United States v. Miller*, 307 U.S. 174 (1939) (upholding registration requirement for sawed-off shotgun based on an understanding of the Second Amendment tied closely to militia service). Recent linguistics scholarship has called the *Heller* Court's conclusions about the original public meaning into serious doubt. *See* Neal Goldfarb, *Corpora and the Second Amendment: "bear"*, LAWNLINGUISTICS (Dec. 16, 2018), <https://lawlinguistics.com/corpora-and-the-second-amendment> (discussing meaning of the term "bear" at the time of the ratification of the Second Amendment); Allison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, THE PANORAMA, Aug. 3, 2018, <http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/>. Professor Dennis Baron's article in this volume further elaborates on this research, Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CON. L.Q. 509 (2019).

5. 561 U.S. 742 (2010). *See, e.g.*, *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Peruta v. Cty. Of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc).

6. *Young*, 896 F.3d 1044; *Wrenn*, 864 F.3d 650; *Peruta*, 824 F.3d 919.

7. *See e.g.*, Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellees and Affirmance, *Peruta v. Cty. Of San Diego* (9th Cir. Apr. 30, 2015) (Nos. 10-56971, 11-16255); Brief of Amicus Curiae National Rifle Association of America, Inc. in Support of Appellants and Reversal, *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018) (No. 17-2202); Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015), <http://www.yalelawjournal.org/forum/firearm-regionalism-and-public-carry>; David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 88 ALB. L. REV. 849 (2015).

made by many plaintiffs in Second Amendment cases, some of which have unfortunately made their way into district and circuit court decisions. These arguments, often made in a misleading sentence or two, usually take a few paragraphs to effectively rebut, paragraphs which the state and local governments defending against challenges to gun laws generally do not have the time, necessary expertise, or word count to include in their briefing. This article aims to provide easy answers to these arguments, hopefully allowing both the courts and the parties to focus on the serious issues of debate.

This article is not asserting that all the historical issues surrounding the Second Amendment are simple, or subject to easy answers. There are serious arguments about history to be made by both sides in Second Amendment scholarship and litigation. Many have been made by the scholars contributing to this volume.⁸ Assessing the original public meaning of rights based on centuries-old legal traditions, which requires the analysis of case law and statutes drawn from an unfamiliar legal tradition and culture, is not easy work and does not yield simple answers. Unfortunately, these issues worthy of serious discussion are often obscured by frivolous arguments that require time-consuming responses and take focus away from the actual issues in the case.

Part II of this article will discuss post-*Heller* public-carry litigation, focusing on the serious historical arguments driving these cases. Part III will discuss and rebut some of the meritless historical arguments that have been made and adopted in Second Amendment litigation, specifically (a) anecdotes about the founders carrying firearms in public or advocating for the carrying of firearms in public; (b) the argument that founding-era militia and other public defense obligations meant a reciprocal right to generally carry firearms in public for self-defense existed; and (c) the claim that the only weapons which could not be carried in public were those deemed ‘dangerous and unusual.’ Finally, Part IV of the article will draw conclusions about these materials.

8. 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); David Kopel, George Mocsary et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY (2012); *The Second Amendment Wild Card: The Persisting Relevance of the “Hybrid” Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597 (2014); Darrell Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85 (2017).

I. Major Historical Issues in Post-*Heller* Second Amendment Public Carry Litigation.

In 2010, two years after the *Heller* decision, the Supreme Court returned to the Second Amendment in *McDonald v. City of Chicago*, in which it incorporated the Second Amendment against the states and struck down the city's prohibition on handguns.⁹ After the *McDonald* decision, gun rights activists began challenging a broad scope of state and local gun laws across the country. Among the most prominent Second Amendment cases were challenges to state public carry licensing laws.¹⁰ These challenges primarily focused on laws completely prohibiting the carrying of firearms in public and licensing systems that required those seeking to carry firearms in public to make a showing that they had a need for self-defense greater than that of the general public.¹¹

Since *Heller*, virtually every circuit court has adopted a method of analyzing Second Amendment cases known as the two-part test.¹² This test first asks whether a challenged firearm (or sometimes other weapon) regulation restricts conduct that falls within the scope of the right protected by the Second Amendment as historically understood. A court makes this determination using the text of the Second Amendment and the history and tradition of firearms regulation in the United States and England.¹³ If the regulation does not fall within the scope of the right as historically understood, then the challenge fails.¹⁴ However, if the regulation does implicate the right, then the court applies some level of scrutiny determined on a sliding scale, from intermediate scrutiny for less significant infringements such as licensing to a categorical prohibition on laws such as the handgun bans struck down in *Heller* and *McDonald*.¹⁵

Given this methodology, it should be unsurprising that in every major challenge to public carry regulations, historical arguments have played an

9. 561 U.S. 742 (2010).

10. See *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016).

11. See, e.g., *Moore*, 702 F.3d (complete prohibition); *Kachalsky*, 701 F.3d (good cause); *Drake*, 724 F.3d (good cause) *Woollard*, 712 F.3d (good cause); *Peruta*, 824 F.3d (good cause).

12. See *Gould v. Morgan*, 907 F.3d 659, 668–69 (1st Cir. 2018) (adopting the two-part test and discussing its near universal adoption in other circuits).

13. *Id.*

14. *Id.* at 669.

15. *Id.*

important role in the courts' analysis.¹⁶ In the cases immediately after *McDonald*, the post-*Heller* Second Amendment historical scholarship had not had time to produce historical research and analysis responsive to *Heller*, so the history presented, and the courts' analysis, is a bit scattershot and unsophisticated compared to later cases. In the last five years an enormous amount of research into the historical regulation of firearms has resulted in clarification of the issues at dispute in the historical debate.¹⁷

In these more recent cases the historical arguments essentially break down into four categories of sources: (1) English history and founding-era regulation; (2) Antebellum firearms regulation; (3) Antebellum and Reconstruction-era case law; and (4) postbellum regulation.

The debate about English and founding-era-American history primarily focuses on how the carrying of weapons in public was regulated during the eighteenth century. This is important because *Heller* stated the Second Amendment "was widely understood to codify a pre-existing right, rather than to fashion a new one."¹⁸ Therefore, if the carrying of firearms was prohibited in England or the United States during the founding period, then the right ratified in the Second Amendment could not reasonably be understood to protect an activity that the founding generation prohibited. This debate largely centers around the eighteenth-century understanding of a fourteenth-century English statute prohibiting going armed "by night or by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers nor in no part elsewhere."¹⁹ Gun rights advocates and some scholars claim that by the eighteenth century, the statute had developed a *mens rea* component, meaning a violation occurred only if a person carrying arms had the intent or purpose to terrorize or threaten.²⁰ Conversely, scholars and litigators arguing for a more limited right argue that public terror was the

16. See, e.g., *Kachalsky*, 701 F.3d at 94–97; *Drake*, 724 F.3d at 432–35; *Peruta*, 824 F.3d at 929–39.

17. See, e.g., Repository of Historical Gun Laws, DUKE U. SCH. OF L., <https://law.duke.edu/gunlaws/> (last visited Feb. 2, 2019) (massive repository of historical firearms regulations produced after *Heller*).

18. *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008).

19. *Statute of Northampton*, 2 Edw. 3, 258, c. 3 (1328) (Eng.).

20. Brief of Amici Curiae National Rifle Association of America, Inc. in Support of Appellants and Reversal at 9, *Gould v. Morgan*, 907 F.3d 659 (1st Cir. Dec. 15, 2017) (No. 17-2202) ("The requirement of an intent to terrify the public was carried down by English courts into the nineteenth and twentieth centuries."); 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, 1481 (2009) ("Even carrying normally dangerous arms was punishable if it was done in a way that indicated a likely hostile intent, perhaps simply by the unusualness of the behavior . . .").

natural result of going armed in public and no additional intent was necessary for the conduct to be prohibited.²¹

Litigants also debate the meaning of Antebellum-era public-carry laws. The most significant controversy surrounds the meaning of a law first passed in Massachusetts in 1836 prohibiting going armed “without reasonable cause to fear an assault or other injury, or violence to his person, or family or property,” and allowing violators to be arrested and forced to post a bond upon application from “any person having reasonable cause to fear an injury or breach of the peace.”²² Disputes over the meaning of this law again revolve around whether violating the law required an intent to terrify or threaten, as well as whether the requirement to pay a surety bond constituted a criminal sanction.²³

The dispute over Antebellum case law is a bit more complicated. Proponents of a broad right to carry firearms in public cite to several, mostly Southern, cases in which courts either struck down complete prohibitions on public carry or upheld complete prohibitions on carrying concealed weapons because those desiring to carry firearms could still do so openly (exposed outside of the clothing).²⁴ Advocates for a more limited right respond by arguing that these cases are outliers representing a uniquely Southern view of gun rights driven by white Southerners’ fears of a slave uprising.²⁵ They

21. Patrick Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why it Matters*, 64 CLEV. ST. L. REV. 373, 468–69 (2016) (discussing the development of the narrow interpretation of the Statute of Northampton which developed in the mid twentieth century); see, e.g., Brief of Amici Curiae Historians, Legal Scholars, & CRPA Foundation in Support of Appellees and in Support of Affirmance at 14, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (No. 15-7057) (“No State prohibited the Public Carrying of Arms in the Early Republic.”); Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What it Tells Us About Firearm Regionalism*, 40 CAMPBELL L. REV. 335, 338 (2018) (noting disagreement); Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellants and Reversal at 6, *Grace v. District of Columbia*, 864 F.3d 650 (D.C. Cir. July 13, 2016) (No. 16-7067) (“In other words, because carrying a dangerous weapon (such as a firearm) in populated public places naturally terrified the people, it was a crime against the peace—even if unaccompanied by a threat, violence, or any additional breach of the peace.”)

22. 1836 Mass. Acts 750, c. 134, § 16.

23. Ruben & Cornell, *supra* note 7; David Kopel, *Ninth Circuit strikes Hawaii law that only security guards may get handgun carry permits*, REASON.COM: THE VOLOKH CONSPIRACY (July 24, 2018), <https://reason.com/volokh/2018/07/24/ninth-circuit-upholds-right-to-licensed>.

24. *Bliss v. Commonwealth*, 12 Ky. 90 (1822); *Nunn v. State*, 1 Ga. 243, 251 (1846), *State v. Reid*, 1 Ala. 612, 617 (1840).

25. Ruben & Cornell, *supra* note 7; see also Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95 (2016) (showing a more permissive Southern view); Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What it Tells Us About Firearms Regionalism*, 40 CAMPBELL L. REV. 335 (2018) (showing broad support among Northerners and Republicans for public carry regulations and opposition among many Southern Democrats).

also argue that even in the South, this understanding of the right was not monolithic and shifted in the direction of a more limited right by the time of the ratification of the Fourteenth Amendment.²⁶ Further, most Southern decisions do not actually call into doubt the most frequently challenged public carry systems, which allow the carrying of firearms when necessary for self-defense.²⁷

Finally, those arguing for the legality of public carry regulations claim that post-war laws completely prohibiting carrying weapons in populated areas or requiring a particular need for self-defense to carry concealed weapons show that modern licensing laws that require a showing of self-defense are longstanding and therefore consistent with the Second Amendment.²⁸ Those challenging gun laws attempt to minimize the importance and scope of the laws banning carry in urban areas. They also argue that because many of the good cause laws do not discuss the open carry of firearms, they allowed for a broad right carry in public.

The author has strong views on all these historical debates and believes that the history of firearms regulation supports the constitutionality of laws prohibiting carrying without a showing of specific need.²⁹ That being said, these debates all raise complicated historical issues that require significant research and analysis to fully understand and are, to some degree, subject to varying interpretations. In contrast, the next section discusses the historical arguments frequently used in Second Amendment litigation that do not require this level of analysis to determine that they are historically inaccurate.

26. *State v. Buzzard*, 4 Ark. 18 (1842); *Aymette v. State*, 21 Tenn. 154 (1840); *State v. Huntly*, 25 N.C. 418 (1843); *Andrews v. State*, 50 Tenn. 165 (1871); *English v. State*, 35 Tex. 473 (1872); *State v. Duke*, 42 Tex. 455 (1874).

27. *But see Bliss*, 12 Ky. at 91–92 (“whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.”).

28. *See e.g.*, 1869 N.M. Laws 321, § 1 (totally prohibiting carry in populated areas); 1871 Tex. Laws 1322, art. 6512 (prohibiting carry without “reasonable grounds for fearing an unlawful attack on his person” that was “immediate and pressing.”); 1873 Minn. Laws, 1025, §17 (similar, in the vein of the Massachusetts model discussed above); 1875 Wyo. Laws 352, ch. 52, § 1907 (prohibiting carrying in populated areas).

29. *See e.g.*, Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellees and Affirmance, *Peruta v. Cty. Of San Diego*, 824 F.3d 919 (9th Cir. 2015) (Nos. 10-56971, 11-16255).

II. Meritless Historical Arguments in Second Amendment Litigation.

A. Anecdotes About the Founders Carrying Firearms in Public

Plaintiffs in Second Amendment public carry cases frequently cite to anecdotes about members of the founding generation carrying firearms in support of arguments for a broad right to carry firearms in public.³⁰ They use these anecdotes to make two claims: (1) a general right to carry firearms in public was protected by the term “bear arms” in the Second Amendment; and (2) carrying firearms in public was not prohibited at the time the Second Amendment was ratified. Some courts have accepted these arguments. In an opinion striking down Washington, D.C.’s public carry licensing system, District Court Judge Richard Leon stated that “it is unquestionable that the public carrying of firearms was widespread during the colonial and founding Eras” and that fact “provide[s] an essential context for what the people who ratified the Second Amendment understood arms bearing to entail.”³¹ However, Judge Leon also acknowledged that “the simple fact that the Framers engaged in certain conduct does not necessarily prove they forbade its prohibition by government.”³²

Arms-carrying for purposes of hunting, sport, and collective self-defense was likely common in parts of the largely agrarian founding-era America. One founding-era source stated: “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.”³³ However, gun rights advocates’ evidence of the founders commonly carrying firearms in public while going about normal activities is remarkably weak. Presumably, these highly motivated organizations, including the National Rifle Association and its affiliated scholars, have done their utmost to find the sources most strongly supporting their view of the Second Amendment. Yet their evidence is so thin and the anecdotes they cite are so easily rebuttable that the absence of any strong

30. Brief of Plaintiffs-Appellants at 23–24, *Gould v. O’Leary*, No. 17-2202 (1st Cir. March 5, 2018); Brief of Plaintiffs-Appellants, *Malpasso v. Pallozzi*, No. 18-2377 (4th Cir. Dec. 20, 2018).

31. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 136 (D.D.C. 2016).

32. *Id.* (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (Thomas, J. concurring)).

33. 5 WILLIAM BLACKSTONE, COMMENTARIES app. B, 19 (St. George Tucker ed., 1803); See also Mark Anthony Frassetto, *To The Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. L. REV. 61, 85 (2018) (discussing the regional nature of Tucker’s description, which would have varied greatly by in more urban parts of the early Republic).

evidence, at least to some degree, undermines their claim that carrying in public was common among the founders.

1. George Washington

Plaintiffs have been especially eager to enlist examples of the Revolutionary War commander-in-chief and first president carrying firearms in public to support their claim that public carry was not regulated during the founding generation.³⁴ The examples they have found, however, have not supported these claims. In a recent challenge to the public carry licensing systems in Boston and Brookline, Massachusetts, the plaintiffs stated, “[t]he practices of the Founding generation confirm that the right to carry arms was well-established. George Washington, for example, carried a firearm on an expedition into the Ohio Country.”³⁵

The Plaintiffs’ cited source discusses a military and diplomatic expedition by George Washington under orders from Virginia’s governor, to travel through the Ohio frontier to a French Fort to warn the French against further intruding into the Ohio territory.³⁶ During the time of the expedition, Washington was an adjutant major overseeing Virginia’s militia.³⁷ The Ohio territory through which Washington travelled was largely unsettled, having been set aside for the Native Americans by British decree, and the expedition faced possible attacks from both Native Americans and the French.³⁸ In fact, on the exact page cited by the Plaintiffs, the author, Washington’s travel companion, describes an attack by a Native American guide and threats that the nearby Ottawa tribe would scalp Washington and his companions.³⁹ Washington and his companions going armed in these circumstances, when he was a high-ranking military officer travelling through hostile territory on orders from the governor obviously does nothing to “confirm that the right

34. Brief of Plaintiffs-Appellants, *Gould v. O’Leary*, No. 17-2202 (1st Cir. March 5, 2018); Brief of Plaintiffs-Appellants, *Malpasso v. Pallozzi*, No. 18-2377 (4th Cir. Dec. 20, 2018); *Grace*, 187 F. Supp. 3d at 137.

35. Brief of Plaintiffs-Appellants at 23–24, *Gould v. O’Leary*, No. 17-2202 (1st Cir. March 5, 2018) (citing WILLIAM M. DARLINGTON, CHRISTOPHER GIST’S JOURNALS 85–86 (1893); see also Brief of Plaintiffs-Appellants, *Malpasso v. Pallozzi* at 19, No. 18-2377 (4th Cir. Dec. 20, 2018).

36. *George Washington and The French and Indian War*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/george-washington/french-indian-war/washington-and-the-french-indian-war/> (last visited Feb. 2, 2019).

37. *Id.*

38. See generally, *The French and Indian War*, BRITANNICA.COM, <https://www.britannica.com/event/French-and-Indian-War> (last visited Feb. 2, 2019).

39. See WILLIAM M. DARLINGTON, CHRISTOPHER GIST’S JOURNALS 85–86 (1893), <https://archive.org/details/christophergists00gistuoft>.

to carry arms was well established.”⁴⁰ The First Circuit did not buy this argument, instead upholding Boston and Brookline’s public carry systems under intermediate scrutiny.

Unfortunately, the same cannot be said for the United States District Court for the District of Columbia, which cited to a perhaps even more absurd historical anecdote in its *Grace v. District of Columbia* decision enjoining enforcement of Washington, D.C.’s public carry licensing system.⁴¹ The anecdote continues to be cited by plaintiffs challenging public carry licensing systems.⁴²

To understand why relying on this anecdote makes little sense, it is most helpful to cite it in full:

Soon after the close of the Revolutionary War, General Washington went to Alexandria on horseback, accompanied by his negro servant. The road then used lay through the farm of a desperado who had committed murder, a stranger to the General, the main road having become impassable. As was then the custom, the General had holsters with pistols in them, to his saddle. On returning to Mount Vernon, as General was about to enter on this private road, a stranger on horseback barred the way, and said to him, “You shall not pass this way.” “You don’t know me,” said the General. “Yes, I do,” said the ruffian: “you are General Washington, who commanded the army in the Revolution and if you attempt to pass me I shall shoot you.” General Washington called his servant, Billy, to him, and taking out a pistol, examined the priming, and then handed it to Billy, saying, “if this person shoots me, do you shoot him;” and coolly passed on without molestation.⁴³

This story comes from a privately published semi-biographical book written from the papers of Benjamin Ogle Tayloe, a wealthy plantation owner and prominent Whig supporter of the Jacksonian and late-Antebellum

40. Brief of Plaintiffs-Appellants at 23, *Gould v. O’Leary*, No. 17-2202 (1st Cir. March 5, 2018).

41. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 137 (D.D.C. 2016) (“For example, when George Washington traveled between Alexandria and Mount Vernon he holstered pistols to his saddle “[a]s was then the custom.”).

42. See Brief of Michelle Flanagan et. al. at 26, *Flanagan v. Becerra*, No. 18-55717 (9th Cir. Oct. 2, 2018) (citing *Grace v. District of Columbia*, 187 F. Supp. 3d at 136–37).

43. BENJAMIN OGLE TAYLOE, IN MEMORIAM: BENJAMIN OGLE TAYLOE 95 (1872).

era.⁴⁴ The book was commissioned by his widow as a memorial to her deceased husband.⁴⁵ The anecdote relied on in the *Grace* decision comes from a section of the book titled “Anecdotes and Reminiscences” comprised of a series of jokes, tall tales, and farfetched stories.⁴⁶ These vignettes were written by Tayloe “during the dark and gloomy days of the Civil War,” sixty years after Washington’s death, to “relieve his mind from the depressing influence of the times.”⁴⁷ Tayloe’s stories are clearly not anything resembling history.

The two other stories about Washington in Tayloe’s book show why his narrative should not be relied on. The first describes a scene between George and Martha Washington as they were lying in bed, during which Martha Washington lectured her husband and George Washington, after listening silently, responded “Good night, Mrs. Washington” and turned away from her in bed.⁴⁸ This joke about marital roles was described as “b[earing] internal evidence of truth.”⁴⁹

The following story in Tayloe’s book falls even further into the absurd. In it a young Washington travelling in the back-country of Virginia stumbled upon and then won a jumping competition for the hand of a wealthy young woman in marriage.⁵⁰ Washington then saw that the woman preferred another competitor and, being the model of chivalry, forfeited his prize and allowed the couple to marry.⁵¹ Other anecdotes mostly appear to have revolved around puns and it does not appear that Tayloe intended for readers to understand them as true.⁵²

In the context of Tayloe’s entire book—a compilation of assorted papers and journals written by a man born three years before Washington died—the humorous anecdote about George Washington seems intended to convey a sense of Washington’s courage rather than a retelling of an actual

44. *Benjamin Ogle Tayloe*, WIKIPEDIA, https://en.wikipedia.org/wiki/Benjamin_Ogle_Tayloe (last visited Feb. 2, 2019).

45. TAYLOE, *supra* note 43, at 93.

46. *Id.*

47. *Id.* at 94.

48. *Id.* at 95–96 (“At Mount Vernon a guest who slept in an adjacent chamber is reported to have heard a curtain lecture from Mrs. Washington to her lord The General received it in silence and at last said Good night Mrs Washington and was heard to turn over bed Mr. Buchanan when I related the above remarked that bore with it internal evidence of its truth.”).

49. *Id.*

50. *Id.* at 96.

51. *Id.*

52. *Id.* at 99.

event.⁵³ This is not the type of history from which decisions about the original public meaning of the Second Amendment should be made.⁵⁴

2. *John Adams*

Another anecdote supposedly showing the founding fathers supporting a broad right to carry in public comes from John Adams's legal representation of the British soldiers on trial for the Boston Massacre.⁵⁵ Gun rights groups claim: "John Adams conceded that, 'in this country, every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence.'"⁵⁶ The *Grace* court adopted this view.⁵⁷

The supposed example of John Adams supporting public carry comes from remarks he made during his defense of British soldiers in the Boston Massacre trial.⁵⁸ However, contrary to the gun rights plaintiffs' characterization, Adams was not discussing a general right to carry, but rather specifically talking about how people have a right to arm themselves to put down riots, the action which the soldiers were engaged in. The full quote makes this clear:

And so, perhaps the killing of dangerous rioters may be justified by any private persons, who cannot otherwise suppress them or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the purpose aforesaid. – Hawkins, p. 71 § 14.

53. Even if the story were true, it describes Washington riding armed in a rural area when faced with a specific threat, "a desperado who had committed murder," providing little support for the modern argument that carrying guns in public is generally allowed. TAYLOE, *supra* note 43, at 95.

54. One interesting point is that Tayloe felt the need to say, "[a]s was **then** the custom, the General had holsters with pistols in them, to his saddle," implying that in the 1860s when these anecdotes are written it would not have been usual to go armed in public. *Id.* at 95. It seems meaningful that in the only period of which Tayloe has direct knowledge it was apparently not the custom to ride armed.

55. British soldiers had killed five colonists during a violent confrontation between British soldiers and the locals. While the event was portrayed by patriots like Samuel Adams and Paul Revere as a massacre of a peaceful crowd, the soldiers were tried and acquitted on most charges after able representation by John Adams. DAVID MCCULLOUGH, JOHN ADAMS 65–68 (2001).

56. Brief of Plaintiffs-Appellants at 24, *Gould v. O'Leary*, No. 17-2202 (1st Cir. March 5, 2018) (citing John Adams, *First Day's Speech in Defense of the British Soldiers Accused of Murdering Attacks, Gray and Others, in the Boston Riot of 1770*, in 6 MASTERPIECES OF ELOQUENCE 2569, 2578 (Hazeltine et al. eds., 1905)); Brief of Plaintiffs-Appellants at 19, *Malpasso v. Palozzi*, No. 18-2377 (4th Cir. Dec. 20, 2018).

57. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 137 (D.D.C. 2016).

58. Adams, *supra* note 56, at 2560–93.

Here every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arms themselves at that time for their defence, not for offence. That distinction is material and must be attended to.⁵⁹

The citation to William Hawkins comes from Adams's discussion of justifiable homicide and the circumstances in which a killing in self-defense would be legal.⁶⁰ During the portion of his remarks relied upon by gun rights plaintiffs and the *Grace* court, Adams was citing a variety of sources explaining when lethal force could be used in self-defense.⁶¹ Reading the passage in the context of the citations to legal authority both immediately following and preceding it, by far the most sensible reading is that the language was tied to suppressing riots rather than a generalized right to carry.

Breaking it down in more detail, Adams's line, "[h]ere every private person is authorized to arm himself," is in reference to the immediately preceding line, "every private person is authorized to arm himself for the purpose aforesaid."⁶² That is, every person is authorized to arm oneself to defend against and suppress rioters. Adams's next line, "on the strength of

59. Adams, *supra* note 56, at 2578.

60. 1 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 81 (John Curwood ed., 8th ed. 1824) (same language from later edition).

61. Adams, *supra* note 56, at 2577 (citing MICHAEL FOSTER, CROWN CASES 274 (Michael Dodson ed. 1762) "Where a known felony is attempted upon the person be it to rob or murder here the party assaulted may repel force with force"); *id.* ("Yet it seems that a private person *a fortiori* an officer of justice who happens unavoidably to kill another in endeavoring to defend himself from or suppress dangerous rioters may justify the fact inasmuch as he only does his duty in aid of the public justice") (citing HAWKINS, *supra* note 60, at 73);

And I can see no reason Why a person who without provocation is assaulted by another in any place whatsoever in such a manner as plainly shows an intent to murder him as by discharging a pistol or pushing at him with a drawn sword etc may not justify killing such an assailant as much as if he had attempted to rob him For is not he who attempts to murder me more injurious than he who barely attempts to rob me And can it be more justifiable to fight for my goods than for my life.

Id. (citing HAWKINS, *supra* note 60, at 72);

And not only he who on an assault retreats to the wall or some such strait beyond which he can go no further before he kills the other is judged by the law to act upon unavoidable necessity but also he who being assaulted in such a manner and in such a place that he cannot go back without manifestly endangering his life kills the other without retreating at all.

Id. at 2578 (citing HAWKINS, *supra* note 60, at 75);

Id. ("And an officer who kills one that insults him in the execution of his office and where a private person that kills one who feloniously assaults him in the highway may justify the fact without ever giving back at all.") (citing HAWKINS, *supra* note 60, at 75).

62. *Id.* at 2577–78.

this authority the inhabitants had a right to arm themselves at that time for their defence, not for offence[.]" references the authority of the Hawkins citation.⁶³ Adams then states that the distinction between arming for purposes of offence and "defence," "must be attended to[.]" before citing a pair of Hawkins citations about self-defense.⁶⁴

This reading of the Adams quote places it sensibly within the context of Adams's discussion about the circumstances of the Boston Massacre and when self-defense was allowed under the law of the time. On the other hand, the reading of the passage by gun rights activists makes Adams's statement a non sequitur detached completely from the context of Adam's defense of the British soldiers and discussion of self-defense standards.

3. *Thomas Jefferson*

One of the most prominent and most outrageous of the founder public carry anecdotes comes from a letter written by Thomas Jefferson to his nephew Peter Carr.⁶⁵ The *Grace* decision cited to this letter in which Jefferson "advised his nephew to '[I]et your gun . . . be the constant companion of your walks.'"⁶⁶ On its face this quote seems like compelling evidence that Jefferson believed carrying firearms generally in public was allowed and, indeed, an advisable course of action.

However, the flaws in this viewpoint become readily apparent when one looks at the full context of the Jefferson quotation, which reads:

Give about two of them [hours], every day, to exercise; for health must not be sacrificed to learning. A strong body makes the mind strong. *As to the species of exercise, I advise the gun.* While this gives a moderate exercise to the body, it gives boldness, enterprise, and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body, and stamp no character on the mind. *Let your gun therefore be the constant companion of your walks. Never think of taking a book with you.* The object of walking is to relax the mind. You

63. Adams, *supra* note 56, at 2577–78.

64. *Id.* at 2578.

65. For a detailed analysis of Jefferson's views on gun rights, see David Thomas Konig, *Thomas Jefferson's Armed Citizenry and the Republican Militia*, 1 ALB. GOV'T L. REV. 250 (2008).

66. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 137(D.D.C. 2016) (citing 1 THE WRITINGS OF THOMAS JEFFERSON 398 (H. A. Washington ed., 1853); Brief of Plaintiffs-Appellants at 24, *Gould v. O'Leary*, No. 17-2202 (1st Cir. March 5, 2018) (citing 1 THE WORKS OF THOMAS JEFFERSON 398 (H. A. Washington ed., 1884)).

should therefore not permit yourself even to think while you walk; but divert your attention by the objects surrounding you.⁶⁷

The Jefferson quote is clearly about hunting and sports shooting for recreation and relaxation rather than travelling with a firearm for purposes of self-defense.⁶⁸ The fact that Jefferson was speaking only of the limited circumstances of leisure is made even clearer by the eight words following the *Grace* Plaintiffs' citation: "never think of taking a book with you."⁶⁹ Thomas Jefferson, perhaps the most ardent bibliophile of the founding generation, whose book collection constituted the Library of Congress's original collection, who once proclaimed, "I cannot live without books," obviously would not have admonished his nephew against taking books with him on his travels or everyday business.⁷⁰

4. *Boston Tea Party*

Another absurd attempt to anecdotally tie the founders to a right to carry firearms in public cites to the participants in the Boston Tea Party. Plaintiffs in a recent public carry case in Washington, D.C. cited to "[t]he Boston Tea Party's 'Indians' [who] were 'each arm'd with a hatchet or axe, and pair pistols.'"⁷¹ It should go without saying that the Tea Partiers' violent and illegal conduct was clearly not representative of what conduct was considered legal or acceptable under normal circumstances. This argument could equally be made for a right to violently seize and destroy private property to protest tax policy.

B. Compelled Arms Bearing as an Argument for A Right to Go Armed in Public.

Another weak argument often made by plaintiffs is that because, at certain times during the colonial and founding period, states required certain people to carry firearms for militia or other self-defense purposes, there is a general right to carry firearms in public. In one recent case, the Plaintiffs

67. Letter from Thomas Jefferson to Peter Carr (Paris, Aug. 19, 1785) (on file with Yale Law School Library).

68. *Id.*

69. *See id.*; see Mem. of Points and Authorities in Support of Plaintiffs' Applications for a Preliminary and/or Permeant Injunction at 15, *Grace v. District of Columbia*, No. 1:15-cv-02234-RJL (D.D.C. Dec. 28, 2015).

70. *Thomas Jefferson, Jefferson's Library*, LIBRARY OF CONGRESS, <https://bit.ly/1qBambE> (last visited Feb. 2, 2019).

71. Appellant's Reply Brief at 17, *Wrenn v. District of Columbia*, No. 16-7025 (D.C. Cir. July 27, 2016) (citing LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772-1776 13 (Winthrop Sargent, ed., 1866)).

argued: “Plainly, if the law imposed on individuals a civic duty to bear arms ‘for public-safety reasons,’ the law necessarily conferred on those citizens a corresponding right to do so.”⁷² This argument refers to militia and militia-related laws passed in several states during the colonial and founding period requiring, for example, citizens to bring arms to church on Sundays or to carry arms when leaving the secured area of a settlement.⁷³ Similarly, all of the American colonies with the exception of Pennsylvania had militia laws requiring citizens of the colony to bear arms in the state militia in certain circumstances.⁷⁴ Again, despite the readily apparent flaws in this argument, it has been adopted by at least one court in a decision striking down public carry licensing systems.⁷⁵

72. Brief of Plaintiffs-Appellants at 22–23, *Gould v. O’Leary*, No. 17-2202 (1st Cir. March 5, 2018) (stating “about half the colonies had laws requiring arms-carrying in certain circumstances”) (citing NICHOLAS J. JOHNSON & DAVID B. KOPEL ET AL., *FIREARMS LAW & THE SECOND AMENDMENT* 106–08 (2012) (internal citations omitted)). The *Gould* plaintiffs also cited to founding era state constitutional provisions granting a right to ‘bear arms in defense of *themselves* and the state’ or ‘bear arms in defense of *himself* and the state,” and claiming the “language that is not amenable to a homebound interpretation.” *Id.* at 23. For the reasons below, the argument also fails to support a broad right to public carry. See also Brief of Plaintiffs-Appellants at 18, *Malpasso v. Pallozzi*, No. 18-2377 (4th Cir. Dec. 20, 2018) (Similar arguments).

73. See, e.g., 1631 Va. Acts 173, Acts Of February 24th, 1631, Acts XLVII, XLVIII, LI, available at <https://archive.org/details/statutesatlargeb01virg> (“Act XLVII: No man shall go or send abroad without a sufficient party well armed. Act XLVIII: No man shall go to work in the grounds without their arms, and a sentinel upon them. Act LI: All men that are fitting to bear arms, shall bring their pieces to the church . . .”); another such law states:

Whereas it is necessary for the security and defence of this province for internal dangers and insurrections that all persons resorting to places of public worship shall be obliged to carry arms . . . every male white inhabitant of this province (the inhabitants of the sea port towns only excepted who shall not be obliged to carry any other than side arms) who is or shall be liable to bear arms in the militia either at common musters or times of alarm, and resorting, on any Sunday or other times, to any church, or other place of divine worship within the parish where such person shall reside, shall carry with him a gun, or a pair of pistols, in good order and fit for service, with at least six charges of gun powder and ball, and shall take the said gun or pistols with him to the pew or seat.

An Act for the Better Security of the Inhabitants by Obliging the Male White Persons to Carry Fire Arms to Places of Public Worship states 1770, reprinted in 1775-1770 *Georgia Colonial Laws* 471 (1932).

74. See, e.g., 1693 Mass. Acts 128 (“That all male persons from sixteen years of age to sixty, (other than such as are hereinafter excepted), shall bear arms and duely attend all musters and military exercises of the respective troops”); 12 Hening’s Statutes c. 1, p. 9 et seq. (The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty . . . All free male persons between the ages of eighteen and fifty years . . . shall be inrolled or formed into companies. There shall be a private muster of every company once in two months.)

75. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 136–37 (D.D.C. 2016).

Like the anecdotes discussed above, this argument breaks down after the slightest analysis. The fact that at certain times in American history the states, or the federal government, have compelled citizens to carry arms is irrelevant to modern questions about whether a citizen has an individual right to carry firearms. Government-mandated arms-bearing in situations in which national or state security is threatened clearly does not indicate broad acceptance of a private right to carry firearms in public. Carrying arms when compelled by the government or acting under government authority has been an exception to the general prohibition on carrying arms since at least 1328, when the Statute of Northampton, the English prohibition on carrying weapons in public, excluded from its general prohibition:

[T]he King's Servants in his presence, and his ministers in executing of the King's Precepts, or of their Office, and such be in their company assisting them, and also [u]pon a Cry made for Arms to keep the Peace, and the same in such places where such acts happen.⁷⁶

During the founding period, prominent treatises made clear that going armed as part of the militia, posse comitatus, or in defense of the community was excluded from the generalized prohibition on armed public carry. Treatise writer William Hawkins, for example, stated that “no person is within the intention of the said statute [prohibiting carrying weapons], who arms himself to suppress rioters, rebels, or enemies and endeavors to suppress rioters, rebels, or enemies and endeavors to suppress such disturbers of the peace or quiet of the Realm.”⁷⁷ Similarly, the Recorder of London, the Senior Circuit Court Judge in the Criminal Court, in an opinion about the legality of certain local self-defense organizations, stated: “The lawful purposes for which arms may be used (besides immediate self-defence) are, the suppression of violent and felonious breaches of the peace and assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders.”⁷⁸

76. Statute of Northampton, 2 Edw. 3, 258, c. 3 (1328) (Eng.).

77. HAWKINS, *supra* note 60, at 136.

78. *Legality of the London Military Foot-Association*, reprinted in WILLIAM BLIZZARD, *DESULTORY REFLECTIONS ON POLICE* 59, 63 (1785). Gun rights litigants have attempted to characterize this opinion as supporting a broad right to carry firearms in public, by pointing out the suppressing riots and repelling invasions is not something that could have been done from the comfort of home. Plaintiffs-Appellants Brief at 22, *Gould v. O'Leary*, No. 17-2202 (1st Cir. March 5, 2018). This characterization strips the opinion of its context and mischaracterizes its scope as dramatically broader than it actually is. The opinion addressed the legality London Military Foot Association, a protestant self-defense organization and found that because “the possession and use

In 1886, shortly after the ratification of the Fourteenth Amendment, the Supreme Court made clear that the duty to carry arms when compelled by the government did not create a reciprocal right to form armed groups in *Presser v. Illinois*.⁷⁹ In *Presser*, the Court upheld a conviction for organizing and parading with a private militia company. The Court rejected the claim that militia participation outside of a government-organized militia is protected, stating:

Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.⁸⁰

Similarly, while the government can compel its citizens to carry machine guns and sawed-off shotguns through a military draft, the Supreme Court in *United States v. Miller*, which upheld a prohibitive tax on sawed-off shotguns, made clear that there is not a reciprocal right to own those weapons in a private capacity.⁸¹ This is true of other duties as well. While every American man has a duty to serve in the military if drafted, there is no parallel right to serve in the military. Similarly, while there is a duty to serve on a jury if called, there is no complimentary right to actually serve on a jury.⁸²

of, for certain purposes, is lawful . . . it cannot be unlawful to learn to use them (for such lawful purposes) with safety and effect,” and because in some cases arms may only be used collectively, there is also a right to be “collectively, as well as individually, instructed.” *Legality of the London Military Foot-Association*, *supra* note 78 at 60–61. The opinion made clear though that the right was but also “a duty[] for all subjects of the realm . . . to assist the sheriff, and other civil magistrates , in the execution of the laws and the preservation of the public peace.” *Id.* at 60. The recorder also made clear “that this right which every protestant most unquestionably possesses individually, may, and in many cases must, be exercised collectively.” *Id.* at 60.

79. 116 U.S. 252 (1886).

80. *Presser*, 116 U.S. at 267.

81. See *United States v. Miller*, 307 U.S. 174 (1939) (upholding the National Firearms Act’s prohibition on sawed-off shotguns); *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

82. A criminal defendant does have a right to a jury of his peers, and potential jurors have a right not to be discriminated against based solely based on race. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

C. Dangerous and Unusual Weapons as a Limitation on English and Founding-Era American Public Carry Regulations.

Another dubious historical argument often made by plaintiffs in Second Amendment challenges is that English and early-American law only prohibited the carrying of a limited class of “dangerous and unusual weapons.”⁸³ This view stems from language in *Heller* interpreting a line in William Blackstone’s eighteenth-century commentaries, “going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”⁸⁴ Proponents of a broad right to carry interpret “dangerous or unusual” much more narrowly than Blackstone intended, essentially arguing that Justice Scalia’s decision to strike down a handgun ban in *Heller* in 2008 meant that Blackstone would not have considered handguns “dangerous or unusual” weapons to carry in public in the 1700s.

Justice Scalia used Blackstone’s “dangerous or unusual” language as a way to reconcile the *Heller* decision with the Supreme Court’s 1939 decision in *United States v. Miller*, which upheld a federal law banning automatic weapons and sawed-off shotguns.⁸⁵ The Supreme Court in *Miller* clearly upheld the law under a militia-based reading of the Second Amendment, stating that because sawed-off shotguns lacked a “reasonable relationship to the preservation or efficiency of a well regulated militia,” the Second Amendment does not protect a right to possess them.⁸⁶ Justice Scalia read the decision narrowly as only indicative of what types of weapons could be prohibited, stating the case found that the Second Amendment “does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”⁸⁷ Reaching for a Founding-Era analogue to his view that particular weapons could be banned, Scalia referenced the “dangerous or unusual” language used by Blackstone.⁸⁸ Justice Scalia was not altering Blackstone’s eighteenth century understanding of the phrase—or interpreting its substantive meaning at all—but rather reasoning by historical analogy in the distinct context of weapon prohibitions, rather than public carry regulation. Unfortunately, a few courts have failed to distinguish between these contexts.

In a recent Ninth Circuit decision, the court used gun rights proponents’ interpretation of the phrase to argue that the carrying of handguns could not

83. See e.g., *Young v. Hawaii*, 896 F.3d 1044, 1064 (9th Cir. 2018).

84. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 148–49 (1769).

85. *Miller*, 307 U.S. 174.

86. *Id.* at 177.

87. *Heller*, 554 U.S. at 625.

88. *Id.* at 627.

have fit into the historical prohibition on going armed with dangerous or unusual weapons. The court reasoned that classifying handguns as “dangerous and unusual” would be inconsistent with *Heller*, which said prohibitions on dangerous and unusual weapons were constitutional while striking down a handgun ban.⁸⁹ Similarly, the Seventh Circuit stated in a decision striking down an Illinois prohibition on carrying firearms in public, “the Court cannot have thought all guns are ‘dangerous or unusual’ and can be banned, as otherwise there would be no right to keep a handgun in one’s home for self-defense.”⁹⁰

This anachronistic analysis, using a twenty-first century Supreme Court decision on a different Second Amendment issue—home possession—to alter the meaning of an eighteenth-century tradition is inconsistent with the history of how the Statute of Northampton and its founding era analogues were enforced. In addition, gun rights plaintiffs do not identify any weapons that would have been considered “dangerous or unusual” in the founding era and earlier if guns do not fall within that category. Indeed, it is difficult to imagine what would fall within that set if guns were excluded.

Excluding guns from the prohibitions in the Statute of Northampton as applicable during the Founding Era is a clear misreading of the historical record. Every piece of evidence about the understanding and enforcement of the law points to its application to weapons generally. To start with the Statute of Northampton, simply prohibited a person to “go nor ride armed,” without any requirement about a weapon’s dangerousness.⁹¹ Two centuries later, after firearms became common, Queen Elizabeth I called for enforcement of the statute against those carrying “Daggers, Pistols, and such like, not only in Cities and Town, [but] in all parts of the Realm in common high[ways].”⁹² Similarly, guides for justices of the peace instructed them to

89. *Young v. Hawaii*, 896 F.3d 1044, 1064 (9th Cir. 2018) (“clearly not all weapons can be characterized as ‘dangerous or unusual,’ else *Heller*’s exemption of Second Amendment protection for weapons of that kind would swallow the Amendment’s protections as a whole.”).

90. *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

91. Statute of Northampton, 2 Edw. 3, 258 c. 3 (1328) (Eng.). Later versions of the statute used similar language. 20 Rich. 2, c. 1 (1396) (Eng.) (prohibiting going or riding “by Night nor by Day armed . . . without the King’s special License.”).

92. Patrick Charles, *Faces of the Second Amendment Outside the Home*, 60 CLEV. ST. L. REV. 1, 21 (2012). Defendants were also charged for violating the statute for wearing pistols. *Rex v. Harwood, Quarter Sessions at Malton (Oct. 4-5, 1608)*, in 1 NORTH RIDING RECORD SOCIETY, QUARTER SESSIONS RECORDS 132 (1884) (prosecution of defendant “armed and weaponed with a lance-staff plated with iron, pistolls, and other offensive weapons . . .”).

“arrest any person, not being in his highness service, who shall be found wearing [] guns, or pistols, of any sort.”⁹³

Colonial and early state analogues of the Statute of Northampton also clearly covered firearms. A 1686 New Jersey statute prohibited going armed with “any pocket pistol, skeins (a knife), stilettoes (a knife), daggers or dirks, or other *unusual or unlawful weapons*.”⁹⁴ A few years later, Massachusetts prohibited public carry using analogous terms by calling for the arrest of anyone who “shall ride or go armed offensively.”⁹⁵ Offensive weapons were a term of art akin to dangerous and unusual weapons that would have included “guns, pistols, daggers, and instruments of war,” but not necessarily a hatchet or horsewhip.⁹⁶ Other early American statutes used similar terms, or directly prohibited going armed with handguns.⁹⁷ Tennessee, for example, prohibited the carrying of “belt and pocket pistols,” describing them as “dangerous and unlawful weapons.”⁹⁸

The best articulation of what the phrase “dangerous and unusual weapon” meant during the founding period comes from *State v. Huntly*, an 1843 North Carolina Supreme Court opinion.⁹⁹ In the case, Huntly was indicted for arming himself with “pistols, guns, knives and other *dangerous and unusual weapons*,” specifically a double-barreled rifle, which he used to threaten a neighbor over a business dispute. Huntly, like many modern plaintiffs, argued that the firearm he carried did not qualify as a dangerous and unusual weapon. The *Huntly* Court decisively rejected this argument, stating:¹⁰⁰

93. 1 GILBERT HUTCHESON, TREATISE ON THE OFFICES OF JUSTICE OF THE PEACE app. I at xlvi (1806) (citing OLIVER CROMWELL, INSTRUCTIONS CONCERNING CONSTABLES (1665)); see also ROBERT GARDINER, THE COMPLETE CONSTABLE 18 (1692).

94. 1686 N.J. Laws 289 (emphasis added).

95. 1784 Mass. Las 105, ch. 27.

96. 2 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 665 (John Curwood ed., 8th ed. 1824);

see also *King v. Hutchinson*, 168 Eng. Rep. 273, 276 (1784); SIR WILLIAM OLDNALL RUSSELL & CHARLES SPRENGEL GREAVES, TREATISE ON CRIMES AND MISDEMEANORS 124 (1854); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 214 (1873).

97. See e.g., 1821 Me. Laws 285, ch. 76, § 1 (“[No one] shall ride or go armed offensively, to the fear or terror of the [people.]”); 1836 Mass Acts 750, §16 (Prohibiting going armed with “a dirk, dagger, sword, pistol, or other offensive and dangerous weapon.”); 1838 Wisc. Laws 381, § 16 (same); 1846 Mich. Laws 690, c. 162, § 16 (same).

98. 1821 Tenn. Pub. Acts 15-16, An Act to Prevent the Wearing of Dangerous and Unlawful Weapons, c. 13 (every person so degrading himself by carrying a dirk, sword cane, Spanish stiletto, belt or pocket pistols,” shall pay a fine).

99. *State v. Huntly*, 25 N.C. 418 (N.C. Sup. Ct. 1843).

100. *Id.*

It has been remarked, that a double-barreled gun, or any other gun, cannot in this country come under the description of ‘unusual weapons,’ for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an ‘unusual weapon,’ wherewith to be armed and clad. No man amongst us carries it about with him, as one of his every day accoutrements—as part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.¹⁰¹

This view aligns with that of Hawkins, who made clear that there are unique, limited circumstances in which it is expected for someone to be armed, such as noblemen wearing “weapons of fashion as swords, etc., or privy coats of mail.”¹⁰² Similarly, the use of weapons “being only for Sport” would have been considered lawful, because the weapons would not be deemed unusual and likely to terrify the public.¹⁰³

Plaintiffs and some courts attempt to convert this broad and nuanced historical meaning into a much more cabined category based on dicta in *Heller* connecting the term “dangerous and unusual weapons” with prohibitions on machine guns.¹⁰⁴ This approach imports language from a twenty-first century Supreme Court decision as an interpretive tool for understanding eighteenth- and nineteenth-century sources. This deference to modern judicial definitions rather than historical understanding misreads *Heller* and is fundamentally inconsistent with the core originalist canon that legal texts have a fixed meaning established when a text was adopted.¹⁰⁵

Further, under the gun rights reading, “dangerous and unusual weapons” seems to have been a null set during Blackstone’s period. If carrying the weapons of the time—handguns, rifles, swords, and daggers—was not prohibited, what would have been? Machine guns were few and far between in Blackstone’s era, and it is doubtful he was concerned with a sailor returned from a long voyage going armed with a boomerang or a scimitar.

101. *Huntly*, 25 N.C. 418.

102. HAWKINS, *supra* note 96, at 489, 798.

103. MICHAEL DALTON, THE COUNTRY JUSTICE 425, 443–44 (1737).

104. *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012); *see also* *Young v. Hawaii*, 896 F.3d 1044, 1064 (9th Cir. 2018).

105. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78 (2012).

Looking at the historical sources as a whole, the only reasonable reading of Blackstone's term is that it covered firearms.

Conclusion

Courts considering challenges to public carry licensing laws are both interpreting the Second Amendment and making important public policy decisions. Who may carry firearms in public and under what circumstances are extremely important public safety issues. Studies have shown substantial increases in gun assaults and murder when stringent laws regulating the carrying of firearms in public are repealed.¹⁰⁶ The Supreme Court has mandated that history play a role in adjudicating the answer to these important public policy discussions. The litigants and judges owe it to the public that will have to live under the law created by these cases to present and consider the best historical analysis possible.

Unsupported and misleading historical arguments like those discussed here demean and undermine the judicial process. How can citizens have faith in the courts when they are being presented with and make decisions based on tall tales, wildly out-of-context quotes, and intellectually dishonest arguments? Our justice system deserves better.

106. See John Donohue, Abhay Aneja et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis* (Nat'l Bureau of Econ. Research, Working Paper No. 23510, 2018).
