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History and Tradition or Fantasy and Fiction: Which Version of the Past Will the Supreme Court Choose in NYSRPA v. Bruen?

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History and Tradition or Fantasy and Fiction: Which Version of the Past Will the Supreme Court Choose in *NYSRPA v. Bruen*?

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District of Columbia v. Heller and *McDonald v. City of Chicago* made history central to the future of Second Amendment adjudication.[1] In *NYSRPA v. Bruen,* the Supreme Court will have to decide how to evaluate conflicting accounts of the history of gun regulation in America.[2] The Court

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1. District of Columbia v. Heller, 554 U.S. 570, 591, 595 (2008); McDonald v. City of Chicago, 561 U.S. 742, 767–68 (2010).

2. N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. Apr. 26, 2021), https://www.supremecourt.gov/docket/docketfiles/html/public/20-843.html [https://perma.cc/5DQT-ZLUY].

must distinguish between pseudo-historical arguments that are part of an invented historical tradition, one that can be directly traced to modern gun rights activism, and the actual history of gun regulation, a tradition that extends over more than four centuries of English and American legal history.[3] Much of this regulatory tradition was not available to either the *Heller* or *McDonald* court because the new materials were identified and collected in the decade after the Court issued its two landmark rulings.[4] This essay analyzes a number of the most egregious historical errors presented to the Court and summarizes some of the findings of the new historical scholarship.

In contrast to the first generation of scholarship on the Second Amendment that informed much of the opinion in *Heller*, a more recent body of research takes up *Heller* and *McDonald*'s injunctions to explore the history of gun regulation.[5] This second generation of Second Amendment scholarship relies on powerful new digital searching techniques and virtual archives of primary sources unavailable at the time the two decisions were rendered.[6] This newly unearthed history has now been scrupulously documented by historians on both sides of the Atlantic: it shows a long tradition of arms regulation in public, extending over six centuries.[7] In particular, the new evidence links the good cause permit scheme at issue in *NYSRPA v. Bruen* to constitutional developments and legislation enacted during the era of the Fourteenth Amendment, a fact that should render New York law presumptively lawful under the *Heller/ McDonald* history, text, tradition framework. Yet, despite clear evidence that New York's law was neither anomalous, nor seen as unduly burdensome for the generation that enacted the Fourteenth Amendment, many of the briefs submitted to the court and the claims presented by Paul Clement during oral argument rest on

3. *Compare* Brief for Second Amendment Law Professors as Amici Curiae Supporting Neither Party, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 20, 2021) *with* Brief of Professors of History and Law as Amici Curiae Supporting Respondents, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 21, 2021).

4. Eric M. Ruben & Darrell A. H. Miller, *Preface: The Second Generation of Second Amendment Law & Policy*, 80 L. & CONTEMP. PROBS. 1 (2017).

5. *See Heller*, 554 U.S. 570; *McDonald*, 561 U.S. 742.

6. Ruben & Miller, *supra* note 4. For a good illustration of the significant expansion in the range of sources now available, *compare* the breadth of sources available using microfilms materials consulted by Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004) *with* the expanded number of sources available using digital materials and search techniques in Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55 (2017).

7. *See generally* the essays collected in A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT (Jennifer Tucker et al. eds., 2019) and the materials presented in the amicus brief by Brief of Professors of History and Law, *supra* note 3.

demonstrably false historical claims.[8] Even more puzzling, many of the positions advanced during oral argument in *Bruen* suggest that a majority of the Court is considering striking down the New York law, not because it fails the text, history, and tradition test, but because it does not fit the modern expansive vision of gun rights that animates the Republican Party and the Federalist Society.[9] It would be difficult to overstate the significance of *Bruen* to the future of the contentious debate over gun regulation. Moreover, the case offers proponents of originalism a rare opportunity to demonstrate that their method is not an ideological smoke screen for results-oriented jurisprudence, but a rigorous and neutral judicial philosophy.

Rather than break free from an earlier generation's penchant for results-oriented law office history, recent gun rights scholarship has carried forward this earlier flawed approach, enhancing it with power of digital searching and an infusion of nearly limitless research support by the NRA and other right-wing sources of funding.[10] This body of gun rights "scholarship" remains highly selective in both its use of primary and secondary sources and continues to be marred by serious anachronisms and methodological problems.[11]

The gulf separating these opposing visions of America's constitutional past was evident in the oral argument in *Bruen*. Indeed, Justice Breyer castigated the gun rights version of the past as little more than law office

8. *See* discussion *infra* pp. 4–31.

9. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008). The Federalist Society has consistently endorsed a strongly libertarian reading of the Second Amendment, and for a good illustration of this approach, *see The Second Amendment and the New Supreme Court, Federalist Society—2019*, 43 Harv. J. L. & Pub. Pol'y, 219–346 (2020).

10. Will Van Sant*, The NRA Paid a Gun Rights Activist to File SCOTUS Briefs. He Didn't Disclose it to the Court,* THE TRACE (Nov. 3, 2021). For a general discussion of the rise of coordinated and funded amicus campaigns, *see* Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE. L.J.F. 141 (2021). *See in particular*, Amicus Brief for Second Amendment Law Professors, *supra* note 3; Brief for Professors Robert Leider and Nelson Lund, and the Buckeye Firearms Association as Amici Curiae Supporting Petitioners N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 20, 2021); Brief for Mountain States Legal Foundation's Center to Keep and Bear Arms as Amici Curiae Supporting Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 16, 2021).

11. On historical methodology, *see generally* MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS (Cornell University Press ed., 2001). On the methods of professional legal history, *see* THE OXFORD HANDBOOK OF LEGAL HISTORY (Markus Dirk Dubber & Christopher L. Tomlins eds., 2018). In contrast to the work of discredited work of historian Michael Bellesiles, gun rights scholarship continues to be churned out with little regard to scholarly norms, *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 (2016). For a short and thoughtful overview of the Bellesiles scandal, *see* David J. Garrow, *Review: Crimes of History*, 29 *The Wilson Quarterly (1976-)* 112 (2005).

history.[12] Although numerous scholars have derided *Heller* as a particularly egregious example of law office history, it is unusual that a sitting justice would make this type of charge in oral argument. Justice Sotomayor was even less charitable in her assessment of the arguments being presented to the Court by gun rights attorney Paul Clement, suggesting that he was making up the history out of thin air.[13] Again, similar claims have been made in academic debate over the Court's gun rights driven Second Amendment jurisprudence, but it is striking to see such trenchant statements in oral argument.[14]

Although clashing views of history have often been presented to the Court in previous cases, the claim that one side's version of the past was essentially made up, literally unanchored from reality, or at least any reality that a serious historian would recognize as a plausible account of the past, is unprecedented in the Court's history.[15] The level of ideological distortion evident in both the briefing and oral argument in *Bruen* may do what a generation of academic scholarship could not do: thoroughly discredit the claims that originalism is a genuinely neutral and rigorous scholarly methodology.[16]

The historical evidence presented to the Court shows that New York's law is not only long-standing, but some of the material is hundreds of years old: the claim that New York's law is deeply rooted in history, text, and tradition is virtually unassailable.[17] Arms have been regulated in populace areas for centuries under Anglo-American law.[18] New York's law at issue in *Bruen* itself derives from permit schemes enacted during the Reconstruction Era, placing them firmly in the period of the Fourteenth Amendment, a fact that makes them presumptively lawful under *Heller* and

12. Transcript of Oral Argument at 10, N.Y. State Rifle & Pistol Ass'n, No. 20-843 (U.S. Nov. 3, 2021), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-843_8n5a.pdf.

13. Transcript of Oral Argument, *supra* note 12, at 19.

14. *See generally*, Patrick J. Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, 2021 U. ILL. L. REV. ONLINE 195.

15. On the use and abuse of history by the Supreme Court, that introduced the concept of "law office history," *see* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (1965). As the Ninth Circuit recently counseled in *Young v. Hawaii*, courts must proceed carefully when tackling complex historical questions, particularly those that span across more than five hundred years, lest they fall into the trap of law office history. *Young v. Hawaii*, 992 F.3d 765, 785–86 (9th Cir. 2021) (en banc), *petition for cert. filed*, (U.S. May 11, 2021) (No. 20-843). Avoiding the trap of "law office history" requires a sophisticated approach to the historical record and the relevant legal sources.

16. Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: A BLOG FOR AMERICAN HISTORY (Mar. 20, 2017), http://www.processhistory.org/originalism-history.

17. Spitzer, *supra* note 6.

18. *Id.*

McDonald's framework.[19] Nor were these regulations a "mere scattering" of laws as Paul Clement argued: millions of Americans were living under some form of good cause permit scheme by the end of the nineteenth century. Finally, states and localities enforced these and other gun laws in a racially neutral manner until the rise of Jim Crow ushered in an era of white supremacy-motivated prosecutions.[20] Gun control, it turns out, was not inherently racist, nor was it antithetical to the Fourteenth Amendment; it was an indispensable part of the government framework adopted by Republicans to implement their vision of equality and rights at the core of the Amendment.[21]

The Court's newest champions of originalism, Associate Justices Neil Gorsuch and Amy Coney Barrett, face a particularly difficult challenge reconciling their professed commitment to this theory with a decision striking the law down. Both jurists have strenuously insisted that originalism is a neutral methodology that follows the historical evidence even if the outcomes are not congenial to their policy preferences or those of the Republican Party's base.[22] Given that ample evidence was presented in the briefs filed in support of New York that stringent regulation of guns in populace areas is deeply rooted in Anglo-American law, it is odd that neither

19. *See Heller*, 554 U.S. 570; *McDonald*, 561 U.S. 742, 767–68 (2010); JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER (Cambridge University Press ed., 2018).

20. By the end of the nineteenth century more than half the population of California were living under some type of restrictive public carry legal regime, *see* Saul Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 U.C. DAVIS L. REV. ONLINE 65, 84–85 (2021). On the racially neutral character of enforcement during Reconstruction and the rise of discriminatory enforcement during Jim Crow, *see* Brennan Gardner Rivas, 55 *Enforcement of Public Carry Restrictions: Texas as a Case Study* 2603, 2607–08, 2616–17, U.C. DAVIS L. REV. (2022) (manuscript at 5–6, 10–12), https://ssrn.com/abstract=3941466.

21. For a sampling of ideologically slanted scholarship on this topic, *see generally* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998); Robert J. Cottrol & Raymond T. Diamond, *Never Intended to Be Applied to the White Population: Firearms Regulation and Racial Disparity — The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1310, 1318 (1995); NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (Prometheus, 1st ed. 2014); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 18 (1994). For its strategic deployment in *Bruen*, *see* Brief for Petitioners at 2, 10–13, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 13, 2021); Brief for National African American Gun Ass'n, Inc. in Support of Petitioners at 2–11, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 16, 2021), [hereinafter Amicus Brief for NAAGA]. For a critique of this argument, *see* Mark A. Frassetto, *The Nonracist and Antiracist History of Firearms Public Carry Regulation*, 74 SMU L. REV. F. 169 (2021).

22. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

justice devoted much time in oral argument to discussing this body of evidence, a striking omission given their originalist commitments.[23]

Ironically, during oral argument Justice Barrett, asked New York's Solicitor General if she thought *Heller* was correctly decided,[24] but the question would have been more appropriately addressed to Chief Justice Roberts and Justice Kavanaugh. Both justices expressed discomfort with treating the Second Amendment differently than the way *modern courts* treat other rights, an odd concern given the originalist framework dictated by *Heller* and *McDonald*. The proper question should have been: how did Americans in the Founding generation and the era of the Fourteenth Amendment understand the scope of permissible gun regulation?

Even if one jettisoned the history, text, and tradition framework, the characterization of rights by Chief Justice Roberts and Justice Kavanaugh was incorrect as a matter of existing federal jurisprudence.[25] There is no single model for adjudicating rights claims in current constitutional jurisprudence.[26] Even if one restricts the scope of inquiry to the First Amendment, a constitutional analogy favored by gun rights advocates that rests on a weak foundation, there is no single standard for this area of the law: there are multiple tests for constitutionality depending on the type of speech being regulated.[27] Although core political speech triggers strict scrutiny, other types of speech are subjected to more deferential tests, and some types of speech enjoy no First Amendment protections.[28] In short there

23. *See* Amicus Brief for Professors of History and Law, *supra* note 3; *see also*, Brief for Patrick J. Charles as Amicus Curiae Supporting Neither Party, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. July 19, 2021).

24. Transcript of Oral Argument, *supra* note 12, at 90.

25. On the problematic analogies between the First and Second Amendment, *see* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 99 (2012); Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L. Q. 621–682 (2019).

26. Transcript of Oral Argument, *supra* note 12, at 50 (Justice Kavanaugh addressing Paul Clement, ". . . I want to make sure I understand your main problem here with this permitting regime . . . that's just not how we do constitutional rights, where we allow blanket discretion to grant or deny something for all sorts of reasons"). *Id.* at 94–6 (Chief Justice Roberts addressing Brian H. Fletcher for the United States and drawing comparisons to the First Amendment and other provisions of the Constitution). In fact, rights, including rights expressly protected by the first eight amendments, are not treated in a uniform manner in existing jurisprudence. *See also* Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, U. OF ILL. L. REV. 1479, 1485, 1499 (2020).

27. *See generally* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 944–46 (Foundation Press, 19th ed. 2016) (analyzing the different categories of speech and relevant tests for constitutionality).

28. For a good summary of types of speech excluded from First Amendment protection, *see* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012). In particular, incitement, fighting words, true threats, and incitement to criminal conduct are all excluded and thus if one made the error of

are multiple standards of review in existing First Amendment doctrine.[29] Moreover, few other rights enshrined in the Bill of Rights are given the same level of protection as core political speech.[30] More germane to *Heller's* originalist framework, guns have never been regulated in a manner analogous to words at any time in the long arc of American legal history. Firearms have always been subject to a variety of prior restraints that would never have been permissible in the case of core political speech.[31]

I. Property Law and Criminal Law: Missing Originalist Contexts for Implementing *Heller* and *McDonald*

Scholarship on the Second Amendment has generally proceeded with little concern for how the history of other fields within American law illuminate the way guns have been treated by states and localities, where the bulk of gun regulation occurred before the 20th century.[32] In particular, the history of property and criminal law are indispensable to understanding how the regulation of guns and self-defense has evolved under American law in the period after the adoption of the Second Amendment.

As a historical matter, the proper analogy to gun regulation has never been words but has always been property.[33] Between the adoption of the

treating guns and words as constitutionally similar, the display of a firearm would place among those types of "speech" outside of the First Amendment.

29. MICHAEL C. DORF & TREVOR MORRISON, CONSTITUTIONAL LAW 159 (Oxford University Press, 1st ed. 2010).

30. On the problematic analogies between the First and Second Amendment, *see* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 99 (2012); Timothy Zick, *The Second Amendment as a Fundamental Right*, *46* HASTINGS CONST. L. Q. 621–682 (2019).

31. Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONSTITUTIONAL COMMENTARY 988 (1999). The example of loyalty oaths illustrates this point. Many states required loyalty oaths and disarmed those who refused to swear or affirm the oath. No state required similar oaths to exercise core First Amendment-type freedoms. Nor can loyalty oaths be understood as imposing a "dangerousness" exemption given that one of the groups disarmed was the Quakers who were pacifists and among the most peaceful and law-abiding communities in early America, a fact that undercuts the interpretation of this evidence offered by Justice Amy Coney Barrett in Kanter v. Barr, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting). For a discussion of how Quaker disarmament confounds the simple individual rights-collective rights categorization that has defined much recent Second Amendment scholarship and jurisprudence, *see* Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard* 29 CONSTITUTIONAL COMMENTARY 383, 299–401 (2014).

32. Spitzer, *supra* note 6.

33. Founding era lawyers and judges approach rights from a paradigm that treated them as property. Thinking of rights in these terms meant that rights were not exempt from reasonable regulation provided the statutes were enacted by representatives of the people acting to further the common good and not any special or partial interest, *see* John Phillip Reid, THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 96–113 (University of Wisconsin Press ed., 1987). Understanding eighteenth-century conceptions of rights requires

Second Amendment and enactment of the Fourteenth Amendment, guns were extensively regulated, and the framework governing them was derived from property law. In fact, the scope of gun regulation intensified after the adoption of the Second Amendment and increased after the adoption of the Fourteenth Amendment. Reconstruction witnessed an enormous expansion of gun regulation at both the state and local level.[34]

If one looks closely at Founding era conception of rights, the case for treating guns as a form of property is even stronger. The concept of inalienable right, including self-defense, was expressly listed as part of the Lockean trinity of life, liberty, and property in the first state constitutions.[35] The term inalienable itself derives from English property law. The notion that because the right to acquire property was inalienable, government was prohibited from regulating it in a manner consistent with police power authority has no foundation in Anglo-American jurisprudence.[36] Indeed, such an idea would have been almost incomprehensible to the Founding generation. Property has always been subject to a host of regulations.[37] Just because you owned a tannery, did not mean you got to dump lye into the stream a mile from your neighbor.[38] The same legal principle has always applied to guns.

All guns were not created equal in the eyes of the law during the Founding era.[39] Only a narrow subset of firearms suitable for participation in the militia were given the highest level of constitutional protection. One

setting aside many modern legal ideas about rights and recovering the lost language of Founding era "rights talk"; *see* Jonathan Gienapp, *Response: The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115 (2019); Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569 (2017).

34. Delaware's provision was typical of militia laws from the Founding era and extended additional constitutional protections for militia weapons, making them immune from seizure in debt proceedings or confiscation for failure to pay taxes, *see* Chapter 36, sec. 42 LAWS OF THE STATE OF DELAWARE (1793). All other weapons were subject to the full range of state police power regulation and civil suits. In essence, militia weapons, were a form of taxation, transferring part of the cost of public defense to individual households. For an exploration of the tax analogy in a modern context, *see* Hannah E. Shearer & Allison S. Anderman, *Analyzing Gun-Violence-Prevention Taxes Under Emerging Firearm Fee Jurisprudence*, 43 S. ILL. U. L. J. 157 (2018).

35. Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991).

36. *See generally* Joseph Postell, *Regulation during the American Founding: Achieving Liberalism and Republicanism*, 5 AMERICAN POL. THOUGHT 80 (2016).

37. *See generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA (The University of North Carolina Press, 1st ed. 1996).

38. *Id*. at 218, 227.

39. On the important distinction between arms suitable for the militia and the ordinary arms most popular with Americans at the time of the Second Amendment, *see generally* 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).

of the most fundamental principles in Founding era constitutional law was the rule against taking property without just compensation. Interestingly, some guns were expressly exempted from this rule. Pennsylvania, the first state to recognize the right to bear arms, excluded the requirement to purchase arms and ammunition from the Takings Principle governing nearly all private property. Modern scholarly and judicial treatments of the right to bear arms in the Pennsylvania Constitution typically focus exclusively on Article XIII affirming the right to bear arms. But this provision was the not the first discussion of arms bearing in the state Constitution. The first mention of this right occurred in the context of the Takings Principle and the right of conscientious objectors:

> That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence [sic] of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.[40]

Government could not take property without compensation, but a subset of firearms were exempt from this rule. The state could require individuals to purchase firearms and use their own ammunition without any compensation. Many of the individual state militia laws also went further and exempted militia weapons from seizure during debt proceedings or sale for payment of tax arrears. All other firearms were treated as ordinary property, subject to the full force of the state's police powers. The modern debate over firearms has operated with a simplistic dichotomy totally alien to the Founding generation. In today's debate guns are either treated like words and entitled to the highest level of constitutional protection or they viewed as entirely outside the scope of constitutional protection. The Founding era approached this issue in more nuanced fashion. Some guns enjoyed protections denied to virtually any other form of property, and other guns were treated in the same way as ordinary property. The modern dichotomy that suggests that guns must be treated like words, or they are entirely outside of constitutional protection is deeply flawed and would have puzzled members of the Founding generation.

40. P.A. CONST. art. VIII (1776).

The principle that not all guns were created equal did not disappear from American law after the Founding era. Several states and localities, passed laws that taxed some weapons, typically pistols, but exempted those firearms "kept for use by military companies."[41] There was also taxes on firing ranges. Directly taxing guns or imposing incidental taxes on their use posed no constitutional issues for Americans in the pre-Civil War era. The trend not only continued after the Civil War, but as was true for nearly every aspect of firearms law, the level of regulation intensified. States and localities taxed pistols during Reconstruction.[42] Alabama imposed the following tax on handguns:

> All pistols or revolvers in the possession of private persons not regular dealers holding them for sale, a tax of two dollars each; and on all bowie knives, or knives of the like description, held by persons not regular dealers, as aforesaid, a tax of three dollars each; and such tax must be collected by the assessor when assessing the same, on which a special receipt shall be given to the tax payer therefor, showing that such tax has been paid for the year, and in default of such payment when demanded by the assessor, such pistols, revolvers, bowie knives, or knives of like description, must be seized by him, and unless redeemed by payment in ten days.

The implication of treating firearms as property, a tradition that extends to the origins of the nation, needs further scholarly attention. The historical evidence that guns have never been treated in the same fashion as words is also overwhelming. Given these facts, the discomfort expressed by Chief Justice Roberts and Justice Kavanaugh about how New York's statute treats the right to bear arms in an anomalous fashion is both historically inaccurate and misrepresents the current state of constitutional jurisprudence. The discomfort felt by both jurists has little to do with New York's law, a statute that has been in place for over a century; the tension is a function *Heller*'s originalism.

Few rights enshrined in the bill of rights are treated in the narrow and circumscribed fashion that the Founding generation approached rights.[43]

41. ANDERSON HUTCHINSON, CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE, WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1798 TO 1848: WITH THE NATIONAL AND STATE CONSTITUTIONS, CESSIONS OF THE COUNTRY BY THE CHOCTAW AND CHICKASAW INDIANS, AND ACTS OF CONGRESS FOR THE SURVEY AND SALE OF THE LANDS, AND GRANTING DONATIONS THEREOF TO THE STATE 182 (1848).

42. THE REVISED CODE OF ALABAMA, 169 (1867). *See also* 1867 MISS. LAWS 327–28, An Act To Tax Guns And Pistols In The County Of Washington, ch. 249, § 1.

43. For a good illustration of this, *see generally* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 312 (2017).

Given that today's First Amendment accords protections largely un-dreamed of in the Founding era, it is hardly surprising that Second Amendment jurisprudence, still in its infancy, has not had time to expand the scope of the right to bear arms to bring it into conformity with other aspects of the modern rights revolution. Most other areas of constitutional law have not been shaped by originalism, but some form of living constitutionalism.[44] What Roberts and Kavanaugh appear to be gesturing toward is a repudiation of *Heller*'s originalism and an application of living constitutionalism to the Second Amendment. Unfortunately, neither jurist articulated this desire in a transparent manner in oral argument.[45]

Given that *Heller* tied the Second Amendment to individual self-defense, one would think that the oral argument in *Bruen* would have devoted greater attention to charting the evolving understanding of this right under Anglo-American law, but sadly this issue did not receive much attention, despite a remarkable brief filed by two of the nation's premier scholars on the history of criminal law, George Fletcher and Guyora Binder.[46] Yet, an understanding of the history of criminal law is indispensable to making sense of the Founding era's approach to self-defense. Although Federalists and Anti-Federalists were divided on many issues, there was little disagreement between the two sides in ratification that the new Constitution would not restrict the states' police powers or their ability to define the scope of self-defense by local statute. Federalist Tench Coxe and the Anti-Federalist author Brutus may have agreed on few things, but they were in accord on this point. Brutus made this point expressly when he wrote, "[I]t ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other . . . ."[47] Federalist Tench Coxe, echoed this sentiment, declaring confidently that "[t]he states will regulate and administer the criminal law, exclusively of Congress."[48] Fletcher and Binder's brief underscores the point that there has never been a single uniform standard of self-defense across all American jurisdictions, a basic fact about criminal law, that seems

44. Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1234 (2015) (arguing "Constitutional law is, after all, replete with instances of non-originalist construction.").

45. Transcript of Oral Argument, *supra* note 12, at 24–27, 52–53.

46. Brief for Criminal Legal Scholars as Amici Curiae Supporting Respondents, N.Y. State Rifle & Pistol Ass'n v. Bruen, (2021) (No. 20-843).

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

48. TENCH COXE & A. FREEMAN, FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS, 1787-1788 82 (Colleen A. Sheehan & Gary L. McDowell eds., Liberty Fund 1998).

to have escaped the notice of the Supreme Court in its oral argument in *Bruen*.[49]

Under English common law, the use of deadly force was permitted in the home but strictly limited outside of the home.[50] So, from its very inception, the right of self-defense in the Anglo-American tradition was related to time and space in a unique way that set it apart from other rights. Outside of the home, one had a duty to retreat, not stand your ground under common law if one faced a threat. The strength of the right diminished as one moved further away from the home and moved into more populous areas. Additionally, the limits on deadly force were also different if one encountered a home intrusion during the day and if one did so at night.[51] Thus, the right of self-defense existed in constitutional space and time in a way that made it different than other rights. Consequently, the scope of the right of self-defense was fundamentally shaped by where and when the right was exercised.

The ancient Statute of Northampton (1328), a law that was extensively discussed in the *Bruen* oral argument,[52] singled out sensitive places such as courts and populous areas such as fairs and markets as locations where one could not travel armed unless one was acting to preserve the peace. Several justices seemed to confuse these two distinct features of the Statute of Northampton thereby eliding the difference between populous areas and historically "sensitive" ones. A federal courthouse is a sensitive place; Grand Central Station is a populous one. This important distinction is supported by a host of specific, contemporaneous statutes that existed alongside Northampton-type laws and separately addressed the use of firearms during sensitive *times*, including holidays such as New Year's

49. Mark Anthony Frassetto, *Meritless Historical Arguments in Second Amendment Litigation*, 46 HASTINGS CONST. L. Q. 531 (2019).

50. Guyora Binder and Robert Weisberg*, What Is Criminal Law About?*, 114 MICH. L. REV. 1173, 1183 (2016); Daryl A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85 (2017).

51. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 72–76 (1716). John Adams used Hawkins extensively in preparing for the Boston Massacre trial, *see* ADAMS PAPERS, LEGAL PAPERS OF JOHN ADAMS, CASES 63 AND 64: THE BOSTON MASSACRE TRIALS 242–270 (L. Kinvin Wroth & Hiller B. Zobel eds., Belknap Press of Harvard University Press, 1965).

52. STATUTE OF NORTHAMPTON 2 EDW. 3, C. 3 (1328), (Phillip B. Kurland & Ralph Lerner eds., The Founders' Const. 1986), https://press-pubs.uchicago.edu/founders/documents/amendIIs1.html. On the importance of the Statute of Northampton to maintain the peace, *see generally* A. J. Musson, *Sub-Keepers and Constables: The Role of Local Officials in Keeping the Peace in Fourteenth-Century England*, 117 ENG. HIST. REV. 1 (2002). Transcript of Oral Argument, *supra* note 12, at 48–49, 57–58, 90–91, 93–94.

Day.[53] Although some populous places may also be sensitive places, and vice versa, the two concepts should not be conflated.

The Statute of Northampton and its American analogs were not just regulations of sensitive places or times. These types of laws prohibited arms from places of commerce and civic life because 18th- and 19th- century Americans believed that the presence of arms undermined civil society, public peace, and freedom itself.[54] Fairs and markets were, at that time, the centers of commerce, civic life, and culture. They were typically the location for the placement of important public announcements—facts which mark them as almost the antithesis of "sensitive places."[55]

II. Pistol Packin' Patriots and Other Antiquarian Oddities

One of the oddest arguments presented by Clement drew on a claim made in an amicus brief by Second Amendment law professors that noted the unremarkable fact that many in the Founding era carried guns in public. This "Founders with guns argument" is not simply meritless, it reveals a lack of understanding about the social and cultural history of eighteenth-century America.[56] Thus, Clement and the pro-gun professors note that Patrick Henry often traveled to court with a musket. What Clement and the pro-gun briefs ignore is that court days were among the most important public occasions in rural Virginia. These events were one of the few times when members of the community, typically scattered across the rural landscape of Virginia, gathered together; it was only natural that these occasions would be a convenient time to gather the militia together for muster, inspection, and training.[57] So rather than provide evidence for a broad free-standing right to travel armed in public, the Henry example merely shows that when traveling to militia muster, Henry carried the weapon that Virginia law compelled him

53. *1665 N.Y. Laws 205, Ordinance Of The Director General And Council Of New Netherland To Prevent Firing Of Guns, Planting May Poles And Other Irregularities Within This Province*, DUKE CENTER FOR FIREARMS LAW (last visited May 26, 2022), https://firearmslaw.duke.edu/laws/1665-n-y-laws-205-ordinance-of-the-director-general-and-council-of-new-netherland-to-prevent-firing-of-guns-planting-may-poles-and-other-irregularities-within-this-province/. *An Act to Prevent firing of guns and other firearms within this state, on certain days therein mentioned, 1785*, 2 LAWS OF THE STATE OF NEW YORK 152 (1886).

54. *See generally* Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel under Anglo-American Law, 1688–1868*, 83 L. & CONTEMP. PROBS. 73 (2020).

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

56. *See* Frassetto, supra note 49.

57. E. Lee Shepard, "This Being Court Day": Courthouses and Community Life in Rural Virginia, 103 THE VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY 459, 466 (1995); Rhys Isaac, *Dramatizing the Ideology of Revolution: Popular Mobilization in Virginia*, *1774 to 1776?* 33 THE WM. & MARY Q. 357, 383 (1976).

to carry on muster days. Similarly, the fact that Thomas Jefferson asked a friend to return a pair of pistols that he mistakenly left locked securely in a case at a tavern he visited in his travels does not support Clement's claim that the Founders promiscuously and habitually carried arms in public. Here is how Clement summarized the Jefferson evidence: "Thomas Jefferson requested that arms be brought to him in the District."[58] Again, the unremarkable fact that members of the nation's political and economic elite owned firearms and used them for a variety of purposes is incorrectly taken as evidence of a broad free-standing right to carry guns in public whenever and wherever an individual traveled. If Clement had quoted the entire relevant section of the latter, not just a snippet out of context, the evidence would support a very different interpretation of Jefferson's actions. "I left at your house, the morning after I lodged there, a pistol in a locked case."[59] Jefferson further remarked that "I have written to desire either Mr. Randolph or Mr. Eppes to call on you for it, as they come on to Congress, to either of whom therefore be so good as to deliver it."[60] The first point worth noting is that Jefferson traveled with his pistols in a locked case. Having accidently left them at an inn, a fact that underscores that the pistols were far from his mind during his travels, he asked that they be returned to him at his friend's convenience, a fact that further suggests that Jefferson did not believe that the pistols were essential to his day-to-day life.[61] Rather than demonstrate that Jefferson was an ardent supporter of unfettered public carry, the full quote shows that Jefferson typically carried weapons locked up when he traveled on the public roads of the new nation. Indeed, Jefferson was so mindful of this need, he had a special pair of pistol holders made that would allow him to carry his arms securely locked when he ventured beyond his vast land holdings in the western part of Virginia.[62]

Although Clement makes much of the guns owned by the Founders, he is dismissive of the law books they owned and the treatment of limits on armed travel that were well established features of the common law. Clement is particularly disdainful of references in amicus briefs to the work of Michael Dalton's *Country Justice*, a popular legal text that was among the most influential legal books published in the eighteenth-century Anglo-

58. Reply Brief for Petitioners at 11, N.Y. State Rifle & Pistol Ass'n v. Bruen, (2021) (No. 20-843).

59. THOMAS JEFFERSON ENCYCLOPEDIA, "Firearms", https://www.monticello.org/site/research-and-collections/firearms.

60. *Id.*

61. *Id*.

62. The research division at Monticello have collected many of Jefferson's comments about firearms. *See* THOMAS JEFFERSON ENCYCLOPEDIA, *supra* note 59. Contrary to claims of Clement and the Professors of Second Amendment Law Brief, Jefferson securely locked up his guns when traveling in public, going so far as to commission a custom saddle to lock them up.

American world.[63] Dalton's discussion of the limits on armed travel makes clear why Clement was so eager to downplay Dalton's importance:

> All such as shall go or ride armed (offensively) in Fairs, Markets or elsewhere; or shall wear, or carry any Guns, Dags, or Pistols charged, any Constable; seeing this may arrest them, carry them before a Justice of the Peace, and he may bind them to the Peace; yea, tho' those persons were so armed or Weaponed for their defense upon any private quarrel.

In such situations, Dalton reminded his readers "they might have had the Peace against the other persons: and besides, it striketh a fear and Terror in the King's Subjects.[64]

As Dalton's text made clear, during the Founding Era the act of traveling with an offensive weapon by its very nature provoked a "fear of the people"—there was no need to independently establish a specific intent to terrify, or prove that an action was an actual breach of the peace to meet this terror requirement.[65] Nor did English law accept that one might pre-emptively arm to address a specified threat, the appropriate response was to bind the threatening person to the peace. Even if a person was "armed or weaponed for their defense upon any private quarrel," the appropriate response was still to arrest them, and bind the threatening person to the peace. Moreover, if the person continued to arm in contravention of the prohibition on armed travel, the justice of the peace "ought to bind him anew, and by better sureties."[66]

Dalton also noted that the law included an exemption for cases in which individuals acted to preserve the peace.[67] It would have made little sense for Dalton to underscore this exception in his guide to the law if there was a general right of armed peaceable travel. As he noted, only "the King's Servants in his presence, and Sheriffs, and their Officers, and other the Kings Ministers, and such as be in their company assisting them in executing the Kings Process, or otherwise in executing of their Office, and all others in pursuing Hue and Cry," were exempt from the prohibition and "may lawfully

63. Reply Brief for Petitioners, *supra* note 58, at 7–8.

64. *See* MICHAEL DALTON, THE COUNTRY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 380 (1726).

65. *Id.* On Dalton's influence and the role of justice of the peace guides to Anglo-American legal culture, *see* Larry M. Boyer, *The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History*, 34 THE Q. J. OF THE LIBRARY OF CONGRESS 315 (1977).

66. DALTON, *supra* note 64, at 380.

67. *Id.* at 381.

bear Armour or Weapons."[68] Dalton's writings were among the most important legal texts imported to the colonies, and any jurist who purports allegiance to the "original public meaning" of the Second Amendment would be remiss to ignore Dalton's guidance. John Adams not only owned a copy of Dalton, but he made extensive use of his book's treatment of the common law in his preparation for the Boston Massacre trial. Adams evidently considered Dalton to be authoritative, as important as other influential English legal commentators he considered, including Coke, Blackstone, and Hawkins (some of whom cited Dalton in their own treatises).[69] Adams noted that the use of arms to put down riots was not simply legal, but subjects were required to assist agents of the crown to restore the peace.[70] The use of arms in these contexts was the limited exception to the general rule against public carry. But Clement takes a very narrow exception to the rule and treats it as dispositive, ignoring the rule itself.

Dalton's writings were incredibly influential at the time that the Second Amendment was ratified, and their significance outlasted the Founding era. Dalton's work continued to be quoted in antebellum American legal texts, including the growing genre of state-specific justice of the peace manuals that proliferated in the early republic.[71] Dalton's exposition of the law—including his position that there existed no general right to carry firearms in public, even for anticipated self-defense—thus contributed to the general understanding of governmental authority to regulate public carry when the Second Amendment was drafted, as well as when the Fourteenth Amendment made it applicable to the States.

III. Regionalism and Change Over Time: Treating the Right of Self Defense and Regulation Historically

No scholar familiar with early American legal history would presume to generalize American legal attitudes based on the views of slave-owning judges in the Antebellum era, yet much of the case against New York rests

68. Adams quoted Dalton, Blackstone, and Hawkins, three of the most influential texts in the colonies. "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; in as much as every private person seems to be authorized by the law, to arm himself for the purposes aforesaid." Hawkins, PLEAS OF THE CROWN p. 71.

69. Reply Brief for Petitioners, *supra* note 58, at 10–11; "Adams' Argument for the Defense: 3–4 December 1770," *Founders Online,* NAT'L ARCHIVES, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016.

70. NAT'L ARCHIVES, *supra* note 69.

71. William Henig, one of the most influential legal figures in early Virginia history, quoted extensively from *The Country Justice* in his discussion of surety of the peace and copied the standard form of a surety from Dalton; *see* WILLIAM HENIG, THE NEW VIRGINIA JUSTICE 572–79 (Johnson & Warner, 2nd ed. 1810).

on generalizations derived from the views of this body of sources.[72] There is little doubt that a more expansive conception of gun rights emerged in parts of the slave-owning South.[73] But, it is equally indisputable that a different model of firearms regulation emerged in Massachusetts and spread to other parts of the nation, and eventually to some parts of the slave-owning South.[74] The Massachusetts Model used sureties of the peace and good behavior to enforce the peace.[75] However, Clement and the other amicus briefs supporting his position misrepresent the nature of sureties, transforming them from a means to limit armed travel and preserve the peace into something resembling a modern shall-issue regulatory framework.[76] The erroneous claim that surety of the peace laws allowed individuals to carry arms, unless a specific individual came forward to demand a peace bond, turns Founding-era history on its head. The purpose of these laws was in fact to achieve the opposite goal: limiting armed travel in public to a very narrow range of situations.[77]

Gun rights advocates have approached Anglo-American law as if little changed between the Glorious Revolution and the American Civil War.[78] But a proper understanding of the evolving meaning of self-defense—and the changing legal response to the potential threat posed by the emergence of cheap, reliable, and easily concealed weapons—is essential to making sense of the legal history of this period.

The common law model of conserving the peace inherited from England was rooted in the face-to-face communal practices of early modern England's rural communities.[79] Until the rise of modern police forces in the nineteenth century, this community-based model of policing dominated on

72. On the importance of early American regional differences in the evolution of the common law, *see generally* David Konig, *Regionalism in Early American Law*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 144 (Michael Grossberg & Christopher Tomlins eds., Cambridge University Press, 1st ed. 2008); 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).

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

74. *Id.*

75. On the Massachusetts Model, *see* Blocher & Miller, *supra* note 19, at 30.

76. Reply Brief for Petitioners, *supra* note 58, at 11–12.

77. DALTON, *supra* note 64, at 380 ("[I]f he hath broken (or forfeited) his Recognizance by Breach of the Peace, the Justice may and ought to bind him anew, and by better Sureties, for the Safety of the Person in Danger . . . .").

78. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009) (erroneously reading developments in the antebellum South backward into earlier English and American history.)

79. *See generally* STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND 1550–1640 (Palgrave Macmillan, 1st ed. 2000).

both sides of the Atlantic.[80] As conservators of the peace, justices of the peace, sheriffs, and constables maintained their traditional authority to enforce the peace. This included the power to preemptively disarm, bind over with sureties of the peace or good behavior, and imprison those who violated the prohibition on armed travel.[81]

The importance of this tradition was underscored in the Massachusetts case of *Commonwealth* v. *Leach*.[82] The case addressed the question of how much of the traditional power accorded to justices of the peace under common law had been absorbed into Massachusetts law. Contrary to Clement's account, the *Leach* case affirmed that the English statutes enacted during the reign of Edward III, bestowing extensive powers on justices of the peace, had been fully absorbed into the state's common law. This included the wide-ranging authority to detain, disarm, and bind to the peace any individual who traveled armed in public outside of the recognized exemptions.[83]

Massachusetts law expanded gun rights well beyond the traditional English common law view, but it stopped short of the modern libertarian vision being championed in *Bruen*. The approach taken by Massachusetts in this effort to rationalize their law was built on the landmark decision on the scope of legal self-defense: C*ommonwealth v. Selfridge*, an 1806 case that changed the course of American criminal law and its view of armed self-defense.[84] By failing to understand the role of *Selfridge* in the history of the evolution of American self-defense law, gun rights advocates and their scholarly allies have warped early American criminal law almost beyond

80. LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 100 (The University of North Carolina Press, ed. 2009). For examples of unreliable historical accounts of sureties and the role of the justice of the peace as conservators of the peace, *see* David B. Kopel and George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's Young v. State of Hawaii*. For another ahistorical treatment of the same issue, *see* Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, GEORGE MASON UNIVERSITY LEGAL STUDIES RESEARCH PAPER SERIES NO. LS 21-06, 1, 13 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697761. Leider weaponized this argument in his amicus brief in *Bruen*, repeating the same errors, *see* Leider, *supra* note 10.

81. Cornell, *supra* note 54, at 79, 83, 90.

82. EPHRAIM WILLIAMS ET AL., REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 31 (Palala Press ed., 2015).

83. Reply Brief for Petitioners, *supra* note 58, at 6–7.

84. Retreat, not stand your ground, was the legal requirement under English common law. The notable exception to this rule was the "castle doctrine" covering deadly force in the home against intruders. *See Semayne's Case*, 77 Eng. Rep. 194, 195 (1604) (KB). *See generally*, Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85 (2017). On Selfridge's importance to the American law of self-defense, *see* RICHARD MAXWELL BROWN, NO DUTY TO RETREAT VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1991).

recognition, and therefore failed to grasp the significance of the Massachusetts Model.[85]

Under English common law, there was no good cause or imminent threat exception that allowed individuals to pre-emptively carry arms to defend against a specified threat. The Massachusetts model built on *Selfridge*'s new reasonable fear standard.[86] According to the *Selfridge* standard, if an individual had a reasonable fear of serious injury or death, with a specified threat, arming pre-emptively was now legal.[87] This new approach to arming in cases of specified need was an important break with English law, but it was not a total rejection of the entire common law approach to limiting armed travel.

It would be hard to over-state the significance of *Selfridge* to American law. *Selfridge* recognized that the traditional communal enforcement of the peace that shaped English law was itself insufficient in the changed circumstances of the early American republic. The world of the Founders had been replaced by the one chronicled by Tocqueville in *Democracy in America*.[88] The evolving right of self-defense as articulated in *Selfridge* reflected the growth of a new, more individualistic conception of armed self-defense—an approach that recognized the need to arm in situations in which an individual could not depend on neighbors or the law for protection.[89]

The new, post-Selfridge standard was codified in two distinct provisions of the criminal code adopted by Massachusetts in the 1830s. The first provision reaffirmed the right of any person to seek a peace bond against any individual who threatened the peace:

> "If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace."[90]

85. Reply Brief for Petitioners, *supra* note 58, at 8–9.

86. The impact of Selfridge on criminal reform in Massachusetts is evident IN REPORT OF THE PENAL CODE OF MASSACHUSETTS 22, (1844).

87. On the significance of Selfridge, *see* Francis Wharton, A TREATISE ON CRIMINAL LAW OF THE UNITED STATES (1846) at 259.

88. George Kateb, *Democratic Individualism and Its Critics*, 6 ANN. REV. OF POL. SCI. 275, 293 (2003).

89. Daniel Breen, *Parson's Charge: The Strange Origins of Stand Your Ground*, 16 CONN. PUB. INT. L.J. 41, 71 (2017).

90. 1836 Mass. Acts 750.

Massachusetts also expressly reaffirmed the broad powers of justice of the peace to maintain the peace even in cases in which no individual brought forward a complaint, providing that:

> "Every justice of the peace, within his county, may punish by fine, not exceeding ten dollars, all assaults and batteries, and other breaches of the peace, when the offence is not of a high and aggravated nature, and cause to be stayed and arrested all affrayers, rioters, disturbers and breakers of the peace, and all who go armed offensively, to the terror of the people, and such as utter menaces or threatening speeches, or are otherwise dangerous and disorderly persons."[91]

Under Massachusetts law, any justice of the peace thus retained the authority that conservators of the peace had enjoyed under English common law, to arrest or bind over citizens violating the statue prohibiting armed travel.

In his reply brief on behalf of the Petitioners challenging New York's law in *NYSRPA v. Bruen*, Paul Clement falsely claimed that the Massachusetts surety law "required a magistrate to find "reasonable cause" that someone had demonstrated a propensity to *misuse* a firearm to cause "injury, or breach the peace," before a surety could be demanded to *continue* carrying it."[92] Paul Clement was, as usual, wrong about the history. In fact, the reasonable cause standard applied to the narrow exception permitting public carry, not to the general rule prohibiting it.[93] Clement's conclusion that "[t]hese laws thus reinforced the understanding that the people had a baseline *right* to carry arms, and that only *abuse* of that right could justify its restriction," is the exact opposite of how these laws actually worked—as the relevant statutes make clear.[94]

One of the best sources to illuminate the public understanding of the 19th-century Massachusetts law is a commentary authored by one of the State's leading criminal law judges, Peter Oxenbridge Thacher.[95] A standard legal maxim familiar to judges and lawyers in antebellum America held that "great regard, in the exposition of statutes ought to be paid to, the

91. 1836 Mass. Acts.

92. Reply Brief for Petitioners, *supra* note 58, at 11.

93. 1836 Mass. Acts, Chap. 85 Sect. 25.

94. Clement offers no historical evidence to substantiate his "reading" of how surety statutes were interpreted at the time by leading Massachusetts jurists.

95. The dominant model of originalism, public meaning originalism, focuses on the how an ideal legally knowledgeable reader at the time would have understood the words of the text, for a useful guide to originalist theory, *see* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

construction that sages of the law, who lived about the time."[96] Few figures in antebellum law exemplified the notion of "a sage of the law" than Peter Oxenbridge Thacher.[97]

Thacher explicated the meaning of the Massachusetts law in an influential grand jury charge that was reprinted as a pamphlet and also excerpted in the press. Grand jury charges were important civic occasion in antebellum America, and were especially significant public events in Massachusetts because they gave the "sages of the law" an opportunity to expound and explicate the meaning of important legal concepts to citizens. Thacher's reading of his own state's laws on public carry left little room for interpretive disagreement. "In our own Commonwealth [of Massachusetts]," Thacher reminded members of the grand jury, "no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property."[98]

Gun rights advocates have either ignored Thacher's writings or dismissed their relevance.[99] According to this flawed gun rights account, Thacher's words were largely meaningless with little legal significance. In

96. Coke's legal maxim regarding the importance of consulting the sages of the law when interpreting statutes was familiar to lawyers and judges in the early Republic, *see* E. FITCH SMITH, COMMENTARIES ON STATUTES AND CONSTITUTIONS 739 (Gould, Banks & Gould, ed. 1848). On Smith's significance to antebellum legal culture, *see* POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 69; *see also* Leider, *supra* note 80.

97. Thacher was praised by contemporaries for his "thorough knowledge of the criminal law and its practical application," P.O WOODMAN, REPORTS OF CRIMINAL CASES TRIED IN THE MUNICIPAL COURT OF THE CITY OF BOSTON, BEFORE PETER OXENBRIDGE THACHER, JUDGE OF THAT COURT FOR 1823-1843 (Boston, 1845). *The American Review*, an influential Whig magazine, singled out this volume with effusive praise, commenting that the judge's "high character as a magistrate was not only known to the profession in New England, but his published charges to grand juries, and occasional reports of important cases tried before him, had made him known throughout the country." See 3 THE AMERICAN REVIEW: A WHIG JOURNAL OF POLITICS, LITERATURE, ART, AND SCIENCE 222–23 (1846).

98. Peter Oxenbridge Thacher, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON ON MONDAY, DEC. 5TH A.D. 1836 AND ON MONDAY, MARCH 13TH, A.D. 27-28 (Dutton and Wentworth eds., 1837); *Judge Thacher's Charges,* CHRISTIAN REGISTER AND BOSTON OBSERVER June 10, 1837, p. 91.

99. For strained efforts by gun rights advocates to discredit Thacher's understanding of his state's criminal law, *see* FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 79–80 (Nicholas J. Johnson et al. eds., 2018); *see also* Leider, *supra* note 80. On the role of grand jury charges in this period of American legal history, *see* DENNIS HALE, THE JURY IN AMERICA: TRIUMPH AND DECLINE 93–98 (2016); Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding,* 24 CARDOZO L. REV. 1753, 1754 (2003). The phrase "sages of the law" was frequently used by legal commentators from Coke to Kent, *see e.g.*, James Kent, 1 COMMENTARIES ON AMERICAN LAW 463 (1826). On Coke's instantiation of the concept in Anglo-American law, *see* Wilfrid Prest, *History and Biography, Legal and Otherwise*, 32 ADEL. L. REV. 185 (2011).

reality though, grand jury charges were important civic occasions in part *because* leading jurists expounded the meaning of the law for the public. Thus, if one were genuinely interested in how the Massachusetts law was understood by the public at that time (and certainly by those well-informed readers acquainted with modes of legal reasoning and canons of statutory construction), Thacher's grand jury address would be precisely the type of source that would illuminate the original public meaning of the Massachusetts laws on public carry.[100] On this matter, Thacher's position and counsel to the public was unequivocal: No civilian had the right to go armed in public "without reasonable cause to apprehend an assault or violence to his person, family, or property."[101]

IV. Armed Travel in Antebellum Boston: Testing the non-Enforcement Thesis

Gun rights advocates have not only ignored or dismissed the express statements of antebellum criminal jurists about limits on armed travel in antebellum Massachusetts, but they have also concocted an alternative theory of a right to peaceable armed travel based on a wholly speculative and implausible set of claims derived not from any actual sources, but from silences in the historical record.[102] According to this deeply-flawed view, carrying guns in public was the contemporary norm simply because scholars (half of whom do not seem to be looking particularly hard in the right places) have not yet found any cases *challenging* the Massachusetts law. This non-enforcement thesis rests on a host of interpretive errors. It misreads the silences in the historical record, ignores readily available evidence from cities like Boston that Massachusetts' public carry prohibition was in fact enforced, effectively jumbles the historical chronology of gun regulation in the state ignoring important changes in the law over time, and fails to understand how criminal justice and law enforcement functioned in the early republic.[103]

First, it is important to acknowledge that written records of the activities of local justices of the peace from centuries ago, are hard to locate, particularly in rural areas of New England, if they survive at all. Although

100. There is a vast and seemingly ever-expanding scholarly literature on originalism, for a useful introduction *see generally*, Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

101. Peter Oxenbridge Thacher, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON ON MONDAY, DEC. 5TH A.D. 1836 AND ON MONDAY, MARCH 13TH, A.D. 27-28 (Dutton and Wentworth, 1837); *Judge Thacher's Charges,* CHRISTIAN REGISTER AND BOSTON OBSERVER June 10, 1837, 91.

102. Leider, *supra* note 80.

103. Leider, *supra* note 80.

the records of justices of the peace in rural New England are rare, there is ample historical evidence from Boston, the area's most populous city, that shows armed travel in public was an unusual event, but nonetheless was a crime that was enforced by the Boston police and courts. The rules and ordinances governing the Boston police expressly empowered police officers to arrest any person who traveled armed in violation of state law. Such individuals could be stopped and searched, and if weapons were found, could be prosecuted. The rules governing Boston police were explicit about this power: police had the power to stop and search any individual who disturbed the peace or was "unduly armed with a dangerous weapon."[104] The gloss on the law in the Boston police rules makes it clear that a good cause—like that required by the modern New York law—was the only reason that would justify armed travel under early Massachusetts law.

The most obvious explanation for why there were no challenges to the Massachusetts prohibition on armed carry is that few individuals at that time traveled armed in heavily-populated areas in the state without a good cause. Historian Roger Lane, the leading authority on crime in nineteenth-century Boston, concluded after exhaustive and meticulous research that "not many criminals in fact carried arms, even after the invention of the revolver made it possible to do so inconspicuously."[105] This conclusion is consistent with the fact that Boston police did not themselves routinely carry firearms until decades after the Civil War period: the standard weapon issued to police in the antebellum era was a club, not a firearm. Not only did the typical Boston policeman not carry a firearm, but the entire police force owned only a handful of revolvers. Property inventories of the Boston police are illuminating in this regard: the list of moveable property owned by the Boston police for the year 1862 shows a total of 270 clubs and only 7 revolvers. If Bostonians were promiscuously traveling armed and gun toting posed a serious threat to public safety, it seems highly unlikely that the entire Boston police would have owned a total of just seven revolvers at the start of the Civil War era.[106]

Arrest statistics compiled by Boston's Chief of Police further undermine the non-enforcement thesis. As the data in Table One shows, only a tiny fraction of assaults in the city involved a weapon of any kind. Moreover, the number of arrests for unlawfully carrying weapons in public were also miniscule. Contrary to the claims of modern gun rights advocates, the evidence from Boston does not support the non-enforcement thesis, but rather suggests that citizens generally obeyed their state's prohibition on

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

105. Roger LANE, POLICING THE CITY: BOSTON 1822-1885 103–04 (Harvard University Press ed., 1967).

106. ANNUAL REPORT OF CHIEF OF POLICE 1862 CITY DOCUMENT NO. 3 13 (Boston, 1863).

armed travel, and few individuals carried weapons in public in the period leading up to the Civil War. In short, Bostonians, in contrast to their southern brethren, simply did not habitually arm themselves.[107]

Boston Police Enforcement Data 1864 and 1866[108]

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

When the commentaries by leading jurists from Massachusetts, most notably Peter Oxenbridge Thacher, are considered alongside the data about policing practices in Boston, the absence of pistols in the inventory of the Boston police department, and the decision to continue to arm officers with clubs, not firearms, the gun rights advocates' non-enforcement thesis collapses under the weight of countervailing evidence.

V. The Modern Paradigm of Gun Control Emerges: Reconstruction and the Right to Regulate Firearms

In a remarkable colloquy between Clement and Justice Thomas during the oral arguments in *Bruen*, the two discussed the relevance of Reconstruction-era practices to understanding the scope of permissible modern regulation.[109] Reconstruction, the contentious period after the Civil War, is generally acknowledged by originalist judges and scholars to be the period most relevant to understanding how the Second Amendment's protections apply to state laws.[110] This was a violent period in American history, one where the nation responded to newly-rising levels of gun violence by enacting tough laws.[111] During Reconstruction, states not only rewrote their constitutional provisions on arms bearing to expressly permit

107. On the different patterns of gun violence in the North and the South in the pre-Civil War era, *see* RANDOLPH ROTH, AMERICAN HOMICIDE 180–249 (Belknap Press of Harvard University Press, 2009).

108. ANNUAL REPORT OF THE CHIEF OF POLICE 1864, CITY DOCUMENT NO. 6 8–9 (Boston, 1865); ANNUAL REPORT OF THE CHIEF OF POLICE 1866, CITY DOCUMENT NO. 9 9–10 (Boston, 1867).

109. Transcript of oral argument, *supra* note 12, at 6–9.

110. Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011); Young v. Hawaii, 992 F.3d 765, 824 (9th Cir. 2021).

111. Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615, 621–22 (2006); Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 113–17 (2016).

the regulation of public carry, but states and localities passed dozens of new laws regulating nearly every aspect of firearms ownership and use. These laws were aggressively enforced and applied to all without regard to race until the era of Jim Crow, when these facially neutral laws were used as tools of racial oppression.[112]

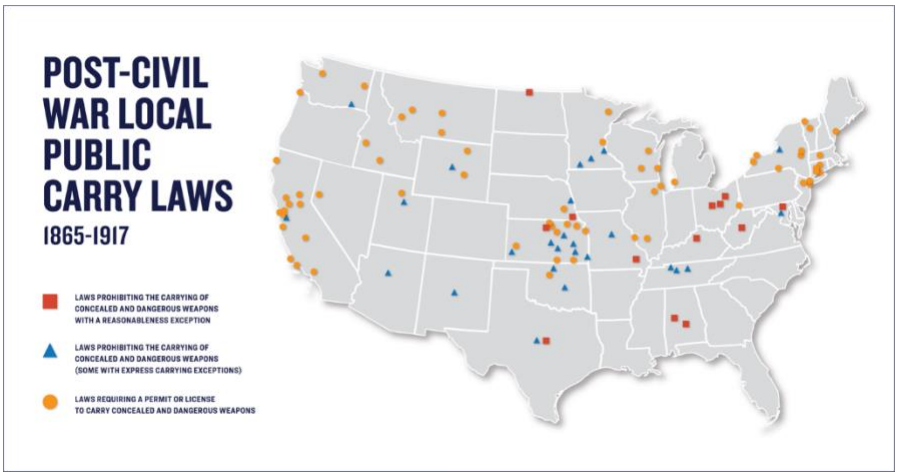

Figure 1 - Post-Civil War Local Public Carry Laws (data from Appendix, Table 2)

Yet, despite having conceded that the evidence from Reconstruction was dispositive, Clement simply dismisses the extensive regulations enacted during this period as little more than a scattering of laws.[113] In fact, as Figure 1 shows, dozens of laws were enacted across the country, and millions of Americans were living under these regulations, including half the population of California and all of the residents of the nation's ten largest cities.[114] Even more germane to the facts before the Court, many localities adopted good cause permit laws—precisely the type of regulations that are at issue in *NYSRPA v. Bruen*.[115] Indeed in many states, the majority of citizens were living under such laws.[116] New York's permit law was modeled on these earlier laws, which emerged during Reconstruction.[117]

As Table 2 shows, most of the nation's largest municipalities had some type of restriction on public carry in place by last decade of the nineteenth

112. Brennan Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, U.C. DAVIS L. REV. (forthcoming 2022).

113. Transcript of oral argument, *supra* note 12, at 6–9.

114. *See* Appendix, Table 2.

115. Dozens of cities enacted permit schemes, *see* Charles, *supra* note 23. *See* Appendix, Table 2.

116. *See* Appendix, Table 1.

117. *See* Appendix, Table 2.

century. The example of California is particularly instructive in this regard. More than half of the state's population was living under a permit scheme or some other restrictive public carry regime as the new century dawned.[118] Nor was California unique in this regard. As Table 2 shows, dozens of similar statutes were passed in the post-Civil War era. These regulations included permit schemes, bans on concealed carry, or total prohibitions on armed carry in public.[119] Given that research on gun regulation, particularly during Reconstruction is still ongoing, it is likely that this list will continue to grow as new research reveals previously hidden sources. These restrictions on public carry governed the lives of millions of Americans who were living under some type of regulatory regime that limited public carry in a manner similar to the New York law at issue in *Bruen*. The idea that permissive open carry was the legal norm in post-Civil War America is a gun rights fantasy and has no foundation in history. Under any serious and credible form of originalist analysis, New York's law ought to be presumptively lawful under the *Heller/McDonald* history, text, tradition mode of analysis.

Not only were these laws common in post-Civil War America, but they were generally understood to be consistent with the Second Amendment. Multiple legal commentators, from the distinguished jurist John Norton Pomeroy to the multi-volume and authoritative *Encyclopedia of English and American Law* all agreed that armed travel in public could be limited, provided a good cause exception was available for those who faced a specified need for self-defense. Pomeroy stated the matter cogently and concisely: the right to keep and bear arms was fully consistent with laws limiting persons from "carry[ing] dangerous or concealed weapons."[120]

The most important change in American law in the post-Civil War era was not the adoption of permissive carry which had always been a southern phenomenon. Rather, the most significant transformation was the move from the common law model and its use of an affirmative defense at trial to vindicate a self-defense claim for traveling armed, towards permit-based

118. *Id*.

119. *Id*.

120. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES: ESPECIALLY DESIGNED FOR STUDENTS, GENERAL AND PROFESSIONAL 152–53 (University of California Libraries, 1868). 3 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 408 (John Houston Merrill ed., 1887). This influential survey of law was an essential reference for lawyers. *See* 2 9 AMERICA AND ENGLISH ENCYCLOPEDIA OF LAW, 42 CENT. L. J. 397, 400 (1896) (book review). In his oral argument Clement claimed that any evidence from beyond the 1870s was not probative because some courts had adopted a militia-based reading of the Second Amendment precluded by *Heller*. The only jurisdiction where such a claim might be plausible was Kansas where courts did adopt an approach to the Second Amendment that derived from antebellum southern cases *Heller* dismissed as early as 1905. Transcript of oral argument, *supra* note 12, at 7. The key Kansas case was City of Salina v. Blaksley, 83 P. 619 (Kan. 1905). Thus, even by Clement's logic, only laws from the early 20th century ought to be excluded.

schemes. Under such schemes, those wishing to travel armed could present evidence of a specified threat to obtain a permit to carry a weapon, which was typically concealed and not carried openly.[121] The use of affirmative defense was consistent with the traditional common law surety model that emerged in the context of a pre-industrial society in which most law enforcement was community-based. Over the course of the nineteenth century, as America modernized and urbanized, professional police forces, police courts, and administrative agencies took over the job of maintaining public order from justice of the peace. The new permit-based scheme emerged in the context of these larger changes in criminal justice.[122]

VI. Conclusion

Many of the Supreme Court's newest justices have aggressively defended originalism's history, text, and tradition approach. *Bruen* offers them an opportunity to demonstrate that this method can be applied rigorously and neutrally. Doing so means distinguishing between invented historical traditions and real history. It remains to be seen if they will follow the history or an invented historical tradition more in line with the political preferences of the modern Republican party. The stakes in this case could not be higher. The Supreme Court will not only decide the framework for evaluating the constitutionality of future gun laws, but the credibility of the Court is itself at stake. Much of the recent criticism of the Court has focused on its increasingly politicization. A decision along partisan lines striking down's New York's law will only lead to the further erosion of the court's legitimacy and intellectual prestige. If members of the Court care about their institution's future, they would be well-advised to avoid a decision that exemplifies law office history at its worst.

121. *Id.*

122. *See* ERIC H. MONKKONEN, AMERICA BECOMES URBAN: THE DEVELOPMENT OF U.S. CITIES & TOWNS, 1780-1980 98–108 (University of California Press, 1st ed. 1988).

APPENDIX

Table 1 - Post-Civil War State Constitutional Arms Bearing Provisions and Regulation

Date	State	Provision	Population
1868	Georgia	Ga. Const. of 1868, art. I, § 14: The right of the people to bear arms in defense of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne.	1,184,109
1869	Texas	Tex. Const. of 1869, art. I § 13: Every person shall have the right to keep and bear arms, in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe.	818,579
1870	Tennessee	Tenn. Const. of 1870, art. I, § 26: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.	1,258,520
1875	Missouri	Mo. Const of 1875, art. II, § 17: Right to bear arms, when – That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when hereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.	2,168,380
1875	North Carolina	N.C. Const. of 1875, Art. I, § 30. A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and as standing	1,399,750

		armies in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Nothing herein contained shall justify the practice of carrying concealed weapon, or prevent the legislature from enacting penal statutes against said practice.	
1876	Colorado	Colo. Const. of 1876, art. II, § 13: That the right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when hereto legally summoned shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.	194,327
1879	Louisiana	La. Const. of 1879, art. III: A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.	939,946
1885	Florida	Fla. Const. of 1885, art. I, § 20: The right of the people to bear arms in defense of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne.	391,422
1889	Idaho	Idaho Const. of 1889, art. I, § 11: The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.	88,548
1889	Montana	Mont. Const. of 1889, art. III, § 13: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid	142,942

		of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.	
1890	Mississippi	Miss. Const. of 1890, art. III, § 12: The right of every citizen to keep and bear arms in defense of his home, person or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.	1,289,600
1891	Kentucky	Ky. Constitution of 1891, § 1.7: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.	1,858,635
1896	Utah	Utah Const of 1896, art. I, § 6: the people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.	276,749
		Total:	**12,011,507**

Table 2 - Post-Civil War Local Public Carry Laws

Year	State	City / County	Population Covered	Population Total Per State
~1885	Alabama	Tuscaloosa	4,215	26,098
~1888	Alabama	Montgomery	21,883	
~1903	Alaska	Skagway	~9,400	~9,400
1873	Arizona	Tucson	3,224	88,243
1889	Arizona (Entire State)	N/A	88,243	
1865	California	Los Angeles	5,728	340,923
1876	California	Sacramento	21,420	
1878	California	Eureka	319	
1880	California	Napa	7,143	
1881	California	Santa Barbara	5,864	
1882	California	Alameda	16,464	
1882	California	San Jose	872	
1884	California	San Francisco	233,959	
1884	California	St. Helena	1,339	
1885	California	Fresno	10,818	
1888	California	Lompoc	1,015	
1889	California	Marysville	3,991	
1890	California	Oakland	48,682	
1892	California	Monterey	1,662	
1914	California	Needles	3,067	
1904	Colorado	Windsor	305	29,383
~1914	Colorado	Colorado Springs	29,078	
1886	Connecticut	New Haven	81,298	236,613
1901	Connecticut	Naugatuck	10,541	
1902	Connecticut	Waterbury	45,859	
1906	Connecticut	Hartford	98,915	
1905	Idaho	Twin Falls	13,543	17,086
1910	Idaho	Caldwell	3,624	
1880	Illinois	Nashville	2,222	23,932
1893	Illinois	Evanston	19,259	
~1912	Illinois	Hinsdale	2,451	
1870	Kansas	Abilene	2,360	
1877	Kansas	Empire City	Unavailable	
1879	Kansas	Arkansas City	8,847	

1879	Kansas	Beloit	1,835	
1882	Kansas	Argentine	4,732	
1883	Kansas	Burlington	2,011	63,600
1884	Kansas	Delphos	4,516	
1887	Kansas	Lakin	258	
1888	Kansas	Concordia	3,401	
1888	Kansas	Holton	3,082	
1888	Kansas	Johnston City	143	
1888	Kansas	Fredonia	1,515	
1888	Kansas	Wichita	23,853	
1890	Kansas	Coffeyville	4,953	
1890	Kansas	Coming	425	
1891	Kansas	Halstead	1,071	
1893	Kansas	Scandia	598	
1876	Kentucky	Frankfort	6,958	6,958
1909	Maine	Portland	58,571	58,571
1894	Maryland (Entire State)	N/A	1,042,800	1,042,800
1906	Massachusetts (Entire State)	N/A	3,365,000	3,365,000
1889	Michigan	St. Joseph	3,733	3,733
1870	Minnesota	Hastings	3,458	59,781
1882	Minnesota	St. Paul	41,473	
1882	Minnesota	Worthington	636	
1888	Minnesota	New Ulm	3,741	
1912	Minnesota	Virginia	10,473	
1881	Missouri	Greenville	1,051	355,569
~1881	Missouri	St. Louis	350,518	
1890	Missouri	Columbia	4,000	
1883	Montana	Helena	3,624	18,006
1893	Montana	Red Lodge	624	
~1906	Montana	Anaconda	12,988	
1909	Montana	Harlowton	770	
1880	Nebraska	Falls City	1,583	57,835
~1872	Nebraska	Omaha	16,083	
1895	Nebraska	Lincoln	40,169	
1905	Nevada	Reno	10,867	10,867
1897	New Jersey	Montclair	13,962	13,962
~1885	New Mexico	Albuquerque	3,785	
1887	New Mexico (Entire State)	N/A	160,282	160,282 (population

				adjusted)
~1877	New York	Syracuse	51,792	3,051,880
1880	New York	Brooklyn	599,495	
1881	New York	New York	1,919,000	
1891	New York	Buffalo	255,664	
1892	New York	Elmira	30,893	
1905	New York	Troy	76,813	
1909	New York	Lockport	17,970	
1910	New York	Albany	100,253	
1888	North Dakota	Bottineau	145	145
1871	Ohio	Newark	6,698	104,940
1893	Ohio	Massillon	10,092	
1894	Ohio	Columbus	88,150	
1893	Oklahoma	Enid	3,444	3,444
1902	Oklahoma	Okeene	Unavailable	
1879	Oregon	Astoria	3,981	3,981
~1871	Tennessee	Lebanon	2,073	27,938
1873	Tennessee	Nashville	25,865	
1897	Tennessee	Centennial	Unavailable	
1870	Texas (Entire State)	N/A	818,579	818,579 (population adjusted)
1871	Texas (Entire State)	N/A	818,579	
~1877	Utah	Provo	3,432	48,275
1888	Utah	Salt Lake City	44,843	
1895	Vermont	Barre	8,448	14,687
1897	Vermont	St. Albans	6,239	
1878	Washington	Walla Walla	8,716	179,307
1895	Washington	Spokane	86,848	
1905	Washington	Tacoma	83,743	
1871	Washington D.C.	N/A	131,700	131,700
1881	West Virginia	Wheeling	30,737	733,531
~1887	West Virginia (Entire State)	N/A	702,794	
1890	Wisconsin	Berlin	4,149	327,842
~1896	Wisconsin	Milwaukee	285,315	
~1917	Wisconsin	Madison	38,378	
1875	Wyoming (Entire State)	N/A	20,789	20,789
			Total:	**11,567,347**