

PROTESTS, INSURRECTION, AND THE SECOND AMENDMENT

The Police Power and the Authority to Regulate Firearms in Early America

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Introduction

Contemporary Second Amendment jurisprudence looks to history for guidance on evaluating the constitutionality of gun regulation.¹ Although much has been written about *District of Columbia v. Heller's* focus on history, relatively little scholarly attention has focused on the way the decision's analysis aligns with the historical conception of rights in place in the founding era.² The language of rights is pervasive in modern American law and is familiar to judges, lawyers, and scholars.³ Yet modern judges and scholars, working in an originalist modality, seldom acknowledge the distinctive nature of founding era rights theory — including the way the concept of police was not primarily understood in terms of the modern conception of the police power, but rather was typically articulated as a right of the people to regulate their internal police. A proper understanding of how the founding era concept of police informed legal thinking about the right to keep and bear arms is therefore essential to the future of Second Amendment jurisprudence.⁴

Rather than fully flesh out the original meaning of the right to keep and bear arms and connect it to the structure of founding era rights theory, *Heller* plucks isolated phrases from founding era texts and interprets them in much the same way a modern tourist uses a phrase book or translator application.⁵ This piecemeal process of translation inevitably distorts the texts it seeks to illuminate. Compounding this problem, *Heller* weaves back and forth between past and present, producing a palimpsest of American constitutional history.⁶ In this ahistorical account, founding era militias and Nazis in Skokie, Illinois, march to the same constitutional drumbeat in Justice Antonin Scalia's static vision of an unchanging idea of liberty.⁷ This approach to constitutional texts is hard to reconcile with any coherent theory of originalism. It is not simply ahistorical; it is anti-historical to its core.⁸

Heller's ahistorical treatment of founding era conceptions of rights emerges most clearly in Justice Scalia's diatribe on constitutional balancing. In his critique of this concept, Justice Scalia imputes to the founding generation a view of rights of fairly recent vintage: an approach to rights most closely associated with Justice Hugo Black's critique of Justice Felix Frankfurter's conception of the First Amendment.⁹ Justice Black famously argued that the Bill of Rights' purpose "was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence."¹⁰ In *Heller*, Justice Scalia channeled Black's jurisprudence, vehemently rejecting the application of modern-style "free standing interest balancing" to Second Amendment questions.¹¹ Echoing Black, Scalia opined:

The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.¹²

At one level, Scalia and Black both were undoubtedly correct that the founding era did not use our modern legal metaphor of balancing. But both were wrong about the founding era's conception of rights. Interpreting 18th-century rights talk means jettisoning many of the ideas and concepts that are familiar to modern lawyers and judges, including the idea that founding era constitutions were designed to take "enumerated rights out of the hands of government."¹³ Not only was this not how the founding generation viewed the function of written bills of rights, but it also compounds this error by applying an equally ahistorical conception of the scope and function of judicial review as an aggressive rights-protecting mechanism.¹⁴ The founding generation would have been shocked that modern judges would think that the Second Amendment was understood to empower

unelected federal judges to act as “Platonic guardians” of the people’s rights, including the right to keep and bear arms.¹⁵ Thus *Heller* is a perfect trifecta of anachronism: it approaches the Second Amendment, founding era rights theory, and judicial review from a distinctly un-originalist and thoroughly modern set of assumptions.¹⁶ In this regard, *Heller*’s many anachronisms mirror the costumes worn by some of the infamous protestors who attacked Congress in the U.S. Capitol riot of January 6, 2021. In one remarkable image from the riot, a protestor dressed as George Washington sporting a tricorne hat looks down at his cell phone while a police officer dressed in modern riot gear gazes at the scene stoically.¹⁷ *Heller*’s mishmash of the past and present — its blatant disregard for historical chronology — is a bit like the image of George Washington looking at a cell phone; it is premised on constitutional fantasy that has little connection to historical reality.

Before analyzing the founding era’s approach to rights, it is important to clearly articulate how modern American law frames issues of rights. There is a vast, erudite, and complex scholarly literature on the nature of legal rights in contemporary Anglo-American law. An influential definition of modern rights theory advanced by legal philosopher Joseph Raz frames the issue clearly: “An individual has a right if an interest of his is sufficient to hold another to be subject to a duty. His right is a legal right if it is recognized by law, that is if the law holds his interest to be sufficient ground to hold another to be subject to a duty.”¹⁸

Another popular framing of contemporary rights derives from the work of philosopher Ronald Dworkin.¹⁹ According to Dworkin, rights are trumps: strong barriers to government interference.²⁰ Both of these conceptions of rights are useful in understanding modern Supreme Court jurisprudence. In a thought-provoking essay in the *Harvard Law Review*, constitutional scholar Jamal Greene argues that modern American constitutional law, particularly Supreme Court jurisprudence, has absorbed a good deal of Dworkin’s conception of rights as trumps. Thus, “rights are absolute but for the exceptional circumstances in which they may be limited. Constitutional adjudication within this frame is primarily an interpretive exercise fixed on identifying the substance and reach of any constitutional rights at issue.”²¹

Joseph Blocher’s exploration of this theme, in a short but incisive response to Greene’s *Harvard Law Review* foreword, identifies the best exponent of this expansive vision of constitutional rights as Justice Black’s absolutist view of the First Amendment.²² Black’s view combines two modern ideas: a libertarian conception of rights and a robust understanding of judicial review. Yet even the most ardent champions of judicial review in the founding era believed that it was an “awesome” power, one that required the utmost judicial humility in its exercise. Failing to adhere to this type of restraint undermined republican ideals and popular faith in government and elevated the judiciary above the legislature.²³ The modern idea of judicial supremacy — an idea that Black, Scalia, and most federal judges take for granted — did not emerge fully formed at the founding but took a long and circuitous path to becoming an accepted feature in American law.²⁴ As historian Gordon Wood observes:

Thus for many Americans in the 1790s judicial review of some sort did exist. But it remained an extraordinary and solemn political action, akin perhaps to the interposition of the states that Jefferson and Madison suggested in the Kentucky and Virginia Resolutions of 1798 — something to be invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution. It was not to be exercised in doubtful cases of unconstitutionality and was not yet accepted as an aspect of ordinary judicial activity.²⁵

The same reticence about judicial review was true of James Madison’s constitutional thought. Historian Jack Rakove’s comment about Madison’s approach to judicial review underscores Wood’s point. Madison, Rakove

notes, “did not expect the adoption of amendments to free judges to act vigorously in defense of rights.”²⁶ Thus, Scalia’s attack on balancing was not rooted in founding era constitutionalism at all; rather, it is a prime example of the type of temporal oddity identified by legal scholar Reva Siegel.²⁷ Justice Black, not Madison, offered the foundation for *Heller’s* anti-balancing screed, an attack that Scalia erroneously imputed to the founding generation. Such a view has little to do with the Constitution’s original meaning and is in fact a product of recent American legal history.

Founding era rights talk was an eclectic mix of social contract theory (including Lockean notions), common law, and Whig republicanism.²⁸ As historian Jonathan Gienapp notes, modern originalist studies of the founding era have worked backwards from contemporary conceptions of rights, where “scholars have thus often begun their analyses with the wrong conception of rights in mind, by assuming that they are ‘the inverse of powers.’”²⁹ Summarizing a generation of scholarship on founding era constitutionalism, Gienapp writes that “early state constitutions vested local legislatures with sweeping authority, not because Revolutionary Americans were indifferent to individual liberty but because they assumed that empowering the people’s representatives was the same thing as preserving the people’s rights.”³⁰ America’s true first freedom — the foundation of all other liberties — was neither the right to bear arms nor the core First Amendment freedoms of speech and the press but the right of the people to enact laws to regulate their own internal police.³¹

Regulation was not antithetical to liberty; it was the necessary precondition for its exercise and survival.³² In an oration commemorating American independence delivered almost a decade after the adoption of the Constitution, a patriotic orator reminded his audience that “True liberty consists, not in having *no government*, not in a *destitution of all law*, but in our having an equal voice in the formation and execution of the laws, according as they effect [*sic*] our persons and property.”³³ Liberty, in this model, was not synonymous with the absence of restraint, a libertarian notion at odds with much founding era constitutional and legal thought. Liberty was the freedom to participate in politics and enact laws aimed at promoting the health, safety, and well-being of the people.³⁴

In modern law, liberty and power are typically cast as antithetical. Accordingly, rights in contemporary law function as trumps, erecting strong barriers against government interference. Founding era lawyers and jurists approached rights with a different conceptual tool kit and set of assumptions.³⁵ Legal scholar Jud Campbell has recently noted that founding era ideas about rights, including those natural rights retained after the creation of a polity, were not taken off the table, as Scalia’s view erroneously claims. “The point of retaining natural rights . . . was *not* to make certain aspects of natural liberty immune from governmental regulation. Rather, retained natural rights were aspects of natural liberty that could be restricted only with *just cause* and only with *consent of the body politic*.”³⁶ Rather than limit rights, regulation was the essential means of preserving rights.³⁷

Unrestrained liberty was a threat, not a guardian of rights.³⁸ This dangerous form of liberty was *licentiousness*, a word that has virtually disappeared from modern rights discourse. Thomas Tudor Tucker, a prominent South Carolina political leader who sat in the first Congress that drafted the first 10 amendments to the Constitution, including the Second Amendment, echoed this viewpoint. “Licentiousness is a tyranny as inconsistent with freedom and as destructive of the common rights of mankind, as is the arbitrary sway of an enthroned despot. And those, who wish to call themselves truly free, have to guard, with equal vigilance, against the one and the other.”³⁹ The preservation of liberty — well-regulated liberty — meant steering a course between arbitrary power and licentiousness.⁴⁰ The core right essential to this scheme of ordered liberty was the right of people to enact laws to promote the common good.⁴¹ Recovering this lost language of 18th-century rights, including the

conception of liberty and regulation that shaped American law in the era of the Second Amendment, is essential if *Heller*'s originalist framework is to remain true to founding era understandings.⁴²

The People's Right to Regulate Their Internal Police: The Foundation of All Other Rights

The notion of a police right — a right of the people to regulate their internal police — was pervasive in the era of the American Revolution and the Second Amendment. Modern American legal theory does not frame issues of police in the same capacious terms as the founding generation. Indeed, the dominant mode of analyzing this concept is not with the language of rights at all but with the language of power, specifically the police power. Scholars of the police power typically focus on Reconstruction, particularly on doctrinal developments following the *Slaughterhouse Cases*.⁴³ Focusing on this era inevitably obscures the early American origins of the idea of police — especially the founding era's rights-based conception of police, a concept that was itself grounded in the idea of popular sovereignty.

A new body of legal scholarship on the early republic has recast the history of the police power by reconfiguring the idea of police as a rights-based legal construct that was tied to Revolutionary theories of popular sovereignty. This rights-based discourse was eventually overshadowed by an early version of the modern view of police power. Thus, the idea of a judicially monitored police power was not rooted in founding era constitutionalism at all, but only emerged gradually as part of an expansion of judicial power beginning with the Marshall Court.⁴⁴

One of the best expositions of the earlier vision of police rights occurred in the first state constitutions.⁴⁵ The 1776 Pennsylvania Constitution, the first document to assert a right to bear arms, preceded that right by affirming a more elemental one: "That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."⁴⁶ The legal concept of "police" — the power of the people, acting through their government, to enact and enforce laws to protect public health, safety, and welfare — was first conceptualized in Anglo-American law by Scottish moral and legal theorists in the 18th century.⁴⁷ The concept was elaborated by Sir William Blackstone in his influential *Commentaries on the Laws of England*.⁴⁸ By the era of the American Revolution, the concept had become foundational to virtually every feature of Anglo-American law and was included in many of the early state constitutions drafted after the American Revolution.

The 18th-century language of police was primarily a language about the right of legislatures to enact laws to promote public welfare. Indeed, recent corpus linguistics evidence about the use of the phrase "right of the people" has underscored this fact by demonstrating that the phrase more often articulated a collective conception of rights and not a highly individualistic one.⁴⁹ Although *Heller* clearly rejected a collective rights reading of the Second Amendment, it did not reckon with the most important founding era right: the right of the people to regulate their internal police. This right was an individual right of citizens, but it was exercised collectively by the people.

Although the rise of a judicial discourse about the police power grew in the 19th century, it did not entirely eradicate the founding era's legislative-based language of the people's right to regulate their internal police. Moreover, the phrase "internal police" had already become common, particularly in state laws establishing towns and defining the scope of their legislative authority.⁵⁰ In his classic study of the police power, Ernst Freund noted that the term "police" became widespread in legislative compilations published during the period of legal codification in the late 1820s.⁵¹ The term "police" continued to be used in various statutes and local

ordinances, but it is indisputable that a slow process of judicializing the concept of police gained traction in American law. The Marshall and Taney Courts facilitated this process, which was aided by state court judges. By the middle of the antebellum era, the concept of state police power had been refined and elaborated by leading jurists and legal theorists.⁵²

The application of the police power to firearms and ammunition was singled out as the locus classicus of state police power by Chief Justice John Marshall in *Brown v. Maryland* (1827).⁵³ Massachusetts judge Lemuel Shaw, one of the most celebrated state jurists of the pre-Civil War era, elaborated this point in his influential opinion in *Commonwealth v. Alger* (1851), a decision that became a foundational text for lawyers, judges, and legislators looking for guidance on the meaning and scope of the police power.⁵⁴ Shaw described the police power in the following manner:

[T]he power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious, that all well regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder.⁵⁵

Indeed, the scope of government power to regulate, prohibit, and inspect gunpowder has been among the most far-reaching of any exercise of the police power throughout American history. The many ordinances authorizing local government officials to search for gunpowder illustrate the scope of this authority.⁵⁶

By the start of the Civil War, a strong consensus in American law had emerged on the broad scope of the police power.⁵⁷ Francis Lieber, a leading commentator on American politics and law in the 19th century, described its role in Anglo-American law in lucid terms: the 1836 edition of the *Encyclopædia Americana* asserted that police, “in the common acceptation of the word, in the United States and England, is applied to the municipal rules, institutions, and officers provided for maintaining order, cleanliness &c.”⁵⁸ The dominant mode of discussing police had been largely recast as a power rather than a right by mid-century.

No jurisdiction enumerated the full contours of the police power in a single text or in a single statute or ordinance. Rather, it was well understood that the exercise of this power would need to adapt to changing circumstances and new challenges as they emerged.⁵⁹ This conception of law was familiar to most early American lawyers and judges who had been schooled in common law modes of thinking and analysis.⁶⁰ Throughout the long arc of Anglo-American legal history, government applications of the police power were marked by flexibility, allowing local communities and states to adapt to changing circumstances and craft appropriate legislation to deal with the shifting challenges they faced.⁶¹ This long-standing tradition of using the police power authority to adopt specific laws to meet shifting challenges has continued to the present day.⁶²

This vision of the police power was articulated forcefully by the Supreme Court in the *License Cases* when Justice John McLean wrote this about the scope of state police power:

“It is not susceptible of an exact limitation but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences

spring up, which require restraints that can only be imposed by new legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied.”⁶³

The police power — the right of the people to regulate themselves — was dynamic, adapting to the changing needs of American society.

State v. Reid: The Police Power, Balancing, and Purposive Carry in Antebellum Southern Jurisprudence

Heller never addresses the police power and its centrality to early American rights theory or antebellum jurisprudence. The omission is striking because *Heller* does devote considerable attention to antebellum southern cases addressing the issue of public carry, and this body of law was strongly influenced by police power jurisprudence.⁶⁴ One of those cases, *State v. Reid* (1840), is often cited in the modern Second Amendment debate because of its robust formulation of the right to keep and bear arms. What has not drawn much judicial or scholarly notice is the way the case uses antebellum police power jurisprudence to address the meaning and scope of the right to keep and bear arms.⁶⁵

The *Reid* court observed that the state’s concealed carry prohibition was a legitimate exercise of police power authority. “The terms in which this provision is phrased,” the court noted, “leave with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals.”⁶⁶ Having framed the issue before as a classic example of police power jurisprudence, the court went on to explain its understanding of how the concept of judicial review related to the proper functioning of the police power. In contrast to Justice Scalia’s anti-balancing model, the *Reid* court defended a theory of judicial humility, one far closer in spirit to the founding era’s vision of judicial review.⁶⁷

Deference to the legislature was the default rule for the *Reid* court even in cases where a law might conflict with a constitutional provision. “But let it be conceded that it is doubtful, whether the statute does not come in collision with the constitution, yet it is our duty to maintain its validity.” The *Reid* court stressed that any responsible judicial body ought to take cognizance of the fact that the law had “received the assent of the two houses of the General Assembly and the Governor.” Given these facts, it was vital for the court to act with some deference to the legislature. The court did not suggest abdicating its role and allowing legislatures to run roughshod over the Constitution. Judicial restraint was the appropriate stance in cases in which an alleged constitutional violation fell in a grey zone wherein reasonable jurists might disagree over the legality of the statute. “Before the judiciary can with propriety declare an act of the Legislature unconstitutional,” the court asserted, “a case should be presented in which there is no rational doubt.”⁶⁸ In other words, short of incontrovertible evidence of a clear conflict, courts ought to defer to legislatures. Moreover, the *Reid* court took notice that other southern courts had divided on the constitutionality of restrictions on public carry. In the absence of a judicial consensus, courts ought to tread lightly before striking down laws. In this regard, the *Reid* court also showed far greater judicial modesty than the *Heller* Court. Justice Scalia made no effort to acknowledge this judicial split over the issue of public carry in the antebellum case law; rather than address this division, he simply dismissed the views of any judges who took a different view of the issue than the one he

advanced. Thus, Scalia effectively erased half the antebellum judicial record, an act of judicial arrogance that has few matches in American constitutional law.⁶⁹

Although *Heller* seems to suggest that balancing is impermissible because of history, neither founding era constitutional thought nor the antebellum jurisprudence that Justice Scalia selectively quoted supports such a conclusion. In fact, both periods support the opposite conclusion: a type of legislative balancing is hardwired into the founding era's conception of the police right, and equally central to antebellum police power jurisprudence. *Heller* got both parts of this history wrong, and in this regard its purported model of originalism is itself profoundly un-originalist.

Reid offers another cautionary tale for post-*Heller* Second Amendment law. Modern champions of a robust right to carry arms openly in public insist that this right is permissive in nature. The notion that one ought to have a reason to carry, they argue, is inconsistent with the very concept of a fundamental right. Once again, this claim has little foundation in founding era law or in the antebellum jurisprudence so central to *Heller*. In fact, such a view would have required repudiating the Enlightenment foundations for much of early American legal culture.⁷⁰ In short, reasonableness has always been a defining feature of the right to carry arms in public under American law.

The facts of *Reid* underscore this important point that has gone unnoticed in post-*Heller* scholarship and jurisprudence. The case involved a sheriff who carried a concealed pistol in violation of the state's prohibition on public carry of arms. The fact that a peace officer was prosecuted for carrying a weapon might seem surprising given the libertarian cast of modern gun rights culture. But the decision makes perfect sense if one roots it in the evolving common law understanding of the limits on public carry inherited from English law. "If the emergency is pressing," the *Reid* court declared, "there can be no necessity of concealing the weapon, and if the threatened violence will allow of it, the individual may be arrested and constrained to find sureties to keep the peace, or committed to jail."⁷¹ The *Reid* court rejected the idea of permissive public carry. Instead, the decision asserted a much narrower vision of purposive open carry: total bans on concealed carry were unproblematic; open carry was permissible, but only if there was a legitimate reason to travel armed. A specific purpose, including a specific and imminent threat, could justify the decision to arm in public, but absent such a reason, open carry in public remained a threat to the peace. Moreover, the sheriff-defendant in *Reid*, the court reasoned, was only entitled to carry openly when the common law methods of surety available to him as a peace officer were deemed to be insufficient to protect him and maintain the peace. The state could not categorically ban open carry, but it could limit and punish those who carried without good cause.

State v. Huntley (1843), another favorite case of modern gun rights advocates, also supports the idea of purposive carry and rejects the idea of permissive open carry.⁷² *Huntley* marked a clear break from the traditional common law limits on armed travel in public. It represented a distinctive southern strain of an evolving American legal tradition in firearms regulation.⁷³ Yet even this case drew a sharp distinction between purposive carry and permissive carry. In *Huntley*, the court wrote:

No man amongst us carries it [a pistol] about with him, as one of his every day accoutrements — as a 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. But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun per se constitutes no offence. For any lawful purpose — either of business or amusement — the citizen is at perfect liberty to carry his gun.⁷⁴

Carrying weapons for a purpose openly was protected; carrying weapons with no specific purpose was not. The phrase “business or amusement” was not synonymous with carrying a weapon every day as one might carry a watch; the decision to public carry had to be grounded in a specific reason. Thus, in one of the most expansive defenses of gun rights in the antebellum South — the region of the new nation with the most tolerant view of public carry — the right protected was purposive in nature and not permissive. Lawful purpose in this case was defined as a specific activity that merited being armed: hunting, target practice, traveling, or self-defense in response to a clear and specific threat.

The Police Power in the Era of the Fourteenth Amendment: Defending Gun Regulation and Protecting the Public Sphere

The legal consensus that states enjoyed broad authority to regulate guns and gunpowder under the police power not only survived the Civil War but as a concept flourished during Reconstruction. A wave of state constitution-making also accompanied Reconstruction, and the notion of police power authority to regulate arms carry in public was expressly written into many of the constitutions drafted during the period. Virtually all of the new constitutions drafted and ratified during Reconstruction in southern states and a number of those adopted in the newly admitted western states used a formulation of the right to bear arms that explicitly recognized the right to regulate firearms, particularly public carry.

Idaho’s formulation of the right to regulate was among the most robust: “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.”⁷⁵ Another popular formulation of the right to keep and bear arms adopted during this period focused on the people’s right to regulate public carry. Prior to the Civil War, Georgia’s courts had carved out one of the most expansive rights to carry arms in public. The new constitution drafted during Reconstruction stepped back from this earlier libertarian conception and reaffirmed the state’s broad police power to regulate arms, especially arms carried in public: “The right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne.”⁷⁶

Christopher G. Tiedeman, one of the era’s leading legal commentators and a critic of an expansive conception of the police power, conceded that the “police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State.”⁷⁷ Thus, even those who were concerned about possible government overreach in this period nonetheless accepted that in matters of public safety the police power was considerable.

Reconstruction witnessed an intensification of firearms regulation. Republicans sought to protect the rights of African Americans to bear arms, but this commitment did not diminish their equally ardent desire to enact strong racially neutral regulations aimed at promoting public safety, especially firearms regulations.⁷⁸ The Republicans who wrote the Fourteenth Amendment were among the most ardent champions of state police power. As heirs to the antebellum Whig vision of a well-regulated society, Reconstruction era Republicans used government power aggressively to protect the rights of recently freed slaves and to promote their vision of ordered liberty.⁷⁹

State police power was not diminished by the Fourteenth Amendment. The author of section one of the Fourteenth Amendment, John Bingham, expressly affirmed this point during the public campaign to ratify the

amendment, assuring Ohioans in Cincinnati that the states would continue to be responsible for all issues of “local administration and personal security.”⁸⁰ As long as laws were racially neutral and favored no person over any other, the states were free to enact whatever reasonable measures were necessary to promote public safety and the common good. In fact, the passage of such laws was deemed vital to address the threat posed by white supremacist paramilitary violence in many parts of the South.

John Norton Pomeroy, the distinguished constitutional commentator from this era, captured this understanding of police power in his influential treatise written during this period, commenting that when the Second Amendment was interpreted with its “intent and design” in view, the right to keep and bear arms was not a barrier to the state’s authority to regulate or limit persons from “carrying dangerous or concealed weapons.”⁸¹ Events on the ground in many areas of the reconstructed South made it more urgent to exercise this power to restore order and protect the lives of free persons.

Texas offers some of the best evidence of the scope of regulation envisioned by Republicans during Reconstruction. To preserve the peace, it was necessary to restrict the permissive carry of weapons. Hence, this Texas statute:

Any person carrying on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purpose of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing; or unless having or carrying the same on or about his person for the lawful defense the state, as a militiaman in actual service, or as a peace officer or policeman, shall be guilty of a misdemeanor, and, on conviction thereof, shall, for the first offense, be punished by fine of not less than twenty-five nor more than one hundred dollars, and shall forfeit to the county the weapon or weapons so found on or about his person.⁸²

Restrictions also prohibited guns in locations deemed to be essential to public or civic life. Thus, Texas specifically criminalized carrying weapons on election day or near a polling place:

It shall be unlawful for any person to carry any gun, pistol, bowie knife, or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within a distance of one half mile of any place of election. . . . Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars, and by imprisonment in the county jail for not less than one month: Provided, that the provisions of this section shall not apply to any officer of the election, police officer, or other person authorized to preserve the peace on the days of election.⁸³

Finally, Texas enacted enhanced protections for public safety aimed at limiting the ability of paramilitary groups to intimidate free persons or Republicans by requiring express consent from property owners to carry weapons on private property:

It shall not be lawful for any person or persons to carry firearms on the enclosed premises or plantation of any citizen, without the consent of the owner or proprietor, other than in the lawful discharge of a civil or military duty, and any person or persons so offending shall be fined a sum not less than one nor more than ten dollars, or imprisonment in the county jail not less than ten days, or both, in the discretion of the court or jury before whom the trial is had.⁸⁴

The necessity of demilitarizing the public sphere and restoring the peace led states to experiment with a range of legal mechanisms to address the problem of gun violence. The regulation of firearms during Reconstruction was not a novel application of the police power but simply an example of the continuing importance of this legal concept to American law. The flexibility of the police power meant that states and localities were able to adapt to changing circumstances and deal with the threats to public order they encountered during Reconstruction.⁸⁵

Conclusion

Heller's judicial reasoning and evidence have been savaged by critics from across the ideological spectrum.⁸⁶ Much of this criticism has focused on specific historical errors and jurisprudential claims not properly grounded in history, text, and tradition. Far less attention has been devoted to the opinion's profoundly anachronistic assumptions about the nature of rights themselves. Similarly, examinations of *Heller* have not addressed the decision's failure to recognize the centrality of an expansive view of state police power both in the founding era and in the southern antebellum case law that *Heller* claims is dispositive of the "original meaning" of the Second Amendment." Finally, *Heller's* rejection of interest balancing rests on a decidedly modern, not originalist, conception of the proper role of judicial review in firearms regulation.⁸⁷

Despite its pretenses to be an originalist decision, *Heller* jumps back and forth across time, melding, conflating, and confusing founding era legal doctrines with modern legal theories at odds with early American law. Rather than take regulation out of the hands of the legislature as Justice Scalia suggests, the founding generation expected that states would continue to use their police powers in an active manner to regulate firearms. Even if one sets the founding era's views aside and instead focuses on the antebellum slave-owning jurists that *Heller* treats as oracular, these jurists were part of an antebellum jurisprudential tradition that conceptualized the police power in expansive terms. Judges in this period also viewed judicial review as an awesome exercise to be used sparingly in cases that were clear and beyond contention. This approach included decisions involving gun regulation. Justice Scalia's legal logic seems hard to reconcile with the views of the judges he claimed supported his view of the scope of the right to keep and bear arms.

There is no originalist foundation for *Heller's* failure to grapple with the police power or with Scalia's outsized vision of judicial review of state firearms laws. *Heller's* doctrine finds no support in founding era law or close reading of the antebellum southern case law. Nor did the adoption of the Fourteenth Amendment change the legal scope of state police power elaborated by pre-Civil War judges. *Heller's* vision of the police power is a product of the modern rights revolution. It is a belated attempt to smuggle gun rights into the Warren Court's broad reframing of American constitutional law. *Heller* reflects Justice Black's views of the First Amendment, not James Madison's views of the Second.

There is nothing inherently wrong with adopting a living constitutional approach, but it can hardly be defended on originalist grounds. To do so not only does great violence to the historical record but also erodes confidence in the law and undermines the Supreme Court's authority. Advancing a living constitutional argument dressed up in a tricorne hat and proclaiming that *Heller* is a triumph of a neutral originalist methodology is a sham. Few law professors, jurists, or lawyers outside the ranks of the Federalist Society would find such a claim tenable, given the mountains of evidence amassed in the past decade and the outpouring of scholarship since *Heller* was decided.⁸⁸ Rather than serving as a model of originalist neutrality, *Heller* has become a major intellectual blemish, a serious obstacle to originalism's acceptance as an impartial methodology.⁸⁹

A genuinely historical treatment of founding era rights theory — including the right to keep and bear arms — provides scant support for *Heller*'s dismissal of the right of the people to regulate their internal police in the case of firearms. Nor does the antebellum southern case law *Heller* highlights as the key to unlocking the meaning of the Second Amendment support such a claim. Reconstruction did not change these basic facts. If one applies *Heller*'s professed methodology neutrally, and Justice Scalia was correct that rights are entrenched with the scope that they had when constitutionalized, then the right of the people to regulate their own police, including firearms, must be treated with the same originalist reverence. Judges, including originalist judges, must recognize the awesome power of the people — including the right to regulate arms. When originalism is applied in a rigorous and disinterested fashion, it presents supporters of *Heller* with an uncomfortable choice: originalists must abandon either *Heller*'s holding or its methodology. It is no longer possible to support both positions and still claim that originalism is a neutral interpretive methodology.

Endnotes

¹ There is considerable scholarly and judicial debate over how much *Heller*'s "text, history, and tradition" approach forecloses other modalities of constitutional interpretation. For a useful overview of these issues, see generally JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (2018).

² For a notable exception to this general silence, see generally Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 32 *L. & CONTEMP. PROBS.* 31 (2020).

³ See generally JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986); and *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* (Barry Alan Shain ed., 2007).

⁴ Campbell, *supra* note 2.

⁵ Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 *FORDHAM L. REV.* 935, 935–36 (2015). To properly recover original meaning, Gienapp invokes Wittgenstein's notion of "language games." *Id.* at 949–50. Making sense of the right to keep and bear arms would require not only an explication of the dictionary definition of the individual words in the amendment but also reconstructing the structure of rights discourse and founding era legal culture more generally.

⁶ Reva Siegel describes these disorienting jumps across time as temporal oddities. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *HARV. L. REV.* 191, 196–97 (2008) ("There are temporal oddities in the evidence the majority marshals in support of this claim about the original meaning of the Second Amendment.").

⁷ Compare *Dist. of Columbia v. Heller*, 554 U.S. 570, 605 (2008), with *id.* at 634–35. Justice Scalia's discussion of Nazis marching in Skokie as a rebuttal to Justice Breyer's discussion of balancing is egregiously ahistorical. For a historical discussion of the way the right to assemble and protest was understood in the founding era. See generally Saul Cornell, "To Assemble Together for Their Common Good": *History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 *FORDHAM L. REV.* 915 (2015).

⁸ For a thoughtful discussion of the role of history in constitutional theory that moves beyond the simplistic view of the past at the core of most forms of originalism, see generally Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641 (2013); and Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 *NOTRE DAME L. REV.* 1753 (2015). For Balkin's assessment of the tension between originalism and history, see generally Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 *CONST. COMMENT.* 345 (2020).

⁹ Joseph Blocher, *Response: Rights as Trumps of What?*, 132 *HARV. L. REV. F.* 120, 123 (2019) (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting)); see generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943 (1987). A corpus linguistic search of the Corpus of Founding Era American English (COFEA), a database hosted by Brigham Young University Law School, shows no evidence that these two terms occurred together. The one example that vaguely analogizes to the modern usage is the following comment made during a congressional debate: "I shall never wish to encroach upon the Constitution, but I will be equally against destroying the balance between the rights which the people have delegated and those they have retained" (3 *ANNALS OF CONG.* 141–42 (1791–93)).

¹⁰ *Id.*

¹¹ *Heller*, 554 U.S. at 634. The classic account of the balancing in modern law is Aleinikoff, *supra* note 9. Although *Heller* precludes something Scalia dubs "free standing interest balancing," there is less agreement on whether it precludes all forms of balancing. See *Heller*, 554 U.S. at 634–35; and Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 *GEO. WASH. L. REV.* 703, 707 (2012).

¹² *Heller*, 554 U.S. at 634 (emphasis in original).

¹³ See generally Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 *TEX. L. REV. ONLINE* 115 (2019). The irony is doubly compounded by the fact that Scalia's approach, reflecting modern incorporation theory, accepts a theory of federal judicial review of local law that was rejected by the founding generation, making his approach not simply inconsistent with founding era constitutionalism but almost the mirror image of it. Nobody in the founding era would have ever imagined that the Second Amendment could be used to limit state police power authority over gunpowder and firearms. If such a view had been articulated, the Second Amendment would never have been ratified, a fact that makes Scalia's originalism paradoxical. Following Scalia's vision of the Second Amendment would have prevented it from existing, a further illustration of his paradoxical "back to the future" judicial surrealism.

¹⁴ See generally Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 *GEO. J.L. & PUB. POL'Y* 569 (2017). Apart from the more ardent Anti-Federalists, judicial review was recognized by a broad range of legal actors. The power was novel to many in the first generation after the Revolution, resisted by some, and still typically framed in a departmentalist framework in which each branch of government would exercise a kind of constitutional review of statutes during its own legitimate functions. The most fervent champions of

judicial review among the Federalists, however, pressed the idea that the judiciary had a special authority on questions of legal/constitutional interpretation, pushing the doctrine of judicial review far closer to the modern idea of judicial supremacy, in which each branch of government is expected to abide by the legal/constitutional pronouncements of the court even when exercising their own independent functions. For a summary of the voluminous body on the early history of judicial review, see generally GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780s–1830s* (2019).

¹⁵ The reference to Platonic guardians is from LEARNED HAND, *THE BILL OF RIGHTS 73-77* (1958). There is a strong scholarly consensus that some form of judicial review was widely recognized at the time the Constitution was ratified but that the scope of the power was narrowly defined. The adoption of the Fourteenth Amendment did not challenge the notion that the states would continue to exercise their police power authority to promote public safety. See *infra* notes 77–85 and accompanying text.

¹⁶ For a brief overview of some of the most blatant and egregious historical errors in *Heller* and the scholarship it cited, see generally Saul Cornell, “*Half Cocked*”: *The Persistence of Anachronism and Presentism in the Academic Debate over the Second Amendment*, 106 J. CRIM. L. & CRIMINOLOGY (2016).

¹⁷ The assault on the U.S. Capitol in 2021 included a plethora of symbols and images borrowed from American history, including a number of people dressed in Revolutionary era costumes. See Washington Post Staff, *Identifying Far-Right Symbols That Appeared at the U.S. Capitol Riot*, WASH. POST (Jan. 15, 2021), <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot/>; and Brent Stirton, *Trump Supporters Hold “Stop the Steal” Rally in DC amid Ratification of Presidential Election*, GETTY IMAGES (Jan. 6, 2021), <https://www.gettyimages.com/detail/news-photo/protester-dressed-as-george-washington-debates-with-a-news-photo/1230734053>.

¹⁸ Joseph Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 14 (1984). See generally Leif Wenar, *Rights*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2021).

¹⁹ Ronald R. Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS 153–67* (Jeremy Waldron ed., 1984). For lucid, brief discussion of Dworkin, see Raymond Wacks, *Dworkin: The Moral Integrity of Law*, in *PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION 49–64* (2d ed. 2014).

²⁰ For an exploration of what a Dworkian reading of the Constitution would look like, see generally JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* (2015).

²¹ For a recent exploration of the impact of Dworkin's framework, see Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 30 (2018).

²² See also Blocher, *supra* note 9.

²³ Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 795–96 (1999).

²⁴ In the period before the incorporation of the Bill of Rights, the debate over judicial review of legislation and the protection of individual rights was largely a question about state courts adjudicating state laws. See LEONARD & CORNELL, *supra* note 14.

²⁵ Wood, *supra* note 23, at 798–99.

²⁶ See also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 355* (1996).

²⁷ See Siegel, *supra* note 6.

²⁸ Campbell, *supra* note 2.

²⁹ Gienapp, *supra* note 13, at 119.

³⁰ *Id.*

³¹ THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (“He has refused his Assent to Laws, the most wholesome and necessary for the public good.”).

³² Modern libertarian legal scholars have generally approached liberty and rights from an anachronistic point of view marred by presentism. See RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 31–82* (2016); and RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 3–6, 17–25* (2014). For critiques of this model, see Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87 (2017).

³³ JOSEPH RUSSELL, *AN ORATION; PRONOUNCED IN PRINCETON, MASSACHUSETTS, ON THE ANNIVERSARY OF AMERICAN INDEPENDENCE, JULY 4, 1799 at 7* (Worcester, Mass., Isaiah Thomas 1799) (emphasis in original).

- ³⁴ See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969); and QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998).
- ³⁵ See generally Dan Edelstein, *Early-Modern Rights Regimes: A Genealogy of Revolutionary Rights*, 3 *CRITICAL ANALYSIS* L. 221 (2016).
- ³⁶ Jud Campbell, *The Invention of First Amendment Federalism*, 97 *TEX. L. REV.* 517, 527 (2019) (emphasis in original). Campbell's work builds on a broad scholarly consensus derived from the work of several scholars, including the works of Wood, Reid, and Rakove; see also *supra* note 3.
- ³⁷ See generally *supra* note 34.
- ³⁸ *Id.*
- ³⁹ [Thomas Tudor Tucker] Philodemus, *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice, Charleston, 1784*, reprinted in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805*, 628 (Donald S. Lutz & Charles S. Hyneman eds., 1983).
- ⁴⁰ On the idea of well-regulated liberty and founding era conceptions of rights, see generally JOHN J. ZUBLY, *THE LAW OF LIBERTY* (1775). The corresponding modern legal concept would be “ordered liberty”; see *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). For a more recent elaboration of the concept, see generally JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013).
- ⁴¹ See Campbell, *supra* note 2. Campbell demonstrates that the meaning of the Second Amendment and founding era rights more generally must be placed in the context of the contractarian discourse of rights.
- ⁴² For a useful summary of *Heller's* complex relationship to other fields of constitutional law, see BLOCHER & MILLER, *supra* note 1.
- ⁴³ See generally *Slaughter-House Cases*, 83 U.S. 36 (1872); Harry N. Scheiber, *State Police Power*, in 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1744* (Leonard W. Levy et al. eds., 1986).
- ⁴⁴ This jurisprudential development was part of a larger effort to limit legislative discretion and curtail democratic overreach begun by the Marshall Court. See generally Aaron T. Knapp, *The Judicialization of Police*, 2 *CRITICAL ANALYSIS* L. 64 (2015); see also MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005); Christopher Tomlins, *Necessities of State: Police, Sovereignty, and the Constitution*, 20 *J. OF POL'Y HIST.* 47 (2008); and LEONARD & CORNELL, *supra* note 14.
- ⁴⁵ See, e.g., MD. DECLARATION OF RIGHTS art. IV (1776); N.C. DECLARATION OF RIGHTS art. I, § 3 (1776); and VT. DECLARATION OF RIGHTS art. V (1777).
- ⁴⁶ PA. CONST. of 1776, ch. I, art. III.
- ⁴⁷ See generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).
- ⁴⁸ 4 WILLIAM BLACKSTONE, *COMMENTARIES* 162 (1769). On the concept of police in early American law, see generally DUBBER, *supra* note 44.
- ⁴⁹ See generally Kyra Babcock Woods, *Corpus Linguistics and Gun Control: Why Heller Is Wrong*, 2019 *BYU L. REV.* 1401 (2020). In her analysis, Woods found that most of the uses of the phrase “right of the people” (65 percent) supported Justice Stevens's reading of the Second Amendment, not Justice Scalia's view. Arguments for a more individualistic reading of this phrase rely not on accepted originalist methods but on intratextualist readings of this phrase within the text of the Bill of Rights. When read against the general use of the term in constitutional writing and speech in the Founding era, the standard approach of most originalists, the meaning of the phrase seems less clearly focused on an individualistic conception of rights.
- ⁵⁰ For examples of this usage, see *An Act Incorporating the residents residing within limits therein mentioned*, in 2 *NEW YORK LAWS* 158 (1785) (establishing the town of Hudson, NY); and *An Act to incorporate the Town of Marietta*, in *LAWS PASSED IN THE TERRITORY NORTHWEST OF THE RIVER OHIO* 29 (1791). For later examples, see 1 *STATUTES OF THE STATE OF NEW JERSEY* 561 (rev. ed. 1847); 1 *SUPPLEMENTS TO THE REVISED STATUTES. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, PASSED SUBSEQUENTLY TO THE REVISED STATUTES: 1836 TO 1849, INCLUSIVE* 413 (Theron Metcalf & Luther S. Cushing, eds. 1849).
- ⁵¹ ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 2, n.2 (1904).
- ⁵² Tomlins, *supra* note 44.
- ⁵³ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442–43 (1827) (“The power to direct the removal of gunpowder is a branch of the police power.”). See generally *Thurlow v. Massachusetts* (The License Cases), 46 U.S. (5 How.) 504 (1847).
- ⁵⁴ *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 76 (1851).

⁵⁵ *Id.* at 85. For another good discussion of how state jurisprudence treated the concept, see *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 149 (1855).

⁵⁶ See generally Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487 (2004).

⁵⁷ John L. Brooke, *Patriarchal Magistrates, Associated Improvers, and Monitoring Militias: Visions of Self-Government in the Early American Republic, 1760–1840*, in *STATE AND CITIZEN: BRITISH AMERICA AND THE EARLY UNITED STATES* (Peter Thompson & Peter S. Onuf eds., 2013).

⁵⁸ 10 *ENCYCLOPÆDIA AMERICANA* 214 (Francis Lieber ed., 1836).

⁵⁹ In the extensive notes he added to James Kent's classic *Commentaries on American Law*, Oliver Wendell Holmes Jr. wrote that regulation of firearms was the locus classicus of the police power. James Kent, 2 *COMMENTARIES ON AMERICAN LAW* 340 n.2 (Oliver Wendell Holmes Jr. ed., 12th ed. 1873).

⁶⁰ See generally KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2011).

⁶¹ See generally William J. Novak, *A State of Legislatures*, 40 *POLITY* 340 (2008).

⁶² See generally GARY GERSTLE, *LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT, FROM THE FOUNDING TO THE PRESENT* (2015).

⁶³ *License Cases*, 46 U.S. (5 How.) at 592.

⁶⁴ On *Heller's* heavy reliance on southern case law, see generally Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 *YALE L.J. F.* 121 (2015).

⁶⁵ See generally *State v. Reid*, 1 Ala. 612 (1840).

⁶⁶ *Id.* at 616.

⁶⁷ Rather than presage Justice Scalia's approach in *Heller*, the *Reid* court articulated a point of view closer in spirit to the model of judicial restraint advocated by Judge J. Harvie Wilkinson in his withering critique of *Heller's* judicial hubris. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *VA. L. REV.* 253 (2009).

⁶⁸ *Reid*, 1 Ala. at 621. The court noted that other antebellum courts had divided over the constitutionality of similar bans on concealed weapons, a fact that further counseled judicial restraint.

⁶⁹ Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 *MICH. L. REV.* 783, 803 (2017). Berman's critique of Scalia is withering, charging the justice with a host of judicial vices, including "hubris, overconfidence, arrogance, dogmatism."

⁷⁰ William Ewald, *James Wilson and the Scottish Enlightenment*, 12 *U. PA. J. CONST. L.* 1053 (2010).

⁷¹ *Reid*, 1 Ala. at 621.

⁷² *State v. Huntley*, 25 N.C. 418 (1843)

⁷³ Ruben & Cornell, *supra* note 64.

⁷⁴ *Huntley*, 25 N.C. at 423.

⁷⁵ *IDAHO CONST. OF 1889*, art. I, § 11.

⁷⁶ *GA. CONST.*, art. I, § 1, para. VIII. Florida adopted the same formulation; see *FLA. CONST.*, art. I, § 8.

⁷⁷ CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT* 4–5 (1886) (citing *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 149–50 (1854)).

⁷⁸ See generally Laura F. Edwards, *The Reconstruction of Rights: The Fourteenth Amendment and Popular Conceptions of Governance*, 41 *J. OF SUP. CT. HIST.* 310 (2016); and Darrell A.H. Miller, "Peruta," *the Home-Bound Second Amendment, and Fractal Originalism*, 127 *HARV. L. REV. F.* 238 (2014). For a discussion of how the courts wrestled with the meaning of the amendment, see generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

⁷⁹ See generally Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the*

Framers Enacted, 42 HARV. J. ON LEGIS. 187 (2005); and Christopher Tomlins, *To Improve the State and Condition of Man: The Power to Police and the History of American Governance*, 53 BUFF. L. REV. 1215 (2005).

⁸⁰ Saul Cornell & Justin Florence, *The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?*, 50 SANTA CLARA L. REV. 1043, 1058 (2010) (quoting John Bingham, Speech in CINCINNATI DAILY GAZETTE (Sept. 2, 1867)).

⁸¹ JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES: ESPECIALLY DESIGNED FOR STUDENTS, GENERAL AND PROFESSIONAL 152–53 (1868).

⁸² *An Act to Regulate the Keeping and Bearing of Deadly Weapons*, Art. 6512, in GEORGE WASHINGTON PASCHAL, 2 A DIGEST OF THE LAWS OF TEXAS: CONTAINING LAWS IN FORCE, AND THE REPEALED LAWS ON WHICH RIGHTS REST 1322–24 (1873).

⁸³ *Id.* at 1317–18 (“Criminal Code, Riots and Unlawful Assemblies at Elections Violence Used Towards Electors, Art. 6490”).

⁸⁴ *Id.* at 1321 (“An Act to Prohibit the Carrying of Firearms on Premises or Plantations of Any Citizen Without the Consent of the Owner, Art. 6510”).

⁸⁵ Miller, *supra* note 78.

⁸⁶ For a good overview of the widespread criticism of *Heller*’s methodology from left, right, and center, see Sanford Levinson, *United States: Assessing Heller*, 7 INT’L J. CONST. L. 316, 319 (2009).

⁸⁷ Ruben & Cornell, *supra* note 64.

⁸⁸ Stephen P. Halbrook, *To Bear Arms for Self-Defense: A “Right of the People” or a Privilege of the Few?*, 21 FEDERALIST SOCIETY REV. 46 (2020), <https://fedsoc.org/commentary/publications/to-bear-arms-for-self-defense-a-right-of-the-people-or-a-privilege-of-the-few-part-2>.

⁸⁹ Rory K. Little, *Heller and Constitutional Interpretation: Originalism’s Last Gasp*, 60 HASTINGS L.J. 1415 (2009); Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, PANORAMA (Aug. 3, 2018), <http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment>; Darrell A.H. Miller, *Owning Heller*, 30 U. FLA. J. L. & PUB. POL’Y 153 (2020).