Constitutional Liquidation, Surety Laws, and the Right to Bear Arms

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Abstract: In recent years, some scholars have claimed that early American law did not recognize a general right to bear arms in public. Although most early state court decisions recognized such a right, these scholars contend that these decisions were peculiar to the antebellum South, which had a uniquely permissive weapon carrying culture. Outside the South, they argue, many states heavily restricted the public carry of weapons through surety laws. These surety laws required that, on complaint of a plaintiff who had "reasonable cause to fear an injury, or breach of the peace," a person would have to post a bond to keep the peace if he went armed "without reasonable cause to fear an assault or other injury." These scholars argue that the surety laws (which they call the "Massachusetts Model") were descendants of the common law crime of going armed to the terror of the people, which, they claim, also generally prohibited private citizens from going armed. Based on this historical practice, they argue that the Second Amendment was not understood to encompass a general right to publicly carry weapons.

This book chapter challenges that historical narrative, and more importantly, disputes the relevance of the Massachusetts Model for constitutional interpretation. First, this book chapter argues that the relevance of nineteenth-century laws and judicial decisions does not primarily come from their ability to elucidate the original public meaning of the right to bear arms in 1791. Instead, their relevance lies in the idea of "constitutional liquidation," that postenactment practice can settle the meaning of legal text.

Next, this chapter argues that the right to bear arms did not liquidate in favor of the constitutionality of the Massachusetts Model. No evidence has emerged that the passage of the surety laws was the product of thoughtful constitutional interpretation. And no course of practice emerged. As applied to the carriage of weapons for lawful purposes, the surety laws went largely unenforced. Likewise, there is almost no known record of American courts enforcing the common law crime of going armed to the terror of the people against individuals carrying weapons for lawful purposes.

Finally, the lack of enforcement meant that the surety laws failed to settle the meaning of the right to bear arms. Quite the contrary, all Massachusetts Model jurisdictions (including Massachusetts) adopted statutory criminal law governing the carriage of weapons in public. None of these states adopted a general ban on public carry. Instead, most states restricted only the carrying of concealed weapons, while a few others (including Massachusetts) had more lenient laws. Ultimately, the "Massachusetts Model" did not serve as a model for restricting public carry anywhere, even in Massachusetts.

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Introduction

In 2008, the Supreme Court issued its landmark decision in *District of Columbia v. Heller*.[1] *Heller* held that the Second Amendment protects the right of "law-abiding, responsible citizens," including those not enrolled in state-organized militia units, to possess firearms and "to use arms in defense of hearth and home."[2] The Court qualified its holding by stating that "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[3] For example, the Court seemingly accepted nineteenth-century decisions upholding prohibitions on the carrying of concealed weapons.[4]

Heller has caused litigation and academic literature to shift its focus, from the question of *who* holds Second Amendment rights to the *content* and *limits* of the right.[5] Arguably the most significant present question is the constitutional validity of laws that generally prohibit individuals from carrying firearms in public. Scholars and judges have approached this issue from at least one of two ways.

The first approach asks whether legislative restrictions are consistent with some form of means-end scrutiny.[6] The means-end approach often looks to empirical sources for answers. Do laws that generally prohibit public carry decrease crime by reducing armed confrontation?[7] Or do they increase crime by making it difficult for law-abiding citizens to defend themselves?[8] Courts, for their part, have mostly elided messy empirical questions by deferring to legislative judgments, creating a strong presumption in favor of sustaining restrictive gun control laws.[9]

The second approach—the one that this chapter will focus on—looks to historical sources, especially nineteenth-century precedents.[10] For example, scholars in favor of broader gun rights note

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[1] 554 U.S. 570 (2008).
[2] *Id.* at 635.
[3] *Id.* at 626.
[4] *See id*.
[5] Compare, *e.g.*, Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE. L.J. 637 (1989); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995), Gregory Lee Shelton, *In Search of the Lost Amendment: Challenging Federal Firearms Regulation Through the "State Right" Interpretation of the Second Amendment*, 23 FLA. ST. U. L. REV. 105 (1995), Michael T. O'Donnell, *The Second Amendment: A Study of Recent Trends*, 25 U. RICH. L. REV. 501 (1991), *with* Darrell A.H. Miller, *Guns as Smut: Defending the Homebound Second Amendment*, 109 COLUM. L. REV. 1278 (2009), Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009).
[6] *See, e.g.*, Gould v. Morgan, 907 F.3d 659, 670 (1st Cir. 2018); Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012); United States v. Mazzarella, 614 F.3d 85 (3rd Cir. 2010); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185 (5th Cir. 2012); United States v. Reese, 627 F.3d 792 (10th Cir. 2010); Allen Rostron, *The Continuing Battle Over The Second Amendment*, 78 ALB. L. REV. 819 (2015).
[7] *See, e.g.*, John J. Donohue, et al., *Right to Carry Laws and Violent Crime*, 16 J. EMPIRICAL LEGAL STUDIES 198 (2019) (finding that right to carry laws increase crime); David McDowall, Colin Loftin, Brian Wiersema, *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193 (1995).
[8] *See, e.g.*, Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995); JOHN LOTT, MORE GUNS LESS CRIME (3d ed. 2010); John C. Moorhouse and Brent Wanner, *Does Gun Control Reduce Crime or Does Crime Increase Gun Control?* 26 CATO J. 103 (2006).
[9] *See, e.g.*, *Gould*, 907 F.3d at 673–76; *Kachalsky*, 701 F.3d at 99.
[10] *See, e.g.*, Peruta v. Cty. of San Diego, 824 F.3d 919, 933–38 (9th Cir. 2016); Kachalsky, 701 F.3d at 90–91; David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y 127 (2016); Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015).

that most nineteenth-century courts struck down complete bans on public carry, while sustaining prohibitions against the carrying of weapons in a concealed manner.[11] Scholars in favor of broader gun control marginalize these decisions as the product of slave states and Southern culture; they point, instead, to some laws and local ordinances that heavily restricted public carry, including in the Old West.[12] A casual reader may think that the historical debate has reached a stalemate.

This chapter contends otherwise. The present debate over the relevance of nineteenth-century carry laws is not about using these laws to determine the original public meaning of the right to bear arms in 1791. Instead, their relevance lies in the idea of "constitutional liquidation."

Constitutional liquidation occurs when postenactment practice settles the meaning of "more or less obscure and equivocal" legal texts.[13] In recent years, scholars have turned some attention to how constitutional liquidation occurs. This chapter will borrow from a recent article on James Madison's theory of liquidation. Madisonian liquidation generally requires three things: (1) constitutional deliberation about the issue, (2) that results in a course of practice, and that (3) settles the constitutional issue in the public's mind.[14] Madison's is not the only theory of constitutional liquidation.[15] But to date, it is the most developed. And to the extent that other theories of liquidation become more developed in the future, many arguments and much evidence in this chapter will likely apply to them, *mutatis mutandis*.

Applying the principles of Madisonian liquidation, I argue, first, that constitutional liquidation is relevant because the full scope of the American right to bear arms was not settled in 1791. In the Anglo-American tradition, the right to have arms emerged with the English Bill of Rights in 1688, and the desire of English subjects to have some means to defend themselves against the lawless use of royal power.[16] But the English right was limited to Protestants, who could have arms "suitable to their conditions and degree and as allowed by law."[17] The American right to bear arms was broader, lacking these limitations.[18] But exactly how broad was unclear. The Framing generation said little about how they understood the full scope of the right to bear arms.[19] Constitutional liquidation is the process by which the right would develop.

Next, I turn my attention to antebellum surety laws. These laws required those who went armed without reasonable cause to fear an attack to post a bond to keep the peace. Surety laws originated in Massachusetts, and eight states plus the City of Washington ultimately passed them. Several scholars, including Eric Ruben, Saul Cornell, and Patrick J. Charles, contend that they serve as historical precedent that the American right to bear arms did not include a general right to carry weapons in public.[20] They call the surety law approach the "Massachusetts Model."[21] They distinguish

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[11] *See*, *e.g.*, David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359 (1998); CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999).

[12] Ruben & Cornell, *supra* note 10, at 124–33; Patrick J. Charles, *The Faces of the Second Amendment Outside the Home*, 60 CLEV. ST. L. REV. 1 (2012).

[13] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (quoting THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed, 1961)).

[14] *Id.* at 13-21.

[15] *Id.* at 32–35.

[16] *See, e.g.*, Aymette v. State, 21 Tenn. (2 Hum.) 154, 156–58 (1840).

[17] 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689).

[18] *Aymette*, 21 Tenn. at 157–58; 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1898, at 621 (Law Book Exchange 2007) (1873).

[19] *See generally* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS (David E. Young, ed. 1995) (collecting sources from the Framing on the right to bear arms).

[20] *See supra* note 12.

[21] Ruben & Cornell, *supra* note 10, at 133.

it from the so-called antebellum Southern model, which prohibited the carrying of weapons in a concealed manner, leaving individuals free to carry arms openly.[22] And they argue that the surety laws were a descendent of the common law crime of "going armed to the terror of the people," which they believe generally prohibited carrying weapons in public because public carry was inherently terrifying.[23] These scholars thus believe that historically the constitutional protection for the right to bear arms coexisted with severe limitations on public carry.

Relying on the Madisonian liquidation framework, I contend that the right to bear arms did not liquidate in favor of the Massachusetts Model. No evidence has emerged that legislatures deliberated about the meaning of the right to bear arms when these passed the surety laws. So we have no reason to think that these laws were the product of thoughtful constitutional interpretation. Second, no course of practice emerged. As applied to the carriage of weapons for lawful purposes, the surety laws went largely unenforced. Finally, the lack of enforcement meant that these laws failed to settle the constitutional issue. Quite the contrary, Massachusetts Model jurisdictions switched to narrower restrictions against the carrying of weapons in a concealed manner, including in jurisdictions outside the South.

My argument in this chapter will be entirely negative. Space limitations preclude me from providing my affirmative argument, which is that the right to bear arms liquidated in favor of recognizing a general right to carry arms openly, while also recognizing the government's power to prohibit the carrying of concealed weapons as a reasonable regulation of the right. Much of the evidence I cite in this chapter, however, provides the foundation for that argument.

More broadly, this chapter challenges how history intersects with constitutional interpretation. Constitutional liquidation is one attempt to reconcile historical practice with constitutional law. There are other approaches. But those who argue that extensive restrictions on public carry do not violate the right to bear arms need to do more than identify a few isolated and likely unenforced nineteenth-century state laws that (arguably) support their view.

I. HELLER, *ORIGINALISM, HISTORY, AND PUBLIC CARRY*

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment "guarantee[d] the individual right"—that is, one not conditioned on being enrolled in a state military unit—"to possess and carry weapons in case of confrontation."[24] Despite recognizing an individual right to bear arms, the Court reassured the public that "the right secured by the Second Amendment is not unlimited" and does not confer "a right to keep and carry any weapon whatsoever and for whatever purpose."[25] The opinion notes, for example, that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[26]

Although *Heller* did not purport to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,"[27] lower courts and litigants have treated *Heller*'s dicta as a comprehensive roadmap for Second Amendment litigation. Post-*Heller*, the most significant Second Amendment issue has been the validity of laws restricting private citizens from carrying firearms in

[22] *Id.* at 124.
[23] Ruben & Cornell, *supra* note 10, at 129–30; Charles, *supra* note 12, at 39–41.
[24] 554 U.S. at 592.
[25] *Id*. at 626.
[26] *Id*.
[27] *Id.*

public. When *Heller* was decided, eight states plus the District of Columbia heavily restricted the ability of private citizens to carry firearms in public.[28]

Subsequent litigation has challenged these restrictive carry laws. In these cases, Justice Scalia's analysis in *Heller* has become a key sticking point. Litigants challenging restrictive carry regimes have argued that *Heller* implicitly adopted the position that states must allow private citizens to carry firearms in some manner.[29] *Heller*'s examples of presumptively constitutional limitations on the right to bear arms included the prohibition of carrying firearms "in sensitive places such as schools and government buildings,"[30] and the Court seemingly accepted the nineteenth-century cases upholding prohibitions on concealed weapons.[31] For these litigants, the exceptions prove the rule—that the government cannot entirely prohibit private citizens from carrying firearms in public. Governments defending restrictive carry laws, however, contend that extensive restrictions on public carry are consistent with *Heller*'s emphasis on the "use of arms in defense of *hearth and home*"[32] and a full picture of historical practice.[33]

Because *Heller* featured history prominently in its decision, both sides of this debate rely on history to advance their understanding of the Second Amendment. The vast majority of nineteenth-century state court decisions upheld the state's power to prohibit the carrying of concealed weapons, while striking down laws that constituted a complete ban on pistol carry.[34] Many scholars and litigants rely on these cases as precedent that the government may regulate the carrying of firearms but not generally prohibit it.

Those who favor a narrower interpretation of the Second Amendment argue that these nineteenth-century state cases provide dubious authority about the original meaning of the Second Amendment. These state cases came decades after the Second Amendment was adopted, when "[a] more liberal, individualistic, and ultimately democratic conception of arms-bearing emerged."[35] Worse, these cases came only from the South, which had a distinctively permissive attitude towards gun carrying.[36] Other regions of the country, they argue, followed the "Massachusetts Model," which generally prohibited individuals from carrying weapons unless they had reason to fear an attack.[37] And

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[28] Illinois maintained a complete ban on carrying firearms in public. 720 Ill. Comp. Stat. Ann. 5/24-1, 5/24-1.6 (West 2008). Six states—California, Hawaii, Maryland, Massachusetts, New Jersey, and New York—provided for licenses to carry firearms only upon a showing of special need. Cal. Penal Code § 12050 (West 2008); Haw. Rev. Stat. Ann. § 134-9 (2008); Mass. Gen. Laws Ann. ch. 140, § 131 (West 2008); N.J. Stat. Ann. § 2C:58-4 (West 2008); N.Y. Penal Law § 400.00 (McKinney 2008). The District of Columbia had a technical discretionary licensing system, despite its complete ban on registering new handguns. D.C. Code § 22-4506 (2001) (licenses to carry); § 7-2502.01(a), (a)(4) (registration requirement and prohibition on registering pistols). And Delaware required a special showing of need for a license to carry a weapon concealed, although state law did not regulate unconcealed weapons. Del. Code tit. 11, §§ 1441(a)(2), 1442.

[29] *See e.g.*, Brief for Petitioner at 19-26, New York State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280) 2019 WL 2068598; Brief for Appellants at 16–20, Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018) (No. 17-2202) 2018 WL 1610774.

[30] 554 U.S. at 627.

[31] *Id.*

[32] *Id*. at 635.

[33] *See e.g.*, Brief for Appellee at 22–26, Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018) (No. 17-2202) 2018 WL 2759720; Reply Brief for Appellants at 2–15, Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013) (No. 12-1437) 2012 WL 3598881.

[34] Kopel, *supra* note 11, at 1416.

[35] 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, 1055 (2010).

[36] Ruben & Cornell, *supra* note 10, at 124–28.

[37] *Id.* at 128–34.

the common law, Massachusetts Model proponents contend, for centuries generally prohibited individuals from "going or riding armed with dangerous or unusual weapons."[38] So, they conclude, the Second Amendment is consistent with heavily restricting public gun carry. As it applies to modern times, these laws may not be a perfect analogue of today's discretionary licensing regimes, which require some showing of personal danger before a license to carry is issued. But these scholars contend they are close enough, and these modern laws are constitutional on a historical approach.[39]

To be sure, affording precedential weight to the nineteenth-century legal framework also has its critics among constitutional scholars examining original meaning. Nelson Lund has argued that nineteenth-century state decisions "do not provide direct evidence of the scope of the preexisting right [to bear arms]," as it was understood when the Second Amendment was adopted in 1791."[40] These cases, moreover, do not share *Heller*'s interpretive methodology or its understanding about the purpose of the right to bear arms.[41] Finally, Lund agrees with proponents of the Massachusetts Model that these decisions may be peculiar to the antebellum South, although for a different reason than they assert. Whereas Cornell and Ruben believe that the South had a uniquely permissive gun carrying culture,[42] Lund argues that the South's emphasis on whether the weapon was concealed may have stemmed from a culture where the concealment of the weapon created "a presumption of criminal intent."[43] Today, in contrast, carrying a firearm *openly* may create a presumption of criminality by disturbing the peace.[44]

This dispute leaves two critical questions on the table. First, methodologically, why is the nineteenth-century legal framework relevant, if at all? As Lund notes, *Heller* fails to "explain why or to what extent judicial decisions under state analogues of the Second Amendment would be relevant to the original meaning of the Second Amendment."[45] Second, can a historical approach help elucidate the scope of the right to bear arms? Or is the history too muddy to draw any firm conclusions?

II. AN ALTERNATIVE READING OF *HELLER*: NINETEENTH-CENTURY PRECEDENT AS CONSTITUTIONAL LIQUIDATION

Heller offers nineteenth-century treatises and state-court decisions as evidence of "the public understanding" of the Second Amendment "in the period after its enactment or ratification."[46] One can read this claim as asserting that these sources provide authoritative evidence of the Second Amendment's original public understanding in 1791. But in this Part, I want to offer a more charitable interpretation for *Heller*'s reliance on nineteenth-century precedents. Instead of being evidence of what the preexisting right to bear arms meant in 1791, nineteenth-century precedents are relevant for how the right to bear arms liquidated in America.

Constitutional liquidation is a method of resolving textual indeterminacy. In *Federalist No. 37*, Madison wrote, "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[47]

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[38] *See supra* note 23.
[39] Ruben & Cornell, *supra* note 10, at 132–33.
[40] Nelson Lund, *The Second Amendment, Heller, & Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1359 (2009).
[41] *Id.* at 1360.
[42] Ruben & Cornell, *supra* note 10, at 124-28.
[43] Lund, *supra* note 40, at 1361.
[44] *Id.*
[45] *Id.* at 1359; *see also* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1577 (2009) ("Whether [the antebellum cases cited in *Heller*] have anything worthwhile to show about the original understanding of the Second Amendment is highly doubtful. Notice the date of these two sources, a half-century after the ratification of the Bill of Rights.").
[46] 554 U.S. at 2805.
[47] Federalist No. 37, at 236 (Jacob E. Cooke, ed.) (Madison)

Constitutional liquidation, thus, is the idea that, in proper circumstances, postenactment practice will settle constitutional meaning.[48]

To "settle" a meaning, of course, implies that a law has some zone of ambiguity that needs to be resolved. As Caleb Nelson explains, ambiguity and vagueness could arise for many reasons:

> Some ambiguities could be traced to the human failings of the people who drafted the laws; they might have been careless in thinking about their project or in reducing their ideas to words, and they would certainly be unable to foresee all future developments that might raise questions about their meaning. Other obscurities would result simply from the imperfections of human language . . . .[49]

Constitutional liquidation has no place, however, where the text of a written law is unambiguous. Were it otherwise, use and tradition would serve as a method to amend written law.[50] For the same reason, even in cases where a law has both unambiguous and ambiguous zones of meaning, liquidation is only appropriate when the meaning of the law is unclear in the circumstances.[51]

The Second Amendment suffers from textual indeterminacy. The Amendment provides, "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."[52] One (implausible) way to read the operative clause is to prohibit the government from encroaching on any individual's ability to possess and carry weapons. That meaning is obviously too broad. For example, it would divest the federal government of the power to disarm prisoners while they were in custody or to prohibit the possession of weapons in legislative chambers and judicial proceedings. A more plausible way to read the amendment is that it protects "*the* right" to keep and bear arms—that is, the right preexisting the Constitution and generally known to the Framers.[53]

But this latter reading solves the indeterminacy problem only if the definiendum "the right" has some known, fixed meaning. When it comes to the right to bear arms, we have good reason to believe that its meaning was not fully settled in 1791. Although the duty to bear arms existed for centuries, the legal *right* to have arms only emerged with the 1689 English Bill of Rights.[54] So unlike rights to due process of law or just compensation for eminent domain, which trace their roots to the Magna Carta, the right to bear arms had a relatively short history before our Bill of Rights was adopted.

Within that short history, the English right did not develop much. We know that the event motivating the creation of the right was the disarming of the Protestants by the Crown, thereby preventing the Protestants from resisting other illegal and unconstitutional royal edicts.[55] But the right to have arms was limited to Protestants, and even Protestants could have arms only "suitable to their conditions and as allowed by law."[56] Parliament heavily restricted who could keep a gun,[57] which led

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[48] Baude, *supra* note 13, at 4.

[49] Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 11 (2001).

[50] *Id.*

[51] Baude, *supra* note 13, at 66.

[52] U.S. CONST. amend. II.

[53] *See* United States v. Cruikshank, 92 U.S. 542, 553 (1876) ("is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.").

[54] JOYCE LEE MALCOLM, TO KEEP & BEAR ARMS: ORIGINS OF AN ANGLO-AMERICAN RIGHT 1 (1996).

[55] Aymette v. State, 21 Tenn. (2 Hum.) 154, 156 (1840) (explaining that "King James II, by his own arbitrary power, and contrary to law, disarmed the Protestant population"); *see* MALCOLM, *supra* note 54.

[56] 1 W. & M., c. 2, § 7 (Eng.), in 3 ENG. STAT. AT LARGE 441 (1689).

[57] 22 & 23 Car. II c. 25 (1671) (Eng.), in 5 STATUTES OF THE REALM 745 (restricting the right to keep arms to those meeting certain rank and property qualifications).

Justice Story to comment that the English right "under various pretences . . . ha[d] been greatly narrowed" and was more "nominal than real."[58]

The ability of English subjects to carry arms for private purposes is the matter of great contemporary scholarly dispute. In 1328, Parliament passed the Statute of Northampton. That statute provided:

> that no man great nor small, of what condition soever he be, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.[59]

The Statute of Northampton was considered "an affirmance of" the common law crime of going armed with dangerous or unusual weapons to the terror of the people.[60] Some claim that the Statute of Northampton made it generally unlawful to ride or go armed in public.[61] Others contend that, by the seventeenth century, the statute was understood only to apply to those "who go armed to terrify the King's subjects."[62] One reason this issue is so contested is that few judicial precedents exist, which raises the question whether the offense was even enforced outside the rarest of circumstances.

Nor was the contemporary American legal picture entirely clear. Before the adoption of the federal Bill of Rights, four state constitutions guaranteed some form of the right to bear arms.[63] But there are no known judicial decisions about these provisions by the time the Second Amendment was adopted in 1791. And very little is known about how the people who drafted and ratified the Second Amendment understood the scope of the right. The ratification debates, both of the Constitution and the Bill of Rights, primarily concerned the administration of the militia and how to handle religious exemptions from military service. They did not discuss the specific limits of the federal police power to regulate guns, even in the limited cases where the federal government possessed a police power.[64] One point of departure from the English practice, however, was that the American right was broader than its English ancestor, lacking the restrictive language ("Protestants," "suitable to their condition and degree," and "as allowed by law") found in the English Bill of Rights.[65]

The American historical legislative picture adds a little clarity, but not much. Americans accepted some forms of weapons control.[66] Colonial and state legislatures readily deprived certain

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[58] 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1898, at 621 (Law Book Exchange 2007) (1873).

[59] Statute of Northampton, 2 Edw. 3, c. 3 (1328).

[60] Sir John Knight's Case, 87 Eng. Rep. 75 (K.B. 1686).

[61] *E.g.*, Charles, *supra* note 12, at 7–36.

[62] Sir John Knight's Case, 87 Eng. Rep. 75 (K.B. 1686); *see, e.g.*, Kopel, *supra* note 10, at 130; JOHN ANTHONY GARDNER DAVIS, A TREATISE ON CRIMINAL LAW 249 (1838) ("In the exposition of the statute of Edward, it has been resolved that no wearing of arms is within its meaning, unless it be accompanied with such circumstances as are apt to terrify the people . . . .").

[63] District of Columbia v. Heller, 554 U.S. 570, 601 (2008) (collecting provisions from Massachusetts, North Carolina, Pennsylvania, and Vermont).

[64] *See supra* note 19.

[65] Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840).

[66] The examples in this paragraph come from Winkler, *supra* note 45, at 1562; SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 26–30 (2006).

individuals outside the political community from having arms, including slaves, Indians, and Loyalists. They also regulated inherently dangerous activities—for example, the storage of large quantities of gun powder, which created a fire and explosion risk in urban areas. And they regulated the militia by requiring able-bodied men to have and train with arms. With at least one notable exception, gun carrying went unregulated by statute until the nineteenth century. And while some legislatures passed laws modeled on the Statute of Northampton,[67] virtually nothing is known about how these laws were construed of enforced, assuming such prosecutions ever happened. Early American weapons regulations were much less comprehensive than modern gun-control regulations.[68] And this fact cuts both ways. Was this a sign that early American legislatures broadly respected the right to keep and bear arms? Or was this a mere legislative policy choice, not constitutionally mandated? Any historical approach to the Second Amendment has to cope with the fact that the precise scope of "the right" was "more or less obscure and equivocal" in 1791.

Now, some may argue that the fact the right to bear arms was ambiguous in 1791 is a reason why judges today—especially those who take originalism seriously—must defer to the legislature on the constitutionality of all gun control laws.[69] But this does not follow for two reasons.

First, the Second Amendment still has a core of unambiguous meaning. For example, under the original understanding of the Second Amendment, Congress could not enact a complete ban on the possession of rifles. And this is true whether one accepts the original understanding of the right to bear arms to be an individual self-defense right or a common-defense/militia-centric right.[70] Deference to the legislature in core cases would elevate ordinary law over the Constitution.

Second, the Framers knew and understood that written constitutional provisions could not answer every difficult interpretive question. Over time, they expected that precedent would settle constitutional meaning. That is to say, constitutional liquidation was part of the "original methods" known to the Framers.[71] And beyond the Framers themselves, liquidation has been a traditional part of the American common law of judging since the beginning. Liquidation "dominated antebellum case law" as "[c]ourt after court used its framework to think about the effect of past decisions interpreting written law."[72] Liquidation has resolved the interpretation of many uncertain constitutional provisions, and we should not think that the right to bear arms should be uniquely excepted.[73]

The next issue is to identify how liquidation of the Constitution happens. As Will Baude has explained, Madison's conception of liquidation has three parts.[74] First, a regular tradition or practice has to develop with respect to the interpretation of the provision.[75] That interpretation should span

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[67] Ruben & Cornell, *supra* note 10, at 129 & n. 43.

[68] Winkler, *supra* note 45, at 1562.

[69] *Cf.* United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) (urging deference on whether the Second Amendment applies outside the home because "[t]he whole matter strikes us as a vast *terra incognita*").

[70] Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840); Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871); English v. State, 35 Tex. 473 (1871); State v. Kerner, 107 S.E. 222 (N.C. 1921).

[71] On original methods, see John McGinnis & Michael Rappaport, *Original Methods Originalism*, 103 NW. L. REV. 751 (2009).

[72] Nelson, *supra* note 49, at 14.

[73] Indeed, both the *Heller* majority and dissenting opinions contain arguments essentially disputing how the Second Amendment liquidated. *Compare* District of Columbia v. Heller, 554 U.S. 570, 605–19 (majority op.) (tracing the nineteenth century understanding of the right to bear arms), *with id.* at 638 & n.2 (Stevens, J., dissenting) (collecting the twentieth-century understanding of the Second Amendment in federal courts) *and id.* at 676–79 (noting the "substantial reliance" of "legislators and citizens for nearly 70 years" on the Court's earlier decision in *United States v. Miller*, 307 U.S. 174 (1939)).

[74] Baude, *supra* note 13, at 16–21.

[75] *Id.* at 16.

significant time period and not be restricted to a particular political faction or party.[76] On that front, liquidation is related to early theories of judicial precedent, which placed primacy on a series of judicial opinions rather than on a single opinion.[77] Second, the precedential interpretation must result from bona fide deliberation about the legal issue.[78] Third, a "settlement" of the issue must result, which means that (1) those holding dissenting interpretive views must accept the countervailing interpretation and (2) the public must accept the interpretation of the provision.[79]

As applied to the right to bear arms, liquidation is more complicated than it would be for purely structural federal issues, such as the constitutionality of the Bank of the United States.[80] The federal government largely lacked a de facto police power until the twentieth century.[81] Consequently, states, territories, and their localities were the primary regulators of weapons.[82] This meant that constitutional liquidation of the right to bear arms occurred in a decentralized fashion throughout the country. And many of the judicial precedents occurred under state analogues protecting the right to bear arms rather than under the Second Amendment directly.[83]

But this kind of decentralization is not fatal to the possibility of liquidation. Judicial decisions routinely accepted that the right to bear arms enumerated in both the state and federal constitutions referred to the same preexisting right, even where state constitutions used slightly different language in how they expressed the right.[84] Treatise writers also treated the various state and federal rights as coextensive, even when they were discussing doctrinal disagreements among the states.[85] One must be careful not to import post-*Erie* visions of states as having entirely separate legal systems into the nineteenth century.

There is also the question of whether liquidation—which relies on the support of the public to settle an issue—is appropriate to determine the scope of (countermajoritarian?) rights-claims. Or should liquidation be confined to questions of governmental structure,[86] as Chief Justice Marshall suggested in *M'Culloch v. Maryland*?[87] I do not see any theoretical difficulty with liquidation settling the meaning of the right to bear arms. As Baude suggests, "the division between structure and rights may

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[76] *Id.*

[77] *Id.* at 38 (citing John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. Rev. 803, 809 (2009)).

[78] *Id.* at 17.

[79] *Id.* at 18–20.

[80] *Id.* at 21-29

[81] *See* Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 418–429 (2003) (tracing rise of federal criminal jurisdiction through the use of the Postal and Commerce Clauses).

[82] *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 58–61 (2017) (collecting state firearms regulations prior to the National Firearms Act of 1934).

[83] *E.g.*, Andrews v. State, 50 Tenn. (3 Heisk.) 165, 175 (1871); State v. Reid, 1 Ala. 612 (1840); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822).

[84] *See, e.g.*, State v. Buzzard, 4 Ark. 18, 26–27 (1842) (opinion of Ringo, C.J.); Aymette v. State, 21 Tenn. (2 Hum.) 154, 157 (1840); *Ex parte* Thomas, 97 P. 260, 262 (Okla. 1908).

[85] *E.g.*, 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 122–123, at 74–76 (4th ed. 1868); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 427 (6th ed. 1890).

[86] Baude, *supra* note 13, at 50 (describing objection).

[87] 17 U.S. (4 Wheat.) 316, 401 ("It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted . . . .").

be somewhat artificial."[88] The Second Amendment illustrates this. The Amendment secures an individual right to bear arms. But that right also serves important structural interests by decentralizing the ability to use force and reserving part of the military power to the citizenry.[89] Moreover, the countermajoritarian problem is mitigated by having liquidation only where the right itself is ambiguous.[90] The Second Amendment in 1791 may have had considerable zones of ambiguity subject to liquidation; but that does not belie that the Amendment also had a clear core zone readily capable of countermajoritarian enforcement. Refusing to allow post-enactment practice to override the clear core of a right prevents liquidation from being used to usurp "the great principles of liberty."[91]

Finally, there is the question of how the right to bear arms actually liquidated, especially as it relates to public carry. I will offer my answer on the public carry question, although I cannot fully defend it here. The right liquidated in favor of (1) the right to carry constitutionally protected arms openly in some form, and (2) the power of the states to punish the carrying of concealed weapons. Throughout the nineteenth century, decision after decision of state courts recognized this distinction.[92] State and territorial legislatures accepted it; nearly all prohibited the carrying of concealed weapons, while leaving individuals free to carry arms openly in some manner.[93] And contrary to Ruben and Cornell's suggestion, this was not a distinction peculiar to the antebellum South. It spread throughout much of the West and North, as well, including after the Civil War.[94] Along the way, we see repeated

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[88] Baude, *supra* note 13, at 50.

[89] Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 1068 (2020).

[90] Baude, *supra* note 13, at 50.

[91] *M'Culloch*, 17 U.S. (4 Wheat.) at 401.

[92] *E.g.*, Nunn v. State, 1 Ga. 243 (1846); State v. Chandler, 5 La. Ann. 489, 490 (1850); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840); State v. Reid, 1 Ala. 612, 615 (1840); Fife v. State, 31 Ark. 455, 458–61 (1876). For early twentieth century cases along the same line, see, for example, *In re* Brinkley, 70 P. 609 (Idaho 1902); State v. Kerner, 107 S.E. 222 (N.C. 1921).

[93] *See, e.g. infra* notes 156–166, and accompanying text. In the nineteenth century, few jurisdictions maintained a complete ban on public carry. For a limited time, Arizona, Idaho, New Mexico, and Wyoming generally prohibited the carrying of weapons in incorporated areas. 1893 Ariz. Sess. Laws 3, § 1; 1888 Idaho Sess. Laws 23, § 1; 1860 N.M. Laws 94, §1; 1876 Wyo. Sess. Laws 352, § 1 (Dec. 2, 1875). Arizona's and Wyoming's were repealed around the time of statehood. Wyo. Sess. Laws 1890, ch. 73, § 6, at 140. For Arizona, compare Revised Statutes of Arizona Territory, Penal Code, Title XI, §§ 382, 385 (1901) (prohibiting carrying concealed weapons statewide and all carry within incorporated areas), *with* Revised Statutes of Arizona Territory, Penal Code, Title XI, § 382 (1901), with Arizona Revised Statutes, Penal Code, Title XII, § 426 (1913) (continuing only the prohibition against concealed weapons). Idaho's carry ban was invalidated by judicial decision. In re Brinkley, 70 P. 609 (Idaho 1902). New Mexico repealed its general ban in 1962, N.M. Laws of 1963, ch. 303, § 7-2, at 842, and the law may have been unconstitutional all along, *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971) (holding that an analogous ordinance violated the right to bear arms). After the Civil War, Texas and West Virginia courts upheld broad restrictions on carrying pistols, though these states allowed individuals to carry rifles and shotguns. *See* State v. Duke, 42 Tex. 455 (1873); State v. Workman, 14 S.E. 9 (W. Va. 1891).

[94] *See, e.g.*, *In re* Brinkley, 70 P. 609 (Idaho 1902); City of Las Vegas v. Moberg, 485 P.2d 737, 738 (N.M. Ct. App. 1971); Dano v. Collins, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990); State v. Wilforth, 74 Mo. 528, 531 (1881); Klein v. Leis, 795 N.E.2d 633, 638 (Ohio 2003) (reaffirming State v. Nieto, 130 N.E. 663, 664 (Ohio 1920)); Mich. Att'y Gen. Op. Apr. 22, 1927, at 349, 350; Deadly Weapons, Phila. Inquirer, Dec. 30, 1897, at 2 (recognizing that Pennsylvania law did not prohibit carrying arms openly and that "the right to openly bear arms is guaranteed by the federal constitution") (capitalization altered). Some of these decisions make the distinction implicitly by holding that a state may regulate the manner of bearing arms, including by prohibiting concealed weapons, because such regulations do not ban the carrying of arms entirely. *See, e.g.*, *Nieto*, *supra*, at 664. These decisions are formally compatible with interpreting the right as guaranteeing some form of public carry, with the legislature choosing the manner (openly or concealed). But this compatibility may just result from imprecision in the language of the

examples of the issue being deemed settled by those holding dissenting views, from the Washington and Tombstone city councils to the halls of Congress.[95]

One may object that the states were not uniform in distinguishing concealed and unconcealed weapons. A very small minority of jurisdictions—most notably Texas—took a different path after the Civil War.[96] A full defense would have to explain how the existence of these isolated outliers remains consistent with the claim that the right to bear arms, in fact, liquidated in favor of the permissibility of public open carry. For now, I will say simply that liquidation does not require perfect uniformity, and nearly all these jurisdictions still allowed broad avenues for public carry of constitutionally protected arms, which separate them from today's restrictive states.[97]

III. Liquidation and the Massachusetts Model

In light of *Heller*, many scholars rely on history to argue that, outside the antebellum South, broad bans on public carry were the norm. As evidence, they cite statutes in eight states and the District of Columbia requiring sureties to keep the peace of those who went armed without reasonable cause to fear an attack. But the Massachusetts Model has no plausible claim to liquidating the right to bear arms. We have no evidence that these laws resulted from reasoned deliberation about the constitutional issue. The "model" never resulted in a tradition or practice. And perhaps most importantly, these laws never "settled" the constitutional question of whether a legislature could generally ban public carry.

A. Practice and Deliberation

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opinions. Prohibiting openly carried weapons while allowing concealed weapons would have raised serious constitutional concerns. *See Aymette*, 21 Tenn. at 161.

[95] Tombstone did not have a complete ban on public carry. Tombstone's original ordinance authorized permits to carry concealed weapons. Ord. No. 9, Apr. 19, 1881. When Tombstone amended its ordinance to cancel those permits, it exempted weapons carried "openly in sight and in the hand," no doubt a concession to the Tennessee-Arkansas decisions that invalidated bans on public carry without those exceptions. John Carr, Mayor, The Tombstone Epitaph, Feb. 21, 1882 (canceling permits and quoting the amended ordinance). For the Tennessee-Arkansas doctrine, see *State v. Wilburn*, 66 Tenn. 57, 62–63 (1872); *Haile v. State*, 38 Ark. 564, 566–67 (1882). The City of Washington enacted a complete ban on public carry in 1857, only to amend it to a ban only on concealed weapons, for fear that the broader ban would not survive a circuit court challenge. *Compare* Act of Nov. 4, 1857, ch. 5, *in* GENERAL LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON 75 (Robert A. Waters ed., 1860) (prohibiting all carry), *with* Act of Nov. 18, 1858, *in* GENERAL LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON, *supra*, at 114 (prohibiting only the carrying of concealed weapons). For an explanation of the 1858 amendment, see *Concealed Weapons*, EVENING STAR, Nov. 11, 1858, at 3 ("Mr. Jones explained that the bill was the same as the old bill, with the exception that the word 'concealed' is here inserted. For want of that word in the former bill, it is now certain that the corporation will lose every case before the circuit court by appeal from the decisions of the police magistrates."). When legislating for the District of Columbia, Congress repeatedly refused to criminalize carrying weapons openly because of concerns that it would violate the Second Amendment. 21 CONG. REC. 4448 (May 10, 1890) (explaining that Congress was not criminalizing unconcealed weapons); 21 CONG. REC. 223–30 (Dec. 8, 1890) (constitutional debates); 23 CONG. REC. 1050–51 (Feb. 11, 1892); 23 CONG. REC. 5789 (July 6, 1892); 48 CONG. REC. 4593 (Apr. 11, 1912) (amending a bill to prevent criminalizing "the bearing of arms openly") (statement of Mr. Johnson); 56 CONG. REC. 9545, 9547–48 (Aug. 26, 1918); Mark Anthony Frassetto, *The First Congressional Debate of Public Carry and What It Tells Us about Firearm Regionalism*, 40 CAMP. L. REV. 335 (2018). Congress adopted the Uniform Firearms Act for the District it 1932, it modified the Act only to apply to concealed weapons. An Act to control the possession, sale, transfer, and use of pistols and other dangerous weapons in the District of Columbia, Pub. L. No. 72-275, § 4, 47 Stat. 650 (1932). Congress finally prohibited carrying pistols openly without a license in 1943 because of concerns that criminals were evading the concealed weapons ban by placing their weapons in plain view when approached by law enforcement. An act to amend the law of the District of Columbia relating to the carrying of concealed weapons, Pub. L. No. 78-182, 57 Stat. 586 (1943).

[96] *See supra* note 93.

[97] All these states, for example, allowed travelers to carry arms. All except Texas also allowed public carry outside of incorporated areas. *See* sources cited *supra* note 93.

Proponents of the Massachusetts Model assert that the model constituted a different tradition of regulating public carry outside the antebellum South. But these proponents offer no evidence that these laws resulted from any kind of constitutional deliberation. Nor have they demonstrated that these laws resulted in a tradition or practice against public carry.

Let's begin with deliberation. For constitutional meaning to liquidate, the practice "must . . . be one of constitutional interpretation,"[98] resulting from "solemn discussion."[99] This means that "[l]egislative precedents [are] entitled to little respect when they [are] without full examination & deliberation."[100]

Did the legislatures that passed these surety laws make a considered judgment that the laws were consistent with the right to bear arms? We have no evidence of this. The proponents of the Massachusetts Model have provided none to indicate that any legislature passing a surety law examined the constitutional issue.[101] I have found no evidence of constitutional deliberation, including in the Report of the Commissioners who first proposed the surety provision.[102]

Now, Massachusetts Model proponents may be right that those legislatures which passed surety laws intended them to be broad restrictions against public carry. The Boston Morning Post reported a Massachusetts legislative debate in which a legislator made reference to "the law forbidding individuals to carry arms."[103] This is postenactment legislative history of the worst kind—a statement of a single member. But given the time period, it may be the best we have. In addition, a Pennsylvania code revision committee reported that the Pennsylvania analogue was intended to prevent "the unnecessarily carrying [of] deadly weapons" because of the "obvious necessity, arising from daily experience and observation."[104] But conspicuously lacking from this description is any analysis of whether these surety laws comported with the constitutional right to bear arms. Both the Massachusetts and Pennsylvania constitutions recognized the right.[105] Yet, we have no evidence that the legislatures considered whether the surety laws complied with these guarantees. And the mere fact that several other antebellum legislatures copied the Massachusetts law is not evidence that they seriously debated its constitutionality. We should be hesitant to infer constitutional meaning from mere legislative copy and paste.

We should be even more hesitant because these laws never resulted in any kind of settled practice against going armed. Proponents argue that the Massachusetts law constituted "a sweeping law that effectively prohibited the right to travel armed."[106] Here is the Massachusetts statute, which the other states copied nearly verbatim:

> 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.[107]

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[98] Baude, *supra* note 13, at 17.

[99] *Id.* (quoting Letter from James Madison to James Monroe (Dec. 27, 1817)).

[100] Baude, *supra* note 13, at 18 n.103 (quoting Madison) (internal quotation marks omitted).

[101] *See, e.g., supra* notes 10, 12.

[102] 4 REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE GENERAL STATUTES OF THE COMMONWEALTH, § 16 (1834).

[103] Boston Morning Post, Feb. 6, 1840 (reporting a transcript of the Massachusetts Legislature debates of Feb. 5, 1840) (statement of Mr. Sumner).

[104] REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE PENAL CODE OF THE COMMONWEALTH OF PENNSYLVANIA, Jan. 4, 1860, at 39.

[105] MASS. CONST. art. XVII; PA. CONST. Art. IX, § XXI (1838).

[106] Saul Cornell, *The Right to Carry Firearms Outside of the Home*, 39 FORDHAM URB. L.J. 1695, 1720 (2012).

[107] 1835 Mass. Acts 750.

From this text, proponents of the Massachusetts Model conclude that surety law "forbade arming oneself except in unusual situations."[108] And as authority, they cite one jurist, Peter Oxenbridge Thacher, who said in a charge to a grand jury that "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."[109]

But this conclusion results from a distorted picture of what the text actually says. The Massachusetts surety statute only states that those who go armed may, in some circumstances, be required to find sureties to keep the peace. The Massachusetts Model left Massachusetts (and the other states that adopted it) with no coercive criminal statute actually forbidding individuals from going armed. So this hardly constitutes a *ban* on public carry. And while Ruben and Cornell state that sureties were "a common enforcement tool in early America,"[110] this is wrong. These sureties were a means to *prevent* crimes, not to enforce violations of the criminal law.[111] In this case, the distinction matters.

The lack of a true ban on public carry is more evident when one examines the standing requirement. To file a complaint, a person must have "reasonable cause to fear an injury" or "breach of the peace." The standing requirement negated the ability to file a complaint based on the carrying of weapons for lawful purposes. And the standing requirement is consistent with Blackstone's explanation that a surety serves as a "caution . . . intended merely for prevention, without any crime actually committed by the party, but arising only from probable suspicion that some crime is intended or likely to happen."[112]

Although the surety law remained on the books for decades, there is little in the way of evidence that Massachusetts viewed this law as a near-complete ban on public carry. To the contrary, the legislature enacted new criminal statutes when it wanted to restrict public carry. Beginning in 1850, Massachusetts made it a crime for a person to be "armed with any dangerous weapon, of the kind usually called slung shot" when committing or being arrested for committing a crime.[113] This statutory crime soon expanded to cover other dangerous weapons,[114] and it became the principal way in which Massachusetts punished some people for carrying concealed weapons.[115] Massachusetts slightly restricted public carry further in 1893, when it prohibited armed bodies of men from drilling and parading with firearms.[116] The passage of these laws is hardly consistent with an understanding that, since 1835, individuals had not been permitted to carry firearms in Massachusetts, except when they were in danger.

There is circumstantial evidence that the Massachusetts Supreme Judicial Court did not view the statute as a complete ban on public carry, either. In 1896, the court resolved an appeal from a person who deliberately violated the prohibition against parading with firearms to test whether the law was

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[108] Cornell, *The Right*, *supra* note 109, at 1720.

[109] Saul Cornell, *The Right to Carry Firearms Outside of the Home*, 39 FORDHAM URB. L.J. 1695, 1720 (2012). [hereinafter *The Right*]; Charles, *supra* note 12, at 39-40.

[110] Ruben & Cornell, *supra* note 10, at 131.

[111] 4 WILLIAM BLACKSTONE, COMMENTARIES *252 (explaining that a surety to keep the peace serves as a "caution . . . intended merely for prevention, without any crime actually committed by the party, but arising only from probable suspicion that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension").

[112] *Id.*

[113] 1850 Mass. Stat. ch. 194, § 1.

[114] 1860 Mass. ch. 164, § 10.

[115] *See About Concealed Weapons*, BOSTON DAILY GLOBE, June 9, 1898, at 4 (explaining that, in Suffolk County (which includes Boston), "it is customary to prosecute" individuals found with concealed weapons when arrested for "disturbance of the peace or of any offense more serious than drunkenness").

[116] 1893 Mass. Stat. c. 367, § 124.

constitutional.[117] Citing the federal Supreme Court's decision in *Presser v. Illinois*,[118] the Massachusetts court held that "[t]he right to keep and bear arms for the common defense does not include the right to associate together as a military organization." The court, moreover, noted that "[t]he protection of a similar constitutional provision has often been sought by persons charged with carrying concealed weapons, and it has been almost universally held that the legislature may regulate and limit the mode of carrying arms."[119] For support, the decision went on to cite seven Southern cases and an early Indiana case—the same cases that Massachusetts Model proponents claim had no influence outside the South. And the court used the phrase "regulate and limit"; the court never said that the legislature could enact a general *ban* on carrying firearms. Finally, note that the court omits any mention of the 1835 surety statute. That is a curious omission. If the state had generally prohibited public carry in 1835 (and if that were thought constitutional), then it would have followed a fortiori that the state could ban public carry in a parade. Yet, in a case involving public carry, the Supreme Judicial Court did not cite Massachusetts' alleged 60-year history of banning the practice.

Nor did the common folk in Massachusetts recognize that the legislature supposedly banned public carry in 1835. Percy A. Bridgham, a member of the Suffolk County bar, answered readers' legal questions in the *Boston Globe*.[120] In 1889, someone asked the *Boston Globe* whether it was unlawful to carry concealed weapons. Bridgham responded with the law prohibiting carrying weapons while being arrested, writing, "The above does not prohibit any one from carrying weapons with which to defend themselves."[121] In a book Bridgham published in 1890 with a collection of legal questions, he noted that "[t]here is no statute in this State which expressly forbids the carrying of weapons, but there is a statute that provides that a person so carrying may be required to give bonds to keep the peace."[122] The *Boston Globe* made a similar statement in 1898.[123] In 1895, the *Boston Daily Advertiser* reported that "there is still a widespread belief that to carry concealed weapons in this city is of itself a misdemeanor punishable under the law." It then explained this assumption was wrong: "Massachusetts has no specific law against carrying concealed weapons. . . . The ordinary citizen who has not otherwise offended against the law is able to arm himself without fear of police interference, so long as he does not attempt to violate the law against the procession of armed organizations."[124] So we have some evidence that ordinary citizens who read the surety law did not understand it to be a near-complete ban on public carry.[125]

The Massachusetts Model's proponents, moreover, do not cite any evidence that the surety laws were actually enforced against individuals who carried firearms for lawful purposes. The

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[117] Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896). Test case, see Indianapolis Journal, Apr. 5, 1896; New Haven Morning Journal & Courier, May 27, 1896, at 4.

[118] 116 U.S. 252 (1886).

[119] *Murphy*, 44 N.E. at 172.

[120] Percy A. Bridgham, Legal Questions Answered by the People's Lawyer of the Boston Daily Globe (1891).

[121] Boston Daily Globe, Jan. 18, 1889, p. 4.

[122] Bridgham, note 56, at 129; *see also id.* at 170 ("There is no penalty in this State for carrying concealed weapons, except in cases where they are found on a person who is attempting to commit another crime.").

[123] Boston Daily Globe, June 9, 1898, at 4 ("No law forbids a man carrying a revolver, but it's different if he should happen to be arrested.") (capitalization of headline altered).

[124] Boston Daily Advertister, July 13, 1895, at 4.

[125] A news article in Michigan offers a similar account of its analogue of the Massachusetts law. The paper explained that "in this State there is no statute whatever against the carrying of concealed weapons." *Concealed Weapons*, DETROIT FREE PRESS, Feb. 26, 1873, at 2. The newspaper also expressed its belief that "[s]o far as it assumes to interfere with the rights of citizens to bear arms openly, it is in direct conflict with the Constitution of the United States and of the State; and as it makes no distinction between the open and secret carrying of weapons, there can be little question of its utter invalidity for any purpose whatever." *Id.*

proponents offer Judge Thacher's grand jury charge,[126] but that "charge" was nothing more than a welcome address to members of the grand jury.[127] The charge had no bearing on any specific case, and more importantly, it did not purport to analyze the constitutional validity of the law. Nor do nineteenth-century justice of the peace manuals help their cause.[128] These manuals simply restated the statutory surety provision. They contain no record of enforcement, and they contain no analysis of the constitutional question.[129]

For actual enforcement, the best evidence Massachusetts Model proponents have delivered is *Bullock*'s case, a case that involved the justice of the peace's *refusal* to require a surety.[130] But even setting aside the judgment line, Bullock's case does not support that the surety statute restricted public carry for lawful purposes. The case involved a complaint that the defendant "did threaten to beat, wound, maim, and kill" the complainant—conduct well beyond a person carrying a weapon for lawful self-defense.[131] Massachusetts Model proponents do not offer a single example of the surety laws being used to restrain peaceful public carry. And they provide no recorded decisions analyzing the constitutional validity of using surety laws in such circumstances.

Next, Massachusetts Model proponents try to explain why this lack of evidence is not a problem. They contend that because these cases were resolved at the justice of the peace level, we should not expect "Westlaw-searchable case law."[132] This is highly problematic. Lack of evidence is not evidence on their behalf. They are the ones arguing that the Massachusetts Model created a constitutional precedent. They bear the burden to show a real tradition or practice, not an isolated set of nine statutes in desuetude.

If anything, the lack of evidence cuts strongly against their position. In the South and West, we have a developed case law on the right to bear arms because defendants convicted of illegally carrying weapons repeatedly challenged the constitutional validity of their convictions.[133] For the Massachusetts Model, however, we have no Westlaw-searchable opinions because we have no appeals to courts of record. Now it is true that, because of the small stakes, defendants in justice of the peace court have low incentives to appeal.[134] But seven other states plus the District of Columbia adopted these laws. If surety laws were being enforced as broad bans on public carry, one would expect to see at least one appeal somewhere.

Until someone does archival research on this issue, we will have to settle for indirect means to determine the scope of enforcement. One method is to search nineteenth-century local news articles for arrests and proceedings before justices of the peace. Searching through several databases of local

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[126] Charles, *supra* note 12, at 41; Ruben & Cornell, *supra* note 10, at 131-32.

[127] *Judge Thacher's Charges,* CHRISTIAN REG. & BOS. OBSERVER, June 10, 1837, at 91.

[128] *Cf.* Ruben & Cornell, *supra* note 10, at 129–31; Charles, *supra* note 12, at 35 & n.185, 36 & n.194 (all looking to justice of the peace manuals as evidence that American common law prohibited going armed to the terror of the people).

[129] *See*, *e.g.*, JOHN C. B. DAVIS, THE MASSACHUSETTS JUSTICE: A TREATISE UPON THE POWERS AND DUTIES OF THE JUSTICES OF THE PEACE 202 (1847); BYRON D. VERRILL, MAINE CIVIL OFFICER 348 (5th ed. 1885).

[130] Ruben & Cornell, *supra* note 10, at 130 at n.53.

[131] Record, Grovner v. Bullock (Worcester Cty. Aug. 13, 1853) (No. 185) (on file with author).

[132] Ruben & Cornell, *supra* note 10, at 130, n.53.

[133] *See, e.g.*, Fife v. State, 31 Ark. 455 (1876); *In re* Brickley, 70 P. 609 (Idaho 1902); Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840); Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871); English v. State, 35 Tex. 473 (1872).

[134] On the lack of appeals for weapons regulations involving minor penalties, *see, e.g.*, *Concealed Weapons*, THE SUN, Feb. 4, 1894, at 8 (explaining that the prohibition against carrying concealed weapons in New York City was "a city ordinance" and stating that there was "doubt whether it would stand if an appeal were taken to the higher courts").

nineteenth-century news, I have found only one incident in Massachusetts of someone prosecuted for peacefully carrying weapons for self-defense.

On April 5, 1851, Boston police arrested two men, Isaac and Charles Snowden, who were armed with concealed weapons.[135] Both were charged with the common-law offense of going armed to the terror of the people. The Justice of the Peace ordered Charles to find a surety to keep the peace, and I am not sure what otherwise came of his case.

But Isaac's case proceeded to judgment. Isaac was alleged to have carried a concealed loaded pistol and a butcher knife. In court, "[t]he watchmen testified that the only reason for their arrest was being seen walking up and down before the chained Court House" at 1:00 AM, and that "they neither spoke to, threatened, nor struck anyone" and that "there was nothing about them suspicious, but their presence in the street at that hour."[136] The defense testified that they carried the weapons for protection.[137] The Justice of the Peace convicted Isaac and fined him $1, taxed him $6 in costs, and required him to post a $500 bond to appeal.[138] A contemporaneous newspaper account was incredulous that "walking peacefully, up and down the street, with arms in your pocket, which you neither use nor threaten to use" could constitute going armed to the terror of the people; the newspaper believed the conviction resulted from the fact that the defendants were poor and African American.[139]

Isaac, nevertheless, found the means to appeal his conviction to the Municipal Court. On appeal, the Commonwealth abandoned the prosecution. Isaac had "behaved quietly & peacefully" during the time he was required to post bond, so the Commonwealth's attorney had no further interest in prosecuting the case.[140] This dropped prosecution is hardly a ringing endorsement that the Commonwealth's prosecution of peaceful carry was proper.

More broadly, we lack any evidence of a *consistent* practice of prosecuting peaceful carry. A single incident in 1851 fails to demonstrate that justices of the peace routinely proceeded under surety statutes for the peaceful carrying of firearms. Again, Massachusetts Model proponents offer no cases to support their thesis, and this case is all I have found in Massachusetts on their behalf. Bridgham, the lawyer who wrote for the Boston Globe, claimed in an 1891 article that an "inquiry at the office of the clerk for Municipal Court reveals the fact that there has not been a single complaint before the court for the past year under [the surety statute or the crime of being armed while arrested]."[141] And the Boston

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[135] *Carrying Concealed Weapons*, THE LIBERATOR, Apr. 11, 1851, at 59.

[136] *Id.*

[137] *Id.*

[138] *Id.* (fine of $1, but erroneously reporting that the bond was set at $600). For the correct amounts, see Record Book, Commonwealth v. Snowden, No. 1663, at 1117 (1857) (on file with author).

[139] The Liberator, Apr. 11, 1851, at 59 ("As the judge had discoursed long, and much to his own satisfaction, on the equal justice he was going to render, *irrespective of color*, he was warmly congratulated by the counsel on his success in this particular, having, on Friday, fixed the bail of Fletcher Webster, with a salary of $5000 a year, son of Daniel, and surrounded with wealthy friends, charged with striking and knocking a watchman down, at $200; and now fixing the bail of a colored man, allowed to have acted like a good and peaceful citizen, *at three times that amount*—$600.").

[140] Record, Commonwealth v. Snowden, No. 1663 (1857) (on file with author) ("And now said Snowden having behaved quietly & peaceably, & the object of the prosecution being satisfied by the preservation of the peace, I will no further prosecute said Snowden on this appeal & complaint."); *see also id.* Police Court Record Book at 1117 (on file with author) ("And now said Snowden having behaved quietly and peaceably and the object of the prosecution being satisfied by the preservation of the peace[,] the Attorney of the Commonwealth says he will no further prosecute said Snowden on this appeal and complaint.").

[141] P.A. Bridgham, *Dangerous Weapons*, BOS. DAILY GLOBE, Sept. 27, 1891, at 20.

Police reported only a handful of arrests each year for the crime of "carrying concealed weapons."[142] It is unclear what statute the "carrying of concealed weapons" fell under; but given that the report was tracking criminal arrests, it was probably for the crime of being armed while arrested rather than a complaint for a surety. Thus, the "Massachusetts Model" did not serve as a model for restricting public carry in Massachusetts.

It is also unlikely that the Massachusetts Model served as a model anywhere else. In my search of newspaper archives, I have found two other possible cases of sureties required for peaceful carry. Both were in the District of Columbia, both appear isolated, and both (like the Snowden case) involved African American defendants. In one case, two men were arrested at a Washington fair "for having loaded pistols." The newspaper reported that "[t]he weapons were confiscated, and this morning the men were ordered to give security to keep the peace and pay costs."[143] In the other case, Lucas Dabney openly carried a loaded revolver for self-defense. It is not clear under what statute he was arrested, and Dabney was correct that District law only prohibited the carrying of concealed weapons.[144] But the judge told him to leave his weapons at home and took a "personal bond."[145]

In nine "Massachusetts Model" jurisdictions, these three cases are all I have found involving sureties or bonds for the peaceful carrying of firearms. I recognize, of course, that my results are limited to the sources that are contained within the databases I used. Perhaps future research using these or other sources will uncover significantly more cases (though I doubt it for the reasons given in the next section). Massachusetts-style surety laws were nothing more than an initial inchoate attempt to regulate public carry, and had little relevance to those who carried weapons for lawful purposes.

Thus, the Massachusetts Model is not an example of liquidating the meaning of the right to bear arms in favor of broad bans on public carry. None of the materials cited by the model's proponents show any considered debate about whether these laws were consistent with the right to bear arms. Worse still, the passage of these laws did not result in a regular practice limiting public carry. These surety laws fell into desuetude and may have been stillborn. Constitutional liquidation requires more than finding a handful of old statutes in the law books.

B. Settlement

The sina qua non of constitutional liquidation is that some settlement of the constitutional interpretive issue takes hold. Under the Madisonian framework, "settlement" exists when the dissenting voices have acquiesced to the interpretation and the result has public sanction.[146] On the surface, it looks like we can dispose of the settlement question quickly. If the surety laws produced no regular course of practice, then no settlement could have occurred, for there was no practice to which the dissenters could acquiesce and the public could sanction. Q.E.D.

But the settlement issue is actually much worse for the proponents of the Massachusetts Model. Remember that Massachusetts Model proponents consider surety laws to be a nineteenth-century descendent of the common law offense of going armed to the terror of the people. And they view the common law offense as essentially a ban on public carry because going armed would inherently terrorize the people. Citing old statutes and treatises, they claim that American jurisdictions widely recognized the offense, and thus, they never liberally allowed public carry, even for self-defense.[147]

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[142] *See, e.g.*, CITY OF BOSTON, ANNUAL REPORT OF THE CHIEF OF POLICE 9 (1868) (of 19,120 reported crimes, two for carrying concealed weapons); CITY OF BOSTON, ANNUAL REPORT OF THE CHIEF OF POLICE FOR 1875, at 20, 21 (of 30,445 reported crimes, 10 for carrying concealed weapons); BOARD OF POLICE COMMISSIONERS, SIXTH ANNUAL REPORT, May 1, 1884, at 6, 7 (of 31,200 arrests made by the Boston police, four for carrying concealed weapons).

[143] THE EVENING STAR, Nov. 26, 1859, at 3.

[144] *See supra* note 95.

[145] THE EVENING STAR, Feb. 5, 1887, at 5

[146] Baude, *supra* note 13, at 18–20.

[147] *See supra* note 12.

As with the surety laws, there is little evidence that the common law offense was enforced in this country. Before 1900, there are few reported decisions. In 1833, the Tennessee Supreme Court explained that if the mere carriage of weapons constituted an affray, it would violate the right to bear arms.[148] A decade later the North Carolina Supreme Court held in *State v. Huntly* that the "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. It is the wicked purpose—and the mischievous result—which essentially constitute the crime."[149] Common nineteenth-century cases and treatises often cite *Huntly* as the sole American judicial authority on the common law crime.[150] No recorded American decision has held that a person committed going armed to the terror of the people by carrying firearms for lawful self-defense.

Why is it so difficult to find American cases? One explanation might be that, like the surety cases, many were handled at the justice of the peace level. But another, more plausible explanation is that the common law offense never took root in this country.

Although it is difficult to search justice of the peace records, we can search nineteenth-century newspaper databases for evidence that individuals were arrested for going armed to the terror of the people.[151] Searches of the Library of Congress newspaper database from 1800–1900 of "'armed to the terror of the people'" or "armed offensively" produce 68 and 37 results, respectively. Of these, only two are clearly reports of arrest.[152] A search of *Newspapers.com* of "armed to the terror of the people" during the same time period produces 28 results, and a handful of arrests. A search of that database for "armed offensively" produces 23 matches and two arrests. To be sure, these searches are limited by the newspapers in those databases. Undoubtedly, they are not capturing every arrest happening in the country. And several nineteenth-century newspaper articles recognize the legal power of various law enforcement officers to arrest those who go armed to the terror of the people.[153] But despite the recitation of these laws, there is little indication that such arrests are actually being made, let alone when people are carrying weapons for lawful purposes including self-defense.

Contrast these results with searches of the same databases for the phrase "carrying concealed weapons." In a search of newspapers between 1800 and 1900, the Library of Congress database returns 24,531 results, including reports of more arrests than I can count. The newspaper.com database returns 104,474 matches for the phrase.

What explains this stark contrast? The rise of statutory criminal law. In the nineteenth century, states are gradually shifting from having primarily common law crimes to having primarily written

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[148] Simpson v. State, 13 Tenn. 356 (1833); *cf.* State v. Bentley, 74 Tenn. 205 (1880) (prosecution for statutory offense prohibiting going armed to the terror of the people required that someone be terrified).

[149] *Id. Accord* State v. Roten, 86 N.C. 701, 704 (1882) (holding that the legislature has not prohibited carrying weapons openly, and the common law offense only applied to an "abuse[]" of "so wearing arms").

[150] *E.g.*, FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 528 & n.j (1846); 2 BISHOP, *supra* note 84 § 120, at 73 & n.5.

[151] All searches that follow were performed on August 6, 2020.

[152] *Letter from Ashland City*, Clarkesville Weekly Chronicle, June 21, 1873, https://chroniclingamerica.loc.gov/lccn/sn88061082/1873-06-21/ed-1/seq-1/#words=armed+people+terror; *Police Affairs*, Delaware Republican, April 2, 1866, https://chroniclingamerica.loc.gov/lccn/sn87062253/1866-04-02/ed-1/seq-2/#words=armed+people+terror. A few other articles—no more than a handful—also ambiguously describe events and might be further examples of arrests for going armed to the terror of the people. *E.g.*, *General Local News*, Shenandoah Herald, Nov. 20, 1896, https://chroniclingamerica.loc.gov/lccn/sn85026941/1896-11-20/ed-1/seq-3/.

[153] *E.g.*, *Acts and Joint Resolutions Passed by the Legislature of South Carolina*, Newberry Herald, Apr. 20, 1870, https://chroniclingamerica.loc.gov/lccn/sn84026909/1870-04-20/ed-1/seq-1; *Editorial Inklings*, Yorkville Enquirer, Apr. 28, 1870, https://chroniclingamerica.loc.gov/lccn/sn84026925/1870-04-28/ed-1/seq-2

criminal codes.[154] As they do, states crack down against weapon carrying primarily by statutorily prohibiting the carrying of concealed weapons. They are not using the common law offense of going armed to the terror of the people.[155] And they are not relying on surety laws, which lack a criminal penalty and do not actually ban public gun carry.

This is precisely what plays out in the Massachusetts Model states. Maine, Michigan, Minnesota, Oregon, Pennsylvania, Virginia, Wisconsin, and the City of Washington all had laws premised on the Massachusetts Model.[156] In addition, Delaware passed a law in 1852 allowing justices of the peace to authorize arrests for going armed to the terror of the people.[157] Yet, these laws were all supplemented (and supplanted) with statutory crimes. Proceeding chronologically, Virginia restricted the carrying of concealed weapons in 1838,[158] Pennsylvania in 1850,[159] the City of Washington in 1858,[160] Wisconsin in 1872,[161] Delaware in 1881,[162] Oregon in 1885,[163] Michigan in 1887,[164] Maine in 1917,[165] and Minnesota in 1917.[166] These laws only prohibited or restricted the carrying of concealed weapons. None of them prohibited carrying firearms openly for self-defense or other lawful purposes.

And even in states like Minnesota, which passed concealed weapons restrictions fairly late, surety laws seemingly played no role in regulating the peaceful carrying of firearms. With no state criminal law governing public carry in the nineteenth century, Minnesota cities and towns filled the void through local criminal ordinances. St. Paul, for example, passed an ordinance in 1882 prohibiting

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[154] *See generally* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 Va. L. Rev. 965, 980–91 (2019).

[155] As with any generality, one can find rare counterexamples. *See, e.g.*, State v. Bentley, 74 Tenn. 205, 206 (1880) (prosecution under a Tennessee statute prohibiting "publicly rid[ing] armed to the terror of the people" and "privately carry[ing] . . . any dangerous weapon, to the fear or terror of any person").

[156] D.C. Code § 16 (1857); Ruben & Cornell, *supra* note 10, at 132 & n. 61 (collecting other statutes).

[157] 19 Del. Laws 733 (1852); *see* Cornell, *The Right*, *supra* note 109, at 1719.

[158] 1838 Gen. Assembly, Ch. 101, Feb. 2, 1838.

[159] Act of May 13, 1850. The prohibition went statewide in 1875. Act of Mar. 18, 1875, § 1, Pub. L. 88. The 1850 Act was enforced. *See Matters in the Courts*, Phila. Inquirer, Dec. 10, 1872, at 7 (compiling arrest statistics for carrying concealed weapons in Philadelphia in 1871 and 1872). Conversely, people were acquitted and discharged when they carried weapons openly. *See* THE EVENING JOURNAL, Dec. 15, 1899, at 2 ("His deadly weapon was not concealed and the law does not prohibit lunatics from carrying unconcealed weapons.").

[160] Act of Nov. 18, 1868. The City first passed a law banning all public carry in 1857, but modified it only to apply to concealed weapons in 1858. The modification occurred because of concerns that the 1857 ordinance was overbroad and would not stand up in court. The District did not resume a general ban on public carry until 1942.

[161] WIS. LAWS of 1872, ch. 7, § 1.

[162] An Act Providing for the Punishment of Persons Carrying Concealed Deadly Weapons, Apr. 8, 1881, 16 LAWS OF DELAWARE ch. 548, at 987.

[163] An Act to Prevent Persons from Carrying Concealed Weapons, Feb. 18, 1885, Ore. 13th Legis. Assembly (General Law), Feb. 18, 1885 In 1880, at 33. In 1880, Portland was given the authority "[t]o regulate and prohibit the carrying of deadly weapons in a concealed manner." Ore. 11th Legis. Assembly (Special Laws) 96, 100, § 38, ¶ 22; Ore. 12th Legis. Assembly (Special Laws) 149, 152, at § 37, ¶ 20.

[164] Act 29, Sept. 28, 1887.

[165] An Act to Prohibit the Carrying of Dangerous or Deadly Weapons without a License, ch. 217, Apr. 6, 1917, 1917 Me. Laws 216 (prohibiting either the threatening display or the concealed carrying of weapons without a license).

[166] An Act Relating to the Manufacture, Sale, and Possession of Dangerous Weapons, ch. 243, Apr. 14, 1917, Session Laws at 354 (prohibiting carrying a weapon with unlawful intent, and made it "presumptive evidence" of unlawful intent that the weapon was carried concealed).

concealed weapons modeled on the "antebellum Southern" approach.[167] Weapon carriers were prosecuted under these local ordinances.[168]

So not only did the Massachusetts Model not result in a settlement of the constitutional question, the other states adopting Massachusetts's surety law uniformly shift to the antebellum South's approach.[169] The truth is that the antebellum South's approach to public carry was not permissive at all. As Ruben and Cornell recognize,[170] the antebellum South was mired in violence. Laws against the carrying of concealed weapons were designed to control this violence.[171] By prohibiting only the carrying of weapons in a concealed manner, these legislatures tried to fashion a solution that would "prevent the carrying of dangerous weapons—to stamp out a practice that has been and is fruitful of bloodshed, misery, and death—and yet so to prohibit the carrying as not to infringe the constitutional right to keep and bear arms."[172] For legislators who wanted to prohibit all public carry, leaving individuals free to carry arms openly was not a perfect solution. But it was a solution that recognized some constitutional limits imposed by the right to bear arms. And it was a solution that the country ultimately accepted, from Maine to California, from the St. Paul City Council to Congress. By the end of the nineteenth century, the surety laws were effectively dead as a means of regulating public carry, with serious doubts about whether they ever had life.

Conclusion

In Second Amendment litigation, the use of nineteenth-century legislative precedent has become the Wild West. Scholars on both sides sling their best examples, without any theorizing about how legislative precedent fits with constitutional interpretation. Judges, too, have fallen into this trap. A search of Westlaw for the text of the surety statutes produces seven recorded decisions, only five of which discuss gun carrying.[173] All five involve challenges, during the past ten years, to public gun carry in which judges have sought to rely on the surety laws as precedent.[174]

When it comes to applying history, judges and scholars have two obligations. The first is to get the history right. Some judges, for example, have overread the surety statutes, contending based on them that "most states outside of the South in the mid-nineteenth century prohibited in most instances the carrying of firearms in public, whether concealed or openly."[175] As I have shown above, this view of the surety statutes is mistaken. False premises result in unsound arguments.

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[167] Ord. No. 265 (Jan. 17, 1882, § 1) ("It shall be unlawful for any person, within the limits of the City of St. Paul, to carry or wear under his clothes, or concealed about his person, any pistol or pistols, dirk, dagger . . . or any other dangerous or deadly weapon.").

[168] STAR TRIBUNE, May 12, 1898, at 10; STAR TRIBUNE, May 6, 1891, at 2.

[169] Ruben & Cornell, *supra* note 10, at 124.

[170] *Id.* at 125–26.

[171] CRAMER, *supra* note 11.

[172] State v. Bias, 37 La. Ann. 259, 260 (1885).

[173] Two decisions from Pennsylvania cite the text, but do not discuss it. Both cases involved a different part of the law, which allowed those who were threatened with interpersonal violence to seek sureties. Commonwealth v. Cushard, 132 A.2d 366, 367 (Pa. Super. 1957) (complaint resulting from a threat of "bodily harm"); Commonwealth v. Miller, 305 A.2d 346 (Pa. 1973) (complaint resulting from a husband who threatened in his wife with a gun in their own home; the question was whether the defendant was entitled to a trial by jury in a surety case).

[174] Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018); Norman v. State, 215 So.3d 18 (Fla. 2017); Grace v. District of Columbia, 187 F. Supp. 3d 124 (D.D.C. 2016); Wrenn v. District of Columbia, 107 F. Supp. 3d 1 (D.D.C. 2015); State v. Christian, 274 P.3d 262 (Ore. 2012).

[175] Norman v. State, 215 So. 3d 18, 30 n. 12 (Fla. 2017).

The second is to place the history in its proper *legal* context. The proponents of the Massachusetts Model are correct that the surety statutes existed in the nineteenth century. But this tells us nothing about what legal effect their existence should have on interpreting the right to bear arms. That is a question of constitutional law.

In this chapter, I have tried to apply a more robust framework for examining nineteenth-century practice. I have argued that the critical interpretive question is whether some form of liquidation has occurred. Madisonian constitutional liquidation using legislative precedent requires that legislation be the result of serious deliberation, that results in a regular practice, which has met the approval of the public and those holding dissenting views. The Massachusetts-model surety laws fail all three parts of this test, and judges should not be relying on them when they determine the scope of the right to carry arms.