New York State Rifle and Pistol Association v. Bruen: Originalism and the Relevance of Common Law Restrictions on Exercise of a Right

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A twenty-first century student of the Constitution might be inclined to think there were no worlds left to explore. First Amendment freedom of expression had become settled law; there was little room for debate over obscenity, defamation, fighting words, and commercial speech. The free exercise clause had become a debate over wedding cakes. Advances in surveillance technology had generated a Fourth Amendment dispute over infrared imaging[1] but that, too, had been resolved. The disputes of the Warren Court, and the Burger and Rehnquist Courts, had become matters of legal histories.

But one amendment of the Bill of Rights remained almost entirely unexplored – the Second Amendment and the right to arms.[2] In that arena there was but one Supreme Court decision, *United States v. Miller*,[3] but its holding was so unclear and its reasoning so murky that as to make it useless;[4] indeed the Circuits had quickly discarded it and gone their own way.[5]

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[1] Kyllo v. United States, 533 U.S. 27 (2001). The status of GPS monitoring remained to be determined. *See* United States v. Jones, 565 U.S. 400 (2012). *See also* United States v. Karo, 468 U.S. 705 (1984) (radio "beepers").

[2] The Third Amendment hardly counts, since it became obsolete once the U.S. began building barracks.

[3] 307 U.S. 174 (1939).

[4] *See generally* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & LIBERTY 48 (2008); David T. Hardy, *The Rise and Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 CLEVELAND ST. L. REV. 315, 345-54 (2011). The defects in the opinion can be attributed to (1) it was considered in haste; (2) defendant's attorney declined to file a brief or appear for oral argument; and (3) writing of the opinion was assigned to one of the laziest and most slipshod justices ever to sit on the Court. An approximation of its holding would be: the government may tax the sale of a firearm if the purchaser fails to show the firearm's use has some sort of (undefined) connection to military use.

[5] *See* Brannon P. Denning, *Can This Simple Cite Be Trusted? Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961 (1966).

There was also some perhaps-useful *dicta*, but in a case which no Court liked to think of, let alone cite.[6]

Then came *District of Columbia v. Heller*,[7] and the Second Amendment opened up as a field of exploration and debate. Two years later came *McDonald v. City of Chicago*,[8] the Court's first Fourteenth Amendment incorporation case in half a century,[9] and which saw the resurrection of the Black-Frankfurter dispute on due process vs. privileges and immunities incorporation.[10]

But *Heller* and *McDonald* settled little more than that the Second Amendment was an individual right and that some extreme restrictions on that right – a few cities' complete bans on handgun possession, by law-abiding citizens, in their homes – were impermissible. Both Courts simply ruled that the laws at issue were outliers that would fail any standard of review.[11] The next twelve years saw lower courts grappling with the applications of these principles, and in the process upholding nearly every lesser form of restriction on the right to arms.[12]

After the lower courts wandered in the desert those dozen years, the Supreme Court took and decided *New York State Rifle and Pistol Association v. Bruen*,[13] a watershed case by any standard.

First, *Bruen* marks the transition of Second Amendment interpretation from what we might term exploration, into settled law. The *Heller* and *McDonald* opinions relied heavily, almost exclusively, on expositions of historical data, for the simple reason that (as noted above) there was almost no useful case law to be had. *Bruen*, in contrast, relied heavily upon *Heller* and *McDonald,* and so did its dissent.[14]

Second, Bruen swept away the circuits' multi-part balancing tests. Under those tests, the Court pointed out, the Second Circuit in the past upheld even a law that New York later repealed after admitting that it had no relationship to public safety.[15]

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[6] *See* Dred Scott v. Sandford, 60 U.S. 393, 420 (1856) (If free Blacks were recognized as citizens, they would have the right to "keep and carry arms wherever they went.")

[7] 554 U.S. 570 (2008).

[8] 561 U.S. 742 (2010).

[9] *See* Benton v. Maryland, 395 U.S. 784 (1969).

[10] *See* 561 U.S. at 805-58 (Thomas, J., concurring). While acknowledging the debate, the majority chose to go with due process incorporation. 561 U.S. at 761-63.

[11] *Heller*, 554 U.S. at 628-29; *McDonald*, 561 U.S. at 790-91.

[12] *See generally* David T. Hardy, *Standards of Review, The Second Amendment, and Doctrinal Chaos*, 42 S. ILL. UNIV. L. J. 91 (2018).

[13] 597 U.S. ____, 142 S.Ct. 2111 (2022).

[14] This judicial development was preceded by a similar academic one. *See* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995) ("Indeed, there is sufficient consensus on many issues that one can properly speak of a "Standard Model" in Second Amendment theory, much as physicists and cosmologists speak of a "Standard Model" in terms of the creation and evolution of the Universe.")

[15] 142 S.Ct. at 2160.

Third, Bruen disposed of any contention that "longstanding" laws were somehow exempt from Second Amendment analysis. The *Heller* Court had stated in *dictum* that it did not mean to "cast doubt on longstanding prohibitions on the possession of firearms by felons" and other listed constraints, which were "presumptively lawful."[16] This led some courts to argue that any laws that could be described as "longstanding" were exempt from, or at least subject to weaker standards under, Second Amendment scrutiny.[17] But *Bruen* struck down the Sullivan Act of 1911, the most "longstanding" of all modern gun control.[18]

Fourth, *Bruen* established "text, history, and tradition" as the basis for interpreting the Second Amendment and its extent. The Court had previously employed this tool in cases arising under the First Amendment establishment clause, and Sixth Amendment confrontation and jury clauses,[19] but not a single circuit had applied it to the Second Amendment.

Fifth, *Bruen* for the first time set out a methodology for employing text, history and tradition. It specifically explained how to interpret and apply a constitution guarantee in light of claimed Anglo-American restrictions on its exercise, before and after the framing period(s).

This article will examine *Bruen's* background and the tests it laid out, and will then proceed to examine two historical considerations which neither the majority opinion nor the dissent explored. The majority opinion and the dissent spar over medieval and early modern English restrictions on the right to bear arms. What relevance have those, we might ask, and the answer would presumably be that they informed the framing generation's understanding of what the "right of the people" to " bear arms" involved. But that should lead us to ask two further question. First, did these early English measures even apply in the New World? Second, would Americans of 1791 have had any way to know of them? These restrictions could not have been accepted by the framing generation right as limits on their rights if they never applied in the Americas, or if Americans of 1791 would have had no way to know of them.

I

NYSRPA v. Bruen: The Court's Ruling

Before we turn to the ruling, we ought to note the rather unusual historical context of the statute under consideration.

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[16] 554 U.S. at 625, 626 n. 26.

[17] *See generally* Jake Charles, *Heller's Dicta?*, Duke Center for Firearms Law, Sept. 4, 2019. Online at https://firearmslaw.duke.edu/2019/09/hellers-dicta/. One might have thought that it would be obvious that 'longstanding" was simply a casually-inserted adjective, not a constitutional test. Most of the restrictions the term referred to dated only to 1968; *Heller* struck down a law that dated to 1972.

[18] The only surviving measures that antedate the Sullivan Law were restrictions upon concealed, but not on open, carrying.

[19] *See* Crawford v. Washington, 541 U.S. 36, 54 (2004) (Confrontation Clause subject only to "exceptions established at the time of the founding"); Giles v. Washington, 554 U.S. 353, 377 (2008) ("We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter.") *See generally* Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323 (1991).

A. The "Sullivan Law"

Bruen involved a challenge to the earliest of the modern gun controls: New York's Sullivan Law. Enacted in 1911, and amended in 1913,[20] it was the first state law to require a permit for almost all handgun carry by civilians. It took its name from its sponsor, the famous ward-heeler "Big Tim Sullivan,[21] but its history was a bit convoluted than that might suggest. Sullivan had started out with the intent to make concealed carry, already a misdemeanor, into a felony. New York City Medical Examiner George P. LeBrun was the drafter and main proponent of the remainder of the legislation.[22] He approached "Big Tim" with the idea for a broader bill, telling him that a ban on concealed carry would do nothing to prevent impulsive suicides and murders, and Sullivan told him to draft what he wanted and Sullivan would push it.[23]

Push it he did. While Sullivan enjoyed legislative work, he deeply disliked speaking on the floor. This time, LeBrun wrote a half-century later, Sullivan made "made the supreme sacrifice" and did speak – an event so rare that members of the other legislative house attended to witness the occasion – and his four-paragraph presentation was the longest of his entire career.[24]

Sullivan's motive, as expressed to LeBrun, puts the matter in historical, and somewhat amusing, context. Sullivan noted that the public did not much care if gangsters shot each other, but now and then a gangster missed and hit an innocent person. Then

> Everybody runs to me and they want me to have the cops do something, as if the police weren't busy with it anyway. But even when gangsters kill each other I still have problems. If the police make an arrest, the friends and relations come knocking on my door for me to get a lawyer or arrange bail. And they're hardly out the door when the relatives of the victim come to me for a contribution to pay for his burial.[25]

The original law provided for handgun carry permits, but gave no standards for their issuance.[26] A 1913 amendment added some vague standards, which remained unchanged over a century later, when "Big Tim's" law came before the Court: the applicant must be of "good

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[20] 1911 N.Y. Laws ch. 195, §1; 1913 N.Y. Laws ch. 608, §1.

[21] "Big Tim" is the subject of a perhaps overly-favorable biography. Richard F. Welch, *King of the Bowery: Big Tim Sullivan, Tammany Hall, and New York City from the Gilded Age to the Progressive Age* (2008). Sullivan was more complex than most politicians, a ward-heeler who was interested in many progressive reforms, and who strove to open Tammany Hall to newer immigrants from Italy.

[22] GEORGE P. LEBRUN, IT'S TIME TO TELL 105-07 (1962); Thomas Earl Mahl, A History of Individual and Group Action in Promoting National Gun Control Legislation During the Interwar Period (unpub. Master's thesis, Kent State Univ. 1972) at 15-17.

[23] *Id.* at 16; George P. Lebrun, note __ *supra* at 106.

[24] Thomas Earl Mahl, note __*supra*, at 17 – 18.

[25] Quoted by George P. LeBrun, note__ *supra*, at 110-11.

[26] 1911 N.Y. Laws ch. 195, §1.

moral character" and show "proper cause" to be issued the permit.[27] New York courts construed "proper cause" to require a showing of "a special need for self-protection distinguishable from that of the general community."[28] In practice, the standards were applied in wildly varying ways depending on the locality, the time period, and the clout of the applicant.[29]

Bruen challenged the "proper cause' component of the statute. It posed the question of whether a right determined in *Heller* to be individual, and in *McDonald* to be fundamental, could be restricted by a permit system that required an applicant to prove "proper cause," established by proof of an individualized danger beyond that experienced by the general public.

B. The *Bruen* Majority and Its Tests

The majority began by noting that the New York law at issue was something of an outlier, which it was, although the national picture is somewhat more complex than either the majority or the dissent recognized.[30]

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[27] 1913 N.Y. Laws ch. 608, §1.

[28] *In re Klenosky*, 75 App. Div.2d 793, 428 N.Y.S.2d 256, 257 (1980).

[29] In 1920, it was reported that a magistrate was signing permits in blank, which were then being sold for $2. *Says An Ex-Convict Got Pistol Permits*, NEW YORK TIMES, Nov. 10, 1920, at 8. A 1973 investigation found that it was customary to pay a $100 bribe to the police commissioner for a handgun permit. THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 188-89 (1973). More recently, it was noted that New York City pistol permits have been issued to Donald Trump, Don Imus, Sean Hannity, Howard Stern, Robert De Niro, and others with influence. *Lifestyles Of The Rich And Packin': High Profile Celebrities Seeking Gun Permits On the Rise,* NEW YORK DAILY NEWS, Sept. 27, 2010. Online at http://www.nydailynews.com/ny_local/2010/09/27/2010-09-27_celebrities_seeking_pistol_permits_on_the_rise_in_the_city_lifestyles_of_rich_n_.html.

The author is informed that in the New York City area, the issuance of permits is indeed very strictly handled, whereas in upstate New York, little more is required than that the applicant pass the background check and ask for a permit. The dissent seems to acknowledge this state of affairs, treating it as allowing local flexibility. 142 S.Ct. at 2171 (Breyer, J., dissenting).

[30] See 142 S. Ct. at 2123-24 (majority), 2172 (Breyer, J., dissenting). Both overlooked the fact that there are many variants of a pistol carrying permit. New York required a permit for any form of carry, but many states require it for concealed but not for open carry. In the author's state, Arizona, the regime was originally: open carry allowed, no concealed carry except for peace officers. Then it became; open carry allowed without a permit, "shall issue" on concealed carry permits. Presently, it is open or concealed carry allowed without a permit, but the state will issue permits anyway, so a resident can qualify for concealed carry in other states that have reciprocity with Arizona. Thus, Arizona has a permit system, but only for concealed carry, and does not require compliance with it.

1. *Demise of the Circuits' Two-Part Balancing Test*

The majority rejected the circuits' two-part test. Under this test, the court would first inquire whether the asserted right fell outside the right protected by the Second Amendment, much as a court might inquire, at the outset of a First Amendment case, whether the challenged communication fell outside freedom of expression because it involved obscenity, fighting words, defamation, or another exception.[31]

The circuits added a second step: to determine the standard of review, the court would assess whether the right asserted fell within the "core" of the Second Amendment.[32]

The definitions of this "core" varied. It was usually phrased as involving the possession of arms by law-abiding persons in their homes.[33] Some circuits phrased it more narrowly, as additionally involving a "substantial burden" on the "core right": under this nothing much short of a *complete prohibition* on possession in the home qualified for the higher level of scrutiny.[34] Under this, the "core right" would only be implicated if a jurisdiction were so stubborn as to enact or re-enact the very class of law that the Court had already stricken in *Heller* and *McDonald*.

Determining whether the "core right" was involved determined the applicable standard of review. Involvement of the "core right" would lead to application of a higher, and involvement of a non-core right to a lower, standard of review.

In most Circuits the higher standard of review was strict scrutiny, and the lower was intermediate review.[35] Since in practice the Circuits almost never found a core right to have been involved, the lower standard of review was the only relevant one.[36] Intermediate review was

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[31] *See, e.g.,* Jackson v. City & County of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014); United States v. Chovan, 735 F.3d 1127, 1137 (9th Cir. 2013); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); United States v. Chester, 628 F.3d 673, 681–82 (4th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

[32] *See* notes ___ - __, *infra.* (the next few notes)

[33] *See* United States v. Marzzarella, 614 F.3d 85, 94 (3d Cir. 2010) ("the defense of hearth and home…."); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 195 (5th Cir. 2012). ("defend his or her home and family").

[34] N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 56 (2d Cir. 2018).

[35] *See* Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 968 (9th Cir. 2014).

[36] When necessary, the circuits sometimes moved the goal posts. For example, the Fourth Circuit initially treated the core right broadly as self-defense: "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense," United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (emphasis removed), but a year later when the issue of carrying for that purpose became the issue, it narrowed the core right to "self-defense in the home by a law-abiding citizen…." United States v. Masciandro, 638 F.3d 458, 470 (4th Cir. 2011).

sometimes so loosely applied that it approached rational basis,[37] and in one case the court indeed declined to apply *any* heightened standard of review outside the core right.[38]

Why a two-level standard of review? The approach was taken from election law, largely involving ballot-access cases, where the issue was whether and how third-party organizations could get their candidates listed on the ballot.[39] These cases involve a most peculiar constitutional setting.[40] Two-level review enables courts to protect the more important aspects of the electoral process with strict scrutiny, without having to apply that to the less-abusable, and quite necessary, aspects of electoral regulation. How this came to be applied to arms rights is unclear, except in terms of giving a desired result: in practice, evaluating a fundamental right under a lax form of intermediate review.

The *Bruen* majority thus had little trouble rejecting the Circuits' two-part test.

> If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.[41]

But if balancing tests were swept off the table, what remained? The majority opted for a test employed for some other constitutional rights, such as confrontation and trial by jury, that is, the text, history, and tradition standard. It answered the dissent's objection that such a test required judges to become historians with the observation that the dissent's balancing standards would require judges to become criminologists.

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[37] *See* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 93-94 (2d Cir. 2012) (suggesting strict scrutiny would be inappropriate for the higher level of review. That would leave intermediate scrutiny as the higher standard, and rational basis as the lower).

[38] N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 56 (2d Cir. 2018). *Heller* itself had repudiated rational basis review. 554 U.S. at 635. Evading that required a very narrow reading of the *Heller* holding and reasoning, treating them as requiring elevated scrutiny only if a complete ban on possession in the home was involved.

[39] *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992); Timmons v. Twin Cities New Party, 520 U.S. 351, 358 (1997).

[40] The electoral process of course involves First Amendment protections, association and expression, ones that lie at the core of that amendment's purposes. But in order for those activities to be meaningful, the government must regulate the process in some detail. (It is hard to imagine any other First Amendment activity that can only be engaged in once every few years, on dates and at places chosen by the government, and which is confined to checking boxes on a form printed by the government).

[41] 142 S.Ct. at 2131.

> But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field. *Id.*, at 790–791 (plurality opinion).[42]

Since the "professional historians" have not covered themselves with glory when it comes to this field of law, this is probably just as well.[43]

2. *The Court's Test: What History Matters?*

As discussed above, the majority opted for a "text, history, and tradition" approach to determining the outer limits of the right to arms. More remarkably, the Court for the first time gave guidance on *just what history matters*. It began by considering whether the legislation at issue addressed a societal problem known or unknown to the framing generation.

a. Societal Problems Known to the Framing Generation

In some cases, the Court noted, the historical inquiry will be "fairly straightforward."[44] It lists out three situations, which we can set out in separate paragraphs:

> [W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.
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> Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.
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> And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.[45]

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[42] 142 S.Ct. at 2130.

[43] *See generally* David T. Hardy, *Lawyers, Historians, and "Law Office History,"* 46 CUMB. L. REV. 1 (2015). Indeed, after historian Michael Bellesiles published a book claiming that guns were rare in early America, *see* MICHAEL BELLESILES, ARMING AMERICA (2000), Clayton E. Cramer published one refuting his contention, *see* CLAYTON E. CRAMER, ARMED AMERICA (2006). The controversy ended with Columbia University cancelling Bellesiles' Bancroft Award and his publisher withdrawing his book. *See* Hardy, 46 CUMB. L. REV. at 7-10.

[44] 142 S.Ct. at 2131.

[45] *Id.* But note the risk of confuting constitutional and policy determination. The framing generations might have declined to adopt an approach because they thought it would not work, not because they thought it unconstitutional.

The Court used *Heller* to illuminate the process. There, the handgun prohibition "addressed a perceived societal problem—firearm violence in densely populated communities." (Note the breadth of the definition). The regulation at issue, a ban on possession in the home, was one "that the Founders themselves could have adopted to confront that problem."[46] That they nowhere did that was evidence that the ban was unconstitutional.

b. Societal Problems Unknown to the Framing Generation

The majority contrasted this with situations involving "unprecedented societal concerns or dramatic technological changes," and which may require "a more nuanced approach."[47] The meaning of the amendment remains the same, its application to changes unforeseeable to the framing generations (fully automatic firearms come to mind) require flexibility and reasoning by analogy.[48] As a beginning, a court should consider "how and why" the regulations burden the right to self-defense.[49] The Court emphasized that courts should not "engage in independent means-end scrutiny under the guise of an analogical inquiry";[50] the framing generations themselves struck the balance, and it should be applied to modern circumstances. To uphold a modern response to an unforeseeable need requires finding similar, but not identical, earlier analogs (and isolated outliers do not count).[51]

(The Court might have invoked a First Amendment comparison here, involving the early proliferation of broadcast radio. This marked a technological change far more dramatic than any change in hand-held weaponry. In the framing periods, a city might contain any number of printing presses without a problem. But two or three radio stations in a city broadcasting on AM 680 MHZ, or two television stations on channel 13, would render the frequencies unusable. In the end, the Court evolved a set of doctrines that permitted regulation of broadcasting to resolve unforeseeable problems while allowing minimal government regulation of content. It is safe to say that many of the regulations – licensing of outlets, restrictions on their number, barring of offensive but not obscene content – would not pass muster if applied to printing presses.)[52]

The majority offered a second example, chosen from *Heller*: that decision's mention of "sensitive places" where arms possession might be forbidden. *Bruen* listed them narrowly: legislatures, courthouses, and polling places, noting that these restrictions were both known in the 18th and 19th centuries, and that "we are aware of no disputes regarding the lawfulness of such prohibitions."[53] Thus, the majority continued, one could reason from that what "*new* and

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[46] *Id.*
[47] *Id.*
[48] *Id.* at 2132.
[49] *Id.* at 2133.
[50] *Id.* at 2133, n.7.
[51] *Id.* at 2133.
[52] *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 375-79 (1969). *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (licensing of newspaper vending machines).
[53] In referring to the lack of disputes over legality, the majority seems to echo James Madison's "liquidation" approach: a post-ratification understanding might affect interpretation to the extent it commanded something approach consensus, where even those who might have been expected

analogous sensitive places are constitutionally permissible."[54] The emphasis upon "new" served to stress that drawing analogies was limited to places of a type not known to the framing generations.

We now come to the most interesting part of *Bruen*, and to some of the deepest conflicts between the majority and the dissent.

II

What History Matters, and Why?

From there the majority turned to what is likely the most interesting aspect of *Bruen*, setting the parameters of its historical inquiry.

A. *Bruen*'s Treatment of English Common Law Restrictions on Arms-Bearing

Having ruled that history will determine the outcome, the majority asks -- which history? The Court begins with some broad principles. First, rights are "enshrined with the scope they were understood to have *when the people adopted them.*"[55] The question is thus what can be taken as evidence of the understanding of the framing generations, Americans of 1791 and of 1868?[56]

The question posed must be refined a bit. *What British restrictions on exercise of a right should be taken as setting the boundaries of the American right?*

This topic engendered a sharp clash between the *Bruen* majority and its dissent. Its relevance is apparent: when the framing generation ratified a "right to keep and bear arms," it did so with an understanding of what those words meant, and existing and accepted restrictions upon arms-bearing would presumably be reflected in that understanding. This is the same reasoning that supports the familiar First Amendment exceptions – e.g., obscenity, defamation, and fighting

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to object to extra-constitutionality instead acquiesced. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13-20 (2019).

[54] 142 S.Ct. at 2133 (Emphasis in original).

[55] *Id.* at 2136 (Emphasis in original).

[56] The majority treats the two framing generations' understandings of the right to arms as identical. It might be more exact to say that the 1868 generation had even more individualistic views of the Second Amendment than had the 1791 generation. *See* AKHIL AMAR, THE BILL OF RIGHTS 216-18, 257-66 (1998)

In 1791, preservation of the universal militia system was seen as important. By 1868, the universal militia was long dead and had been replaced by a volunteer militia. In the South the volunteer militia was being used to disarm Unionists and the freedmen. In the 39th Congress, the proposal was made to disband and disarm the Southern militias; Second Amendment objections led to the deletion of the disarmament portion, but the legislation was passed with regard to disbanding them. *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 135-38 (1994). By 1868, then, the Second Amendment was not merely about individual armament, it was *entirely about* individual armament and not the militia system.

words.[57] Whether and to what extent English law restricted arms-bearing is thus presumably relevant to the scope of the Second Amendment.

The dissent sees restrictions upon bearing of arms as well-established by the colonial period. It stresses the 1328 Statute of Northampton,[58] which forbade Englishmen riding or going "armed," seemingly anywhere: "in fairs, markets, nor in the presence of the Justices, nor in no part elsewhere."[59] It cites royal proclamations to establish that "for more than a century following its enactment, England's sheriffs were routinely reminded to strictly enforce the Statute of Northampton against those going armed without the King's permission."[60]

The dissent acknowledges *Sir John Knight's* Case, which in 1686 interpreted the Statute as forbidding only going armed with "dangerous and unusual weapons" to the terror of the public.[61] The Breyer dissent suggests this inserted an "extratextual intent element" into the statute, and that "the legal significance of Knight's acquittal is now impossible to reconstruct."[62] It closes with a reference to Tudor-period parliamentary enactments that restricted the ownership and use of firearms, and the conclusion that "[w]hatever right to bear arms we inherited from our English forebears, it was qualified by a robust tradition of public carriage regulations."[63]

The majority declined to consider English common law history that greatly antedates 1791, pointing out that the "Statute of Northampton was enacted nearly 20 years before the Black Death, more than 200 years before the birth of Shakespeare, more than 350 years before the Salem Witch Trials, more than 450 years before the ratification of the Constitution, and nearly 550 years before the adoption of the Fourteenth Amendment."[64] The majority likewise considered inapplicable the anti-arms measures adopted under the Tudors and James I; these had lapsed by the time most of the English colonies were established.[65]

Both majority and dissent assume that English restrictions on arms-bearing have some potential relevance to the ratifying generation's understanding of the Second Amendment.

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[57] *See* Roth v. United States, 354 U.S. 476, 482-83 (1957); McKee v. Cosby, 586 U.S. ___, 139 S.Ct. 675, 678-79 (2019) (Thomas, J., concurring in denial of certiorari).

[58] 2 Edw. II, ch. 3 (1328).

[59] *Id.* A serious question has arisen as to the Statute of Northampton's wording. In the 14th century, might the Law French translated as "armed" actually have meant "wearing armor" and not "carrying arms"? See Clayton Cramer, The Statute of Northampton (1328) and Prohibitions on the Carrying of Arms, SSRN (Sept. 15, 2015), online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662910; Richard E. Gardiner, The Meaning of "Going Armed" in the 1328 Statute of Northampton, SSRN, online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885061. It seems a strong argument. The Statute itself provides for forfeiture of the offender's armor, not his weapons.

[60] 142 S.Ct. at 2182-83 (Breyer, J., dissenting)

[61] 142 S.Ct. 2183-84 (Breyer, J., dissenting).

[62] *Id.* at 2183.

[63] *Id.* at 2184.

[64] 142 S.Ct. at 2139.

[65] 142 S.Ct. at 2140.

The conflict between the majority and the dissent is interesting both legally and historically. But there are two deeper questions involved.

Pre-framing English statutes are relevant, then, because they might have formed a background to what Americans in 1791 viewed as their right to arms, and what they thought the words "to keep and bear arms" meant.

But this raises two questions addressed neither by the *Bruen* majority nor by its dissent. First, would Americans of 1791 have seen the early English measures as applicable to the New World, as defining *their* right? Second, would Americans of that era even had the ability to know of the early English measures?

B. Did Medieval and Tudor-Era Restrictions on Bearing of Arms Apply in the American Colonies?

Courts have sometimes too lightly assumed that common-law restrictions and enactments applied to the American colonies, and thus that early Americans would have seen these measures as applicable to them and implicitly defining *their* rights. *Bruen* is a prominent example of this. Early Courts appreciated that the question was not that simple. As Justice Joseph Story acknowledged in an 1829 ruling:

> The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.[66]

It would be more accurate to say that Americans saw themselves as bound by the common law *when they wanted to be bound*, and not otherwise.

The very foundation of colonial governments posed novel questions. Some colonies (*e.g.*, Pennsylvania and Maryland) were proprietary, where the monarch simply gave the land to an individual and left him to deal with it as a realty owner. Some, *e.g.*, Massachusetts, were charter, where the monarch assigned governance to a group of persons. Some (*e.g.*, New York) were royal, where the monarch chose some of their political leadership, and the colonists elected the rest.[67] But in all these, the local decision-maker(s) had to face novel issues not arising in the home country, and so the royal instructions at most advised them that, to the extent they found it feasible, they should make their law track the common law. Most critically, the royal instructions recognized that the colonies would have to *make their own law*; the colonists were not automatically subject to the laws of England.

Thus, William Penn's charter for Pennsylvania gave him and his successors 'full and absolute power" to make "any laws whatsoever" with a proviso that the laws should

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[66] Van Ness v. Pacard, 27 U.S. 137, 144 (1829) (declining to follow English landlord-tenant law).

[67] To complicate matters, a colony might shift from one status to another. Virginia started out as a charter colony, but in 1624 became a royal one, under which the Crown appointed the governor and the qualified colonists elected the legislature. North Carolina started as a proprietary colony but became a royal one when, in 1729, the proprietors sold their interests to the Crown.

be "consonant to reason, and bee not repugnant or contrarie, but as neere as conveniently may bee agreeable to the Lawes, statutes and rights of this our Kingdome of England…."[68] So also the charter for Rhode Island Colony, which empowered its founders to make laws with the command that the laws "bee not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this our realme of England, considering the nature and constitutions of the place and people there…."[69] Likewise, in 1606 James I ordered that Virginia's governing body dispose of all legal questions "as neer to the common lawse of England, and the equity thereof as may be."[70] In other words: make your own law and your own judicial rulings, but try to parallel English law whenever you can.

These provisions reflected what historian Mary Sarah Bilder has termed the "Transatlantic Constitution."[71] Within that constitution, colonies would make laws to govern themselves, conforming to English common law where feasible and varying from it when not, so long as the variances were not "repugnant" to the common law. These standards were understood to cover both the judge-made common law and statutes declarative of or implementing common law.[72]

In the words of another historian,

> The men responsible for establishing the jurisdictions in the colonies must have believed they could create better systems of social control than the ones they had left behind. The fact that they had left England indicates that they must have been receptive to new options in establishing a system of criminal law. The documents that empowered them set no precise limits to their authority as legislators and judges. The laws they were to make were to be reasonably consistent with and not repugnant to English law. Three thousand miles of open ocean and a government at home with troubles of its own guaranteed that there would be no sustained, strict scrutiny of consistency or repugnancy.[73]

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[68] Charter to William Penn, March 4, 1681, §§ iv, v. Online at http://www.phmc.state.pa.us/portal/communities/documents/1681-1776/pennsylvania-charter.html

[69] Charter of Rhode Island Colony, July 15, 1663, online at: https://www.landofthebrave.info/charter-of-rhode-island-words-and-text.htm

[70] 1 WILLIAM WALTER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF THE ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE 68, 69 (1823). James added a little specificity: English property laws were to be observed, and six crimes "and noe other offences" would carry the death penalty. The offenses made capital were rebellion ("tumults, rebellion, conspiracies, mutiny and seditions"), murder, manslaughter, incest, rape and adultery. This in itself was a considerable departure from English law! Omitted, *inter alia*, were burglary, theft, robbery, forgery, counterfeiting, witchcraft, and arson.

[71] MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004).

[72] *Id.* at 104-05.

[73] BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660 4 (1983). Chapin cites an example: Virginia, peopled by royalists, after the English Civil War and Restoration, made it treason to doubt Charles II's restoration to the throne. The

Framing-era Americans appreciated this. Jefferson's first draft of the Declaration of Independence explained:

> Nor have we been wanting in attentions to our British brethren. we have warned them from time to time of attempts by their legislature to extend a jurisdiction over these our states. We have reminded them of the circumstances of our emigration & settlement here, no one of which could warrant so strange a pretension: that these were effected at the expence of our own blood & treasure, unassisted by the wealth or the strength of Great Britain: that in constituting indeed our several forms of government, we had adopted one common king, thereby laying a foundation for perpetual league & amity with them: but that submission to their parliament was no part of our constitution, nor ever in idea, if history may be credited….[74]

Thus, colonial legislatures and courts fashioned their own law, with an (ambiguous and largely unenforceable) duty to make it conform to the common law "as neare as may bee." When it came to arms, that was not particularly near. The colonists faced threats from rival French, Spanish, and Dutch colonists, brigands, wildlife, and hostile Indians. In 1622, a well-coordinated Indian attack killed a third of the Virginia colony's settlers in a single day. Historian Clayton Cramer has documented numerous colonial measures requiring that colonists possess and carry arms. Maryland in 1638 required every household to have ammunition and guns for every member able to bear arms; in 1648, officials in Portsmouth, Rhode Island investigated whether residents had ammunition; Maryland and New Jersey mandated that every immigrant to their colonies have a firearm, ten pounds of gunpowder, and forty pounds of bullets.[75]

Among the earliest enactments of Virginia's colonial legislature were the 1632 commands that "Noe man shall goe to worke in the grounds without theire armes, and a centinell uppon them" and "All men that are fittinge to beare armes, shall bringe their peices to the church."[76] Similar laws were enacted by other colonies, requiring arms to be brought to church or carried while on travel.[77] In these respects, colonial legislatures chose to go directly *contra* to English measures such as the Statute of Northampton and the decrees of Henry VIII. Instead of *forbidding* possession and carrying of arms, colonial legislatures *mandated* it.

In short, even if Americans of 1791 had known of the restrictions being discussed here, they would have considered them among the part of common law that was inapplicable to their

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Puritan colonies did not, and only made treason to the colony an offense. *Id.* at 14-15.

Some historians contend that this is an understatement of how colonists made their own law, quite independent of English law. *See* JOHN H. LANGBEIN, RENEE LETTOW LERNER, & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 875-82 (2009).

[74] 1 PAPERS OF THOMAS JEFFERSON 423 (Julian Boyd, ed. 1950), online at https://jeffersonpapers.princeton.edu/selected-documents/jefferson's-"original-rough-draught"-declaration-independence.

[75] Clayton Cramer, note ___ *supra*, at 7-8.

[76] 1 HENING'S LAWS OF VIRGINIA, note __ *supra*, at 198 (1769).

[77] CLAYTON E. CRAMER, ARMED AMERICA 9-10 (2006).

conditions and thus did not set limits on their rights. Early American constitutional commentators took this view, arguing that American's arms rights were far more expansive than those of the English. St. George Tucker pointed out the Second Amendment lacked the limitations put upon the English right in the 1688 Declaration of Rights, and heaped scorn upon Parliament for the arms restrictions of the Hunting Acts.[78] William Rawle's 1803 *A View of the Constitution* did the same.[79] (Both books, by the way, illustrate the inability of framing era Americans, *even their most respected legal scholars*, to inform themselves about older English law. The provisions of the English Hunting Acts which restricted gun ownership had in fact been removed by Parliament in 1692, a century before Tucker and Rawle wrote!)[80]

C. Did Framing-Era Americans Even *Know* of Early English Restrictions on Arms?

It is natural to assume that, if we in the 21st century can familiarize ourselves with, say, 14th or 16th century legal authorities, then the framing generation could so as well. After all, it was history to them as it is to us, and they were centuries years closer to the events. But this assumption involves a serious anachronism. In fact, "Scholars know more today about English law than the colonists did, and it would be a genuine mistake for the scholar to impose his or her knowledge upon the minds of colonial lawmakers."[81]

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[78] 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE 300 (1803) ("In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game.").

[79] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION 126 (2nd ed., 1829) ("In England, a country which boasts so much of its freedom, the right was secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence, "suitable to their conditions, and as allowed by law." An arbitrary code for the preservation of game in that country has long disgraced them.").

[80] JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 126 (1994) ("In the Game Act of 1671 guns led the list of prohibited devices. In the act of 1692 guns were not listed at all.")

[81] PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA xiii (1998). There was, in short, no English equivalent of the United States Code, nor even of the Statutes at Large, *i.e.*, an official, organized, compilation of statutes in effect. Rather there were privately-printed compilations of early laws, with translations of varying quality from the original Law French or Latin. For a discussion of the chaotic status of English laws in the 18th century, *see* FIRST GENERAL REPORT FROM THE COMMISSIONERS APPOINTED BY HIS MAJESTY… RESPECTING THE PUBLIC RECORDS

What we today know of English medieval and Tudor-period law is mostly a product of *19th and early 20th century* English efforts to research and compile the original sources. Today we cite the Statute of Northampton from the Statutes of the Realm, the first volume of which was only printed in 1810, after a ten-year effort to retrieve and compile documents from many English archives.[82] We cite case law interpreting the Statute from the *English Reports*, but these began publication in 1900 and the volumes containing the two reports on *Sir John Knight's Case* were only published in 1908. We draw royal proclamations and edicts from the Calendar of the Close Rolls, the first volume of which was published in 1900.

What was available in the late 18th century (even in London) was reports of decisions utterly unlike any being published today. There were no official reporters or written opinions. Private persons (often writing anonymously) would sit in on an important court (*e.g.*, King's Bench) and write down summaries of rulings to publish for profit. Other private authors might then plagiarize these, or organize them by subject matter. The compilers of *English Reports* likely got *Sir John Knight's Case* from *Modern Reports*, 1725,[83] which got it from earlier reports.[84]

Even in England, old and unrepealed statutes were sometimes discovered, unearthed, and invoked. In 1818, a plaintiff sued under an ancient and never-repealed statute that allowed a prosecution for murder despite the defendant's prior acquittal. His opponent invoked equally ancient and never-repealed laws that allowed trial by combat, and in the end Parliament had to moot the case by repealing both sets of laws.[85]

It would thus have been difficult for a 1791 London barrister to have obtained the medieval and Tudor-period statutes, proclamations, and judicial rulings which were being

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OF THE KINGDOM 91-93 (1819). How many of these compilations were available in early America is unknown. *See also* PERCY WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 106-08 (1925).

[82] 1 STATUTES OF THE REALM (1810). The first volume begins with an address to the king, noting that the Statutes were compiled from records, some "preserved with great order and regularity," but in many important offices they were 'wholly unarranged, undescribed, and unascertained; that some of them are exposed to erasure, alteration, and embezzlement…." *Id.* at vii. The address is followed by the 1800 royal command to compile the statutes, *id.* at ix; that the effort took ten years suggests how difficult was the task.

[83] 3 Modern Reports 117-18; *See Modern Reports, or, Select Cases Adjudged in the Courts of Kings Bench, Chancery, Common Pleas, and Exchequer*, College of William and Mary, online at http://lawlibrary.wm.edu/wythepedia/index.php/Modern_Reports.

"Authoritative" is a relative term. The above account notes that Lord Holt complained that poor quality of the reports "will make us appear to posterity for a parcel of blockheads."

[84] *See* ROGER COMERBACH, ED., THE REPORT OF SEVERAL CASES ARGUED AND ADJUDGED IN THE COURT OF KING'S BENCH AT WESTMINSTER 38, 40 (1724); 2 WILLIAM NELSON, ABRIDGMENT OF THE COMMON LAW 1004 (1726).

[85] Ashford v. Thornton, 106 Eng. Rep. 149 (K.B. 1818); Appeal of Murder Act, 59 Geo III ch. 46 (1819).

invoked in the *Bruen* briefs. It would have been utterly impossible for a 1791 American to have done so.

So where would Americans have turned for their knowledge of English laws? The answer is: the great common-law commentators, who had had some access to those laws. For a 1791 American, Lord Justice Coke, Sergeant[86] William Hawkins, and later Sir William Blackstone were not secondary, but primary, legal sources.

In Coke's *Institutes* (published in stages over 1628-1644), they would have read the statute and an unhelpful commentary. The commentary misstates the statutory command as "Nor to goe armed, by night or by day, &c. before the King's Justices in any place whatsoever," thus making the "any place" clause modify the "before the King's Justices" clause.[87]The Statute forbade being armed before the King's Justices or anywhere else, but in Coke's version this became being armed before the King's Justices, anywhere.

From Hawkins' *Pleas of the Crown* (first published in 1716, after *Sir John Knight's Case*) they would have learned that "no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people" and that persons "of quality" would not offend by "wearing common weapons."[88] Hawkins thus emphasizes an element of causing public terror, and the nature of the weapon.

Blackstone's *Commentaries on the Common Law* (published 1765-1769) informed early Americans that "riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land…."[89] In Blackstone, the offense is linked to carrying of "dangerous or unusual weapons"; whether causing public terror is an element is likely, though not entirely clear.

None of the three commentators mentioned the statutes of Henry VIII, or royal proclamations regarding arms-bearing. The commentators either were unaware of them or did not consider them presently relevant. To Americans of 1791, dependent upon these commentators, these measures would have been unknown and unknowable.

Early Americans simply did not have access to the Statutes of the Realm or the English Reports, or anything comparable, and certainly did not have access to 14th-16th century royal proclamations. Their knowledge of English restrictions would have been gained from the common law commentators, who set out the Statute of Northampton as the sole common law restriction upon arms, and treated it as a prohibition on carrying dangerous or unusual arms in a terrifying manner.

In short, even if Americans of 1791 had known of the restrictions being discussed here, they would have considered them among the part of common law that was inapplicable to their conditions and thus did not define set limits on their rights.

Indeed, the first of the American statutes cited and rejected by the *Bruen* majority[90] and relied on in its dissent[91] shows Americans' reliance upon common law commentators rather than

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[86] Sergeant was then the highest rank of barrister.

[87] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, Ch. 73 (1654).

[88] 1 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 488-89 (8th ed. 1824).

[89] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *149 (1769).

[90] 142 S. Ct. at 2143.

[91] 142 S.Ct. at 2185 (Breyer, J., dissenting).

primary sources. The 1692 Massachusetts statute was not a criminal law, but rather a surety to keep the peace statute; persons violating it could be required to post a surety bond guaranteeing that they would keep the peace (not, we might note, that they would stop carrying arms). Such bonds were frequently used in the colonial period to guarantee future good behavior.[92]

Its standards including some paralleling those of the Statute of Northampton, but appear to be borrowed, not from the statute, but from the description given in Coke's Institutes. The Statute forbade going armed before officials "nor in no part elsewhere." Coke treated it as forbidding being armed "before the King's Justices in any place whatsoever," quite a different thing. Under the Massachusetts measure, bond could imposed for being armed before officials whether preforming their office "or elsewhere,"[93] tracking Coke's summary and not the actual Statute. Massachusetts additionally required that the person be armed "offensively" and that the arms-bearing be proven to be "in fear or affray of their majesty's liege people." The very fact that Massachusetts had to enact the statute underscores that the colonists understood that the Statute of Northamption did not govern them; the fact that they made their version so much narrower shows that they judged the Statute inapplicable to *their* right to arms.

In short, the argument over the interpretation and antiquity of the Statute of Northampton, sundry Royal decrees, and the arms restrictions of Henry VIII are anachronistic. None of those measures had ever applied to the American colonists. Americans in 1791 (and probably in 1868) knew about the Statute of Northampton only second-hand from commentators, and knew nothing at all of the other restrictions. Accordingly, these restrictions could have played no role in 1791 Americans' perception of their right to arms.

Conclusion

In *Bruen*, the Court determined the boundaries of the American right to arms by reference to its text, history, and tradition, an approach already used in the context of rights to jury trial, confrontation, and self-incrimination. Moreover, for the first time it delineated just what history and traditions matter, and why. They matter because they inform us as to how the framing generations would have understood the words "right of the people to keep and bear arms" when they ratified the Second Amendment.

By this standard, however, the Court should not consider English statutes and proclamations that (1) never applied in the English colonies and/or (2) were unknown and unknowable to Americans of the framing period. It is wrong to assume that an English enactment or royal proclamation automatically bound the American colonists. The colonies formulated their own legal standards, under some loose and only occasionally enforced guidelines. In the area of

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[92] "Judges demanded bonds for good behavior from a wide variety of persons not of good fame: William Lewis, a Catholic, for attacking Protestant books and ministers; John White, not to be alone with Bull's wife; Oliver Weeks, 'a common swearer….'" BRADLEY CHAPIN, note __ *supra*, at 28. 17th and 18th century governments were commonly short of money, and the American colonies were particularly so. They thus emphasized sanctions which (unlike imprisonment) were inexpensive. If an offense did not merit hanging, the remedy was apt to be flogging, the pillory, or posting of a bond for good behavior.

[93] An Act for the Punishment of Criminal Offences, 1 Acts and Resolves of the Province of Massachusetts Bay 52-53 (1869).

personal arms, the colonies not only ignored English restrictions, they directly contradicted them. The Statute of Northamption and the proclamations of Henry VIII were simply impracticable on the American frontier, and formed no part of the American experience.