

# Second Amendment Traditionalism and Desuetude

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## INTRODUCTION

With some notable complications,<sup>1</sup> the Roberts Court continues to draw upon common law, custom, and tradition to resolve constitutional disputes. Custom and tradition anchor a range of recent decisions limiting government authority: whether we speak of state court power to compel an appearance,<sup>2</sup> law enforcement searches with new technology,<sup>3</sup> or congressional power to enforce voting rights under the Reconstruction Amendments.<sup>4</sup> Given this trend, the Second Amendment right could be another area where a jurisprudence of tradition may take root.<sup>5</sup>

Assuming the Court is serious about cultivating Second Amendment traditionalism, it will inevitably discover that some historical regulations have been seldom, weakly, or haphazardly enforced and that some once-common practices have become rare. This phenomenon has a name—desuetude. How the Court

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1. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality) (“Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”).

3. *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (“[O]ur Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.”); cf. *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (noting that protection of the interior of homes has “roots deep in the common law”).

4. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (arguing that the “tradition of equal sovereignty” requires extraordinary justifications to authorize the pre-clearance formula for the Voting Rights Act).

5. See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 249 (2008) (footnotes omitted) (“In the Second Amendment context, the Court had sparse precedents with which to work . . . [M]any judges might be drawn to the original understanding even if they would not consider it, or would not give it a great deal of weight, if they were writing on an unclean slate.”).

approaches desuetude will say as much about the Court's commitment to a tradition-based jurisprudence as it will about the future course of Second Amendment doctrine.

Desuetude also raises broader issues of constitutional theory. First, if desuetude becomes a common tool to pare away relevant from irrelevant data in construing tradition, is there some neutral principle to govern its use, or is desuetude simply an instrument to arrive at pre-determined policy preferences? Second, and relatedly, how does desuetude fit with notions of originalism, common law constitutionalism, popular constitutionalism, original public methods originalism, or some blending of these methodologies? Finally, what does desuetude say about the timeless debates about the sources of constitutional law? Can desuetude distinguish legal norm creation from political norm creation, and, if so, how?<sup>6</sup> This essay raises these issues as topics for reflection rather than resolution.

### I. SECOND AMENDMENT TRADITIONALISM

*District of Columbia v. Heller*<sup>7</sup> and *McDonald v. City of Chicago*<sup>8</sup> repeatedly invoke tradition. These opinions use tradition to identify the values the Second Amendment protects as well as the regulations it permits despite those protections. The amendment protects the individual possession of firearms for “traditionally lawful purposes, such as self-defense within the home.”<sup>9</sup> But what other “traditional[] lawful purposes” it protects is not specified. It may protect hunting.<sup>10</sup> It may protect target shooting. The Court has not yet elaborated on what other practices are traditional, or how to identify such practices.

The Court cites tradition to support restrictions as well, even when those restrictions seem to contradict the value the right protects. As Justice Scalia said in his *McDonald* concurrence, “traditional restrictions . . . show the scope of the right.”<sup>11</sup> Bans on sawed-off shotguns are constitutional because they derive from the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>12</sup> This prohibition is valid irrespective of whether such weapons advance the core self-defense value at the heart of the right.

The Court's traditionalism implies that if a type of arm, or bearing, or keeping, is not traditional, then the activity is not protected; it also implies that, if the regulation is not traditional, the regulation is unconstitutional. But answer-

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6. See Frederick Schauer, *The Jurisprudence of Custom*, 48 TEX. INT'L L.J. 523, 530 (2013) (“As the phenomenon of desuetude illustrates, a rule of recognition could recognize as law only most statutes, rather than all of them.”).

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

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

9. *Heller*, 554 U.S. at 577 (characterizing the Respondent's Brief).

10. See Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133 (2015).

11. *McDonald*, 561 U.S., at 802 (Scalia, J., concurring).

12. *Heller*, 554 U.S. at 627 (citing, inter alia, 4 WILLIAM BLACKSTONE, COMMENTARIES \*148–149 (1769)).

ing the one question does not necessarily answer the other. For example, few have identified a longstanding tradition of persons taking firearms to school; but, so far, few have identified a longstanding tradition of regulating firearms at school (although such regulations do appear as early as the 19th century<sup>13</sup>). The Supreme Court did say that longstanding prohibitions on carrying firearms into “sensitive places” included schools, but it did not offer specific evidence to support the assertion.<sup>14</sup> Schools may be able to prohibit firearms because no demonstrable tradition of bearing firearms into schools exists. It could be that bearing arms to school is traditional in some rural areas where hunting is popular, but that there is a counter-tradition of regulating such activity. It could be that a specific school-related regulation of weapons is unnecessary, given a more general tradition of state regulation of public schools<sup>15</sup> or public property.<sup>16</sup> Or schools could constitutionally prohibit firearms for simple utilitarian or instrumental reasons, and tradition is merely a make-weight.

Further, the Court’s imprecise appeal to tradition poses a host of familiar conceptual and interpretive problems.<sup>17</sup> What does the court mean by tradition? Whose tradition? English, American, African-American, Native-American, city, country, South, North? Tradition as expressed over what duration of time? Since the thirteenth century? Since the sixteenth? The eighteenth? Does the historical evidence relevant to a tradition end in 1791, in 1868, in 1930, or 2016?<sup>18</sup> At what level of abstraction is the tradition to be drawn?<sup>19</sup> And what of conflicting traditions, or conflicting claims to a tradition; as, for example, claims to traditional public policing

13. See, e.g., 1 Statutes of Oklahoma, Art. 47, § 7, at 496 (Will T. Little, L.G. Pittman & R.J. Barker eds., 1891) (“It shall be unlawful for any person, except a peace officer, to carry into any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes . . . any of the weapons designated in sections one and two of this article.”); An Act Regulating the Right to Keep and Bear Arms, Art. 6511, in 2 A Digest of the Laws of Texas, at 1322 (George Paschal, 3d ed., 1873) (“If any person shall go into any church or religious assembly, any school-room or other place where persons are assembled for educational, literary, or scientific purposes . . . and shall have about his person a bowieknife, dirk, or butcher-knife, or fire-arms, . . . such person so offending shall be deemed guilty of a misdemeanor . . .”); see also Crimes and Punishments, § 387, 1 Revised Statutes of the Arizona Territory, at 1252 (1901) (same).

14. See Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 80 (2009).

15. See *United States v. Lopez*, 14 U.S. 549, 564 (1995) (identifying “education” as an area “where States historically have been sovereign”).

16. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda*, 56 UCLA L. REV. 1443, 1473 (2009) (discussing the “government as proprietor” rationale for regulation).

17. See generally Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013).

18. For example, the “common use” test for protected weapons suggested by *Heller* seems to draw upon modern customs. Judge Kavanaugh pointed to the sales of firearms at the sports retailer Cabela’s as evidence of common use. *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (2011) (Kavanaugh, J., dissenting). See also *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032 (2016) (Alito, J., concurring in the judgment) (per curiam) (“[T]he pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today.”).

19. See Miller, *supra* note 17, at 919; see also Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1075–77 (1990).

by communities of Freedmen as compared to communities of white supremacists?<sup>20</sup>

Moreover, the relationship between tradition and the written language of the Second Amendment is not clear. How much of this tradition is an enforceable constitutional norm, as opposed to a rule of construction, or an aspiration? It could be tradition forms a freestanding source of constitutional norms irrespective of the text.<sup>21</sup> Alternatively, it could be tradition is simply informative of how to read the text.<sup>22</sup> If the latter, what of traditions that appear to contradict the strict semantic meaning of the Second Amendment, as, for example, prohibitions on carrying concealed weapons?<sup>23</sup>

## II. “DESUETUDE, AMERICAN STYLE” IN SECOND AMENDMENT THEORY AND LITIGATION

Assuming courts must identify tradition at some level of abstraction to enforce the Second Amendment, some behavior or regulations that would constitute this tradition unquestionably have fallen into desuetude. Desuetude is the concept that a law may lose legitimacy by a protracted period of non-enforcement, often coupled with flagrant and open non-compliance by the people.<sup>24</sup> More loosely, desuetude can also refer to institutions, protections, or cultural practices that have become isolated or uncommon. Both notions of desuetude appear to do work in *Heller*.

Desuetude, as a legal doctrine, is a creature of civil law and may still enjoy official recognition in some jurisdictions, such as Scotland.<sup>25</sup> But desuetude, as with other civil law concepts, has occasionally migrated into English and American law, sometimes on its own terms, sometimes cloaked as “due process” or “equal protection.”<sup>26</sup> This form of desuetude enjoyed something of a minor renaissance in constitutional theory when Cass Sunstein used it to explain the Court’s decision in *Lawrence v. Texas*.<sup>27</sup> He called this form “desuetude

20. See Miller, *supra* note 17, at 913.

21. See Volokh, *supra* note 16, at 1450–51 (making these points).

22. *Id.* See also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 465, 482 & n.100 (2013) (discussing how practice or history may contribute “contextual enrichment” to vague or ambiguous terms).

23. Compare *Heller*, 554 U.S. at 581 (internal quotation marks and citation omitted) (defining arm as “any thing that a man . . . takes into his hands, or useth in wrath to cast at or strike another.”), and *id.* at 584 (“At the time of the founding, as now, to ‘bear’ meant to ‘carry.’”), with *id.* at 626 (suggesting that carrying concealed weapons may be prohibited).

24. See, e.g., Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 395–96 (1964); Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006).

25. Bonfield, *supra* note 24, at 395–405; Note, *supra* note 24, at 2209.

26. See Bonfield, *supra* note 24, at 430. See also Comm. on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720, 724 (W. Va. 1992) (“Desuetude, like vagueness, is based on the concept of fairness embodied in the due process and equal protection clauses. Thus, a law prohibiting vagrancy is unfair because it is both broad and vague . . . ; similarly, a law prohibiting some act that has not given rise to a real prosecution in 20 years is unfair to the one person selectively prosecuted under it.”).

27. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2003). See also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 148–56 (2d ed. 1986) (making arguments from desuetude concerning laws on contraception).

American style” to distinguish it from its more formal civil law cousin, and he offered the following gloss: where a fundamental constitutional value is at stake, the government may not justify a largely unenforced law based on moral arguments that no longer command public support.<sup>28</sup> Perhaps desuetude, so conceived, explains some of *Heller*’s apparently unsatisfactory reasoning.<sup>29</sup>

Weapons regulations fill the law books of England and America, both prior to ratification of the Second Amendment and for over a century thereafter.<sup>30</sup> Various Second Amendment scholars appeal to desuetude when confronted with these sources. For example, the Tudor monarchs prohibited the possession of crossbows and handguns by certain classes.<sup>31</sup> Some have suggested these laws should not influence Second Amendment doctrine because they were either unknown to the Framers of the Second Amendment, were repealed by Parliament, or were infrequently or partially enforced.<sup>32</sup> The Statute of Northampton, a medieval law enacted in the fourteenth century but with its roots in ancient Athens, generally criminalized the public carrying of arms except by certain elites and peacekeeping officials.<sup>33</sup> Scholars like Joyce Malcolm have argued—perhaps erroneously—that such regulations were seldom enforced.<sup>34</sup>

28. Sunstein, *supra* note 27, at 30, 51–52.

29. For a discussion of Sunstein’s application of desuetude to the *Heller* case, see *infra*.

30. See Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry*, 125 YALE L.J. FORUM 121, 128–34 (2015) (citing some of these historical regulations). See also Mark Anthony Frassetto, *Firearms and Weapons Legislation up to the Early 20th Century* (Jan. 15, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2200991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200991) (compiling laws).

31. See An Act Concerning Crossbows and Handguns, 33 Hen. 8, c. 6 (1541) (Eng.), in 3 STATUTES OF THE REALM 832.

32. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 258 n.235 (1983); Dave Kopel, *Malcolm in the Middle*, DAVEKOPEL.ORG (Sept. 16, 2002), <http://www.davekopel.org/NRO/2002/Malcolm-in-the-Middle.htm> (observing that Henry VIII’s regulation was “ineffectually and temporarily” enforced).

33. The Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.) states:

[N]o 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. And that the King’s justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises, and their bailiffs in the same, and mayors and bailiffs of cities and boroughs, within the same cities and boroughs, and borough-holders, constables, and wardens of the peace within their wards, shall have power to execute this act.

1 STATUTES OF THE REALM 258 (capitalization modernized). See also 4 WILLIAM BLACKSTONE, COMMENTARIES \*149 (relating the Statute of Northampton to “the laws of Solon,” which stated that “every Athenian was finable who walked about the city in armour”).

34. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104 (1998) (stating that the statute was rarely enforced except for “occasional[]” indictments where persons “terrorize[d] their neighbors”). *But see* Patrick Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing “Standard Model” Moving For-*

Justice Scalia engaged in an argument from desuetude when he distinguished away colonial-era laws that criminalized the firing of weapons, the carrying of firearms into dwellings, or the improper storage of gunpowder.<sup>35</sup> Scalia expressed doubt that these regulations would have been upheld against individuals pressed by the immediate necessity of self-defense.<sup>36</sup> But, perhaps cognizant that almost all regulations contain unwritten, common law exceptions for necessity, he also remarked on the insignificant penalties associated with these regulations.<sup>37</sup>

The thrust of these arguments is that superannuated, unenforced, or under-enforced regulations do not shape the Second Amendment and cannot undermine broader and more abstract Second Amendment values. But if we care about a methodology that looks to tradition, there should be a theory that explains why these portions of Anglo-American tradition are irrelevant. Perhaps some theory of desuetude American style is at work here, but, if so, it needs elaboration. At present, it still looks very much like picking one's friends out of a crowd.<sup>38</sup>

Further, if tradition is to become an intelligible basis for a decision, a court must peer beyond law books and regulations and look at actual practice to identify the scope of constitutional protection. Here again, desuetude comes into play. Practices that were once common but have become rare do not meet the strict legal definition of desuetude. Nevertheless, desuetude as the decline of a social practice also appears to define the scope of the Second Amendment right. For example, weapons that are not in "common use" or that are "dangerous and unusual" do not fit within the definition of an "Arm" protected by the Second Amendment.<sup>39</sup> *Heller* thus suggests that firearms that were once common, but are no longer, could perhaps lose constitutional protection.<sup>40</sup> Also, arguments from desuetude support the notion that some behaviors associated with the initial codification of the right, such as the ability to conduct private policing, or to form a detachment of the "citizens' militia" to apprehend criminals, or to aid

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ward, 39 *FORDHAM URB. L.J.* 1727, 1804 (2012) (arguing that the statute was enforced); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 *CLEVELAND ST. L. REV.* 1, 7–40 (2012) (same). *Cf.* Ruben & Cornell, *supra* note 30, at 128–34 (arguing why case law research may not accurately show the frequency of enforcement).

35. "[W]e would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home." *Heller*, 554 U.S. at 632.

36. *Id.*

37. "A broader point about the laws that Justice Breyer cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties." *Id.* at 633.

38. *See Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting) (criticizing the majority's use of social science data for "look[ing] over the heads of the crowd and pick[ing] out its friends.>").

39. *See Heller*, 554 U.S. at 627.

40. *See Allen Rostron, Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 *GEO. WASH. L. REV.* 703, 726–29 (2012) (discussing "common use" test as meaning arms that are not commonly used are not protected).

another in resisting an unlawful arrest, may no longer rise to the level of constitutionally protected activity.<sup>41</sup> In any event, if further litigation will elaborate the manner in which outdated regulations shape the Second Amendment, courts also will have to address the constitutional relevance of outdated practices relating to firearms.

### III. A FEW THOUGHTS ON DESUETUDE AND CONSTITUTIONAL THEORY

If desuetude, American style or some other style, gains traction in Second Amendment doctrine, it will raise broader issues about constitutional theory and jurisprudence.<sup>42</sup> Among those issues, is desuetude simply a device to trim historical evidence to fit pre-conceived policy ends, or is it governed by neutral rules of application?<sup>43</sup> Relatedly, is desuetude sufficiently familiar in Anglo-American jurisprudence to qualify as a form of original methods originalism? Finally, what about desuetude and law-making by non-judicial communities: is desuetude a mechanism by which, as Matt Adler has written, overlapping communities engage with each other over the legal status of constitutional norms?<sup>44</sup>

At least at first blush, the minimalist view of desuetude that Sunstein uses to explain *Lawrence* may be applicable to *Heller* and *McDonald*. Both seem to say that infrequently or haphazardly enforced sanctions rooted in outmoded moral commitments cannot contradict other fundamental constitutional values. In fact, Sunstein suggested that *Heller* could be construed as a minimalist decision along these lines, although he concluded that desuetude, even American style, does not fit *Heller*, because the District of Columbia regulation was relatively new and actively enforced.<sup>45</sup>

Nevertheless, it could be possible to systematize desuetude the same way as other, less exotic doctrines. For example, a court could specify that if there is evidence that *x* regulation was never enforced, or infrequently enforced, over *y* years, and subject to *z* examples of its public repudiation, it is subject to less weight for purposes of constitutional construction. This task would be no different from those jurisdictions that recognize desuetude as a defense and

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41. See *Heller*, 554 U.S. at 627 (suggesting that the “degree of fit” between the militia clause and the “operative clause” has loosened).

42. New scholarship by Richard Albert and John Stinneford has begun tackling these matters. See Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641 (2014); John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 532 (2014).

43. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

44. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

45. Sunstein, *supra* note 5, at 263 (“A doctrine that would authorize challenges to recent departures and innovations raises quite different considerations from a doctrine that merely authorizes attacks on anachronistic laws. In this respect, Bickel’s understanding of *Griswold* offers no help in *Heller*.”).

have had to fashion formal elements for its application.<sup>46</sup> One could use desuetude in a similar way to understand the specific practices that the Constitution protects. Whereas at one time assaulting a police officer attempting an unlawful arrest may have been a common practice of self-defense, it has fallen so far out of generally accepted conduct as to be unprotected today.<sup>47</sup>

If desuetude were domesticated into American constitutional jurisprudence, would it qualify as a form of “original methods originalism?”<sup>48</sup> John McGinnis and Michael Rappaport have argued that the proper method of constitutional adjudication is through “the interpretive methods that the constitutional enactors would have deemed applicable to [the Constitution].”<sup>49</sup> James Pfander and Daniel Birk have cited the influence of Scottish jurists, lawyers, and philosophers on the Framers of the Constitution.<sup>50</sup> Although desuetude was not widely recognized in England, it appears to have been a fixture of Scottish law during the Founding generation.<sup>51</sup> Perhaps desuetude would be one of these original methods.

Finally, desuetude, as with the entire notion of custom and tradition, raises foundational issues about who makes constitutional law. As Matt Adler has written, debates between and within schools of constitutional thought often turn on judgments about which communities get to call their norms legal norms.<sup>52</sup> Desuetude is potentially a device by which judicial actors, through an ancient legal mechanism, may take notice of the juris-generative behavior of other actors, in particular non-judicial officers and laypersons.<sup>53</sup> As the Court said

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46. See Comm. on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d. 720, 726–27 (W.Va. 1992) (articulating a three-part test for desuetude). Cf. Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, RUTGERS L. REV. COMMENTARIES (Mar. 11, 2014), available at <http://www.rutgerslawreview.com/wp-content/uploads/archive/commentaries/2014/LarkinCommentary.pdf> (discussing application of desuetude in the context of overcriminalization).

47. See Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L. J. 939, 947–66 (2011).

48. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009). But see Richard H. Fallon, Jr., *The Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1771 n.88 (2015) (noting that this move simply “postpones . . . the need for normative judgment if . . . members of the Founding generation differed among themselves about applicable norms of constitutional adjudication.”).

49. McGinnis & Rappaport, *supra* note 48, at 751.

50. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1630 (2011). See also Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 735–36 (2011) (identifying the Founder’s effort to accommodate “the English, Scottish, and Continental political theory that they had long studied.”). But see Stinneford, *supra* note 42, at 564 & n.156 (noting objections by the Framers to novelties in the legal system that do not comport with English common law).

51. See Bonfield, *supra* note 24, at 403 (identifying Scottish recognition of desuetude as far back as 1751).

52. See generally Adler, *supra* note 44. See also Albert, *supra* note 42, at 654–56, 680–86 (discussing the relationship between desuetude and constitutionalism).

53. As Fred Schauer has written: “[T]he fact that the rule of recognition as it exists in, say, English law, recognizes only some customs as law is not fundamentally different from the way in which the



in *Poe v. Ullman*, “‘deeply embedded traditional ways of carrying out state policy . . .’—or not carrying it out—‘are often tougher and truer law than the dead words of the written text.’”<sup>54</sup> As such, desuetude may be a mechanism to bridge popular constitutionalism with other, more juris-centric forms of law making.

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same rule of recognition might recognize only some statutes, only some court decisions, or only some constitutional provisions as law.” Schauer, *supra* note 6, at 530.

54. *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (quoting *Nashville, C. & St. L.R. Co. v. Browning*, 310 U.S. 362, 369 (1940)); *Printz*, 416 S.E.2d at 725-726 (citing *Poe* as supporting desuetude).