

**FAUX HISTOIRE OF THE RIGHT TO BEAR ARMS:**

***YOUNG v. HAWAII* (9<sup>th</sup> Cir. 2021)**

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*CONTENTS*

Introduction

I. THE TEXT OF THE SECOND AMENDMENT OVERRIDES SELECTIVE “HISTORY”

II. HISTORICALLY, HAWAIIAN CARRY LAWS WERE ADVERSE TO THE RIGHT

III. PEACEABLE CARRY WAS LAWFUL IN THE ENGLISH TRADITION

A. The Royal Decrees Were Directed at Tumultuous Gatherings, Not Peaceable Carry

B. The Statute of Northampton and Related Laws Applied to Affrays and Violent Crime

C. *Rex v. Knight*, the Decisive Precedent, Held that Going Armed was Lawful Unless Done in a Manner to Terrorize the Subjects

D. English Treatises Limited the Offense to Carrying Dangerous and Unusual Weapons

E. The English Bill of Rights Confirmed the Ancient Right to Have Arms

IV. AMERICA WAS FOUNDED ON A ROBUST RIGHT TO BEAR ARMS

A. Colonial Laws Often Mandated the Carrying of Arms

B. Post-Ratification Laws Only Banned Going Armed Offensively, to the Terror of the Citizens

C. Nineteenth-Century Surety Laws Only Applied with a Showing of Reasonable Cause to Fear Injury or a Breach of the Peace

D. Courts Upheld Concealed Carry Bans Only Because Open Carry was Lawful

E. Slaves and Persons of Color Were Denied the Right to Bear Arms Because They Were Not Considered Citizens

F. None of the Early Treatises Countenanced a Carry Ban

G. The Fourteenth Amendment Sought to Do Away with Black Code Requirements that African-Americans Obtain a License to Bear Arms Subject to an Official’s Discretion

H. Twentieth-Century Aberrations Teach Nothing about the Original Understanding

Conclusion

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## Introduction

The Ninth Circuit’s en banc decision in *Young v. State of Hawaii* (2021) holding that no “right of *the people* to . . . bear arms” exists under the Second Amendment could perhaps win a contest for the most *faux histoire* of any judicial decision on a Bill of Rights guarantee.<sup>1</sup> The Ninth Circuit previously held that no right exists to carry a concealed weapon.<sup>2</sup> It now extends its ruling to the only other way to bear arms – open carry. Without any linguistic analysis of the text of the Second Amendment, the majority essentially holds that the right to bear arms is outside “the historical scope” of the right to bear arms.<sup>3</sup>

To obtain a license to carry a firearm, Hawaii requires a person to show “the urgency or the need” to do so, a requirement not specified for *any* constitutional right. Per the court’s description, the applicant George Young only “relied upon his general desire to carry a firearm for self-defense,” thus failing to show “the urgency or need.”<sup>4</sup> Thus, from the very beginning of the opinion, the court signaled that it did not consider “the right of the people to . . . bear arms” to be a right at all that one may exercise based on the desire to do so, but is a privilege that the government may grant or withhold based on its subjective assessment of whether the applicant has an “urgency or need” to exercise this fundamental constitutional right that is a non-constitutional right. Imagine subjecting the right of free speech to whether the Ninth Circuit says an arm of government considers it urgent or needed for a citizen to speak.

The majority decision by Judge Jay Bybee has been subjected to withering criticism not only in the dissenting opinion by Judge Diarmuid O’Scannlain, joined by three other judges<sup>5</sup> – not unexpectedly – but also by Second Amendment scholars. Professor Nelson Lund focuses on the general “fake originalism” of the decision,<sup>6</sup> which the court apparently saw as necessary to clothe the Amendment with its supposed original understanding. Professors David Kopel and George Mocsary delve into the opinion’s “errors of omission,” based on the slicing out of critical

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<sup>1</sup>*Young v. State of Hawaii*, 992 F.3d 765 (9<sup>th</sup> Cir. 2021) (*en banc*), petition for cert. filed, No. 12-17808 (U.S. May 25, 2021).

<sup>2</sup>*Id.* at 773, citing *Peruta v. County of San Diego*, 824 F.3d 919 (9<sup>th</sup> Cir. 2016) (*en banc*).

<sup>3</sup>*Id.* at 773.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 828 (O’Scannlain, J., dissenting).

<sup>6</sup>See Nelson Lund, “Fake Originalism and the Right to Bear Arms,” *Law & Liberty*, April 12, 2021. <https://lawliberty.org/fake-originalism-and-the-right-to-bear-arms/>

words to distort historical quotations.<sup>7</sup> Without replicating these very valid criticisms, this Article demonstrates that the *Young* decision is even worse.

## I. THE TEXT OF THE SECOND AMENDMENT OVERRIDES SELECTIVE “HISTORY”

First a word on the text, which is AWOL from the majority opinion. The Second 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.” What could be unclear about “the right” of “the people” to “bear arms”? Everything, saith the court. In fact, the court does not even purport to discuss those words. Instead, the firearm restrictions in English and American history supposedly “reflect longstanding prohibitions,” and “the conduct they regulate is therefore outside the historical scope of the Second Amendment.”<sup>8</sup> Pay no attention to the words behind the curtain.

This nullifies not only the literal words of the Amendment, but also the Supreme Court’s analysis of those words in *District of Columbia v. Heller*, which decided: “At the time of the founding, as now, to ‘bear’ meant to ‘carry.’”<sup>9</sup> The Court added that the right to “bear arms” refers to a right to “wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.”<sup>10</sup> The Court found the “inherent right of self-defense” to be “most acute” in the home, indicating that it is also acute outside the home.<sup>11</sup> It noted that the decision did not “cast doubt” on “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . .”<sup>12</sup> That comment obviously casts doubt on laws forbidding the carrying of firearms in *non-sensitive* places.

The *Young* court mentions, but sees nothing particularly significant or binding about, *Heller*’s above discussion.<sup>13</sup> While the Amendment’s text does not limit the right to the home,

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<sup>7</sup>David B. Kopel & George A. Mocsary, “Errors of Omission: Words Missing from the Ninth Circuit’s *Young v. State of Hawaii*,” 2021 *U. Ill. L. Rev. Online* 172 (May 13, 2021).

<sup>8</sup>*Id.* at 773.

<sup>9</sup>*District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 628.

<sup>12</sup>*Id.* at 626.

<sup>13</sup>*Young*, 992 F.3d 782-83.

and *Heller* said that Americans valued the right “more important for self-defense and hunting” than for militia purposes,<sup>14</sup> *Young* thought that exercise of the right “outside the home is less clear,” and that *Heller* only “implied” that “some right to bear arms may exist outside the home.”<sup>15</sup> Perhaps it is unclear that hunting and militia activities always take place outside the home, and that self-defense is frequently exercised outside the home.

As has been stated about passages from *Heller*: “This is the sort of message that, whether or not technically dictum, a court of appeals must respect, given the Supreme Court’s entitlement to speak through its opinions as well as through its technical holdings.”<sup>16</sup>

Judge O’Scannlain said it best in his dissent – “the majority reduces the right to ‘bear Arms’ to a mere inkblot.”<sup>17</sup> Instead of beginning with the constitutional text – as *Heller* did with its linguistic analysis of each word and phrase<sup>18</sup> – *Young* claimed that it would base its determination of whether “the challenged law affects conduct that is protected by the Second Amendment” on the “historical understanding of the scope of the right.”<sup>19</sup> While *Heller* indeed used that phrase about the historical understanding, it began with the language of the Amendment. *Young* simply skipped that stage and jumped right into the history. But it would be a combination of the wrong history and a distorted history.

*Young* begins its analysis of the historical scope of the Second Amendment by noting its prior decision in *Peruta* that “the Second Amendment does not protect the right of a member of the general public to carry concealed firearms in public.”<sup>20</sup> No need exists to review *Peruta* here because it was based on the same *faux histoire* that *Young* uses to square the circle and conclude that no member of the general public has a right openly to carry firearms either.

The court goes on to say: “Our sister circuits have, in large part, avoided extensive historical analysis.”<sup>21</sup> It is certainly true that the circuits that have upheld carry bans have avoided the actual history. But *Young* declares its ambition to write the definitive history: “We

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<sup>14</sup>*Heller*, 554 U.S. at 599.

<sup>15</sup>*Young*, 992 F.3d at 783.

<sup>16</sup>*United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*).

<sup>17</sup>*Young*, 992 F.3d at 830 (O’Scannlain, J., dissenting).

<sup>18</sup>*Heller*, 554 U.S. at 576.

<sup>19</sup>*Young*, 992 F.3d at 783 (quoting *Heller*, 554 U.S. at 626).

<sup>20</sup>*Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (*en banc*).

<sup>21</sup>*Young*, 992 F.3d at 784.

do not think we can avoid the historical record.”<sup>22</sup> It then announces its determination that “restrictions on carrying arms openly have long been a part of our legal tradition,”<sup>23</sup> from which it concludes that “the people” have no “right to . . . bear arms” at all.

## II. HISTORICALLY, HAWAIIAN CARRY LAWS WERE ADVERSE TO THE RIGHT

Rather than limiting its analysis to the “historical scope” of the Second Amendment, *Young* deemed it relevant to trace in detail Hawaiian laws beginning when Hawaii was a monarchy, before its annexation by the United States. The court quotes the Act of May 25, 1852, § 1, as imposing punishment on “[a]ny person not authorized by law, who shall carry, or be found armed with, any bowie-knife, sword-cane, pistol, air-gun, slung-shot or other deadly weapon.”<sup>24</sup> But the sentence did not end there – it continued “unless good cause be shown for having such dangerous weapons . . . .”<sup>25</sup>

For all we know, a person’s credible claim that he or she was carrying for self-defense, in the absence of evidence that the person was carrying for a nefarious purpose, would have been considered good cause. Or would that have depended on the person’s race or national origins? At any rate, at that time, no state in the United States had any such ban, and no state delegated power to a legislature to “authorize” select persons the privilege of carrying arms.

Section 2 of the Act (of which the court quotes just a few words) provided in full: “The following persons are hereby declared to be authorized to bear arms, viz: – All persons holding official, military or naval rank either under this government or that of any nation at peace with this Kingdom, when worn for legitimate purposes.”<sup>26</sup> The contrast could not be more stark – the Second Amendment recognizes “the right of the people to . . . bear arms,” while the law declared that only persons in government were “authorized to bear arms.”

On the date of the above enactment, the 1840 Constitution of the Hawaiian Kingdom was in force. It did not declare any right to bear arms.<sup>27</sup> Hawaii’s Constitution of 1852, enacted on June 14, 1852 – just a month after passage of the Act – included a Declaration of Rights, but it

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<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 786.

<sup>24</sup>*Id.* at 774, citing 1852 Haw. Sess. Laws 19.

<sup>25</sup>§ 1, 1852 Haw. Sess. Laws 19.

<sup>26</sup>*Id.*, § 2.

<sup>27</sup>See text at <http://hooilina.org/collect/journal/index/assoc/HASH0166.dir/5.pdf>.

said nothing even remotely about the right to bear arms.<sup>28</sup> With provisions like the following, the 1852 Constitution was alien to American values: “The King is sovereign of all the chiefs and of all of the people; the kingdom is his.”<sup>29</sup> That recalls the infamous dictum of Louis XIV: “*L’état, c’est moi.*”

According to *Young*, “Hawai‘i’s regulation of dangerous weapons remained in effect after Hawai‘i consented to annexation as a U.S. territory in 1898.”<sup>30</sup> But the court neglected a significant liberalization of Hawaiian law that took place after the monarchy was overthrown and the Republic of Hawaii was proclaimed in 1894. Under the new Constitution, all statutes in force at the time continued to be in force,<sup>31</sup> which meant that the 1852 law remained on the books. However, a law was passed in 1896 providing for a license to carry a pistol or other firearm based on the payment of a fee, without any other qualification.<sup>32</sup> As the following explains, a person with that license was not subject to the 1852 law.

In *Republic of Hawaii v. Clark* (1897) – which *Young* ignores – the Hawaiian Supreme Court quoted what was then Chapter 54, § 1, of the Penal Code, that “any person not authorized by law, who shall carry or be found armed with” a pistol or other dangerous weapon was subject to punishment “unless good cause be shown for having such dangerous weapon.”<sup>33</sup>

But that was not the only pertinent law on the books. Chapter 64, Laws of 1896, provided for an “annual fee for a license to possess, carry or use a pistol, rifle, carbine, shotgun or other fire-arm” of one dollar and stated that “no fire-arm shall be possessed, carried or used in the Republic without a license . . . .”<sup>34</sup> The only qualification for the license was the payment of the fee. The defendant in *Clark* was charged under Chapter 54, but had a license under Chapter 64 to carry a Smith & Wesson revolver. The court reversed his conviction based on the following:

Upon comparison of Chap. 64, Laws of 1896, with Chap. 54 of the Penal Code, we are of opinion that this Act does not repeal Chap. 54 of the Penal Code;

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<sup>28</sup>See text at <http://hooilina.org/collect/journal/index/assoc/HASH01ce.dir/5.pdf>.

<sup>29</sup>Haw. Const., Art. 36 (1852).

<sup>30</sup>*Young*, 992 F.3d at 774.

<sup>31</sup>Haw. Const., Art. 92, § 1 (1894).

<sup>32</sup>Ch. 64, §§ 59 & 60, *Laws of the Republic of Hawaii Passed by the Legislature at its Session, 1896*, at 224 (1896).

<sup>33</sup>*Republic of Hawaii v. Clark*, 10 Haw. 585, 585-86 (1897).

<sup>34</sup>*Id.* at 587, quoting §§ 59 & 60, Chapter 64, Laws of 1896.

but, as its terms are explicit in giving a license to possess, carry and use fire-arms, a person who has complied with its terms and obtained a license thereunder can plead the same in justification under a criminal charge made against him for carrying deadly weapons under Chap. 54 of the Penal Code, and claim that he was authorized by the license law to carry the weapon, and the same would be a good defense and no conviction could be had.<sup>35</sup>

So *Young* left out a significant chapter in the history of Hawaiian law on the carrying of firearms. While no state in the United States had such a law, Hawaii allowed anyone to carry a pistol merely by paying a license fee.

As of 1913, *Young* tells us that Hawaiian law allowed a person to carry a pistol if he or she had “good cause” (which did not require a license) or was “authorized by law.”<sup>36</sup> For all we know, “good cause” may have included a credible claim that the person was carrying a pistol for self-defense. Or the authorities may have tied “good cause” to one’s race or national origins. And although not mentioned by *Young*, the law continued to provide that “[t]he following persons are hereby declared to be authorized to bear arms, viz.: all persons holding official, military, or naval rank . . . .”<sup>37</sup> Again, the conflict with the right of “the people” to bear arms in the Second Amendment was obvious.

Under a 1927 law, *Young* continues, a person needed a license to carry a “pistol or revolver concealed upon his person or to carry one elsewhere than in his home or office,” which would be granted on showing a “good reason to fear an injury to his person or property, or . . . other proper reason for carrying a pistol or revolver.”<sup>38</sup> The court states that this only applied to concealed carry, but in 1961, a law was enacted that to carry openly, one must demonstrate “the urgency of the need” and must be “engaged in the protection of life and property.”<sup>39</sup>

Nothing in *Young* reflects how the above provisions were interpreted. Under the “good” or “proper” reason requirements, was a statement on the application form that the person wished to carry for self-defense sufficient to be issued a license?<sup>40</sup> Given that not a single Hawaiian case

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<sup>35</sup>*Id.* at 587.

<sup>36</sup>*Young*, 992 F.3d at 774, citing 1913 Haw. Sess. Laws 25, act 22, § 1.

<sup>37</sup>§ 3090, Revised Laws of Hawaii 1123 (1905).

<sup>38</sup>*Young*, 992 F.3d at 774, citing 1927 Haw. Sess. Laws 209, 209–211.

<sup>39</sup>*Id.* at 775, citing 1961 Haw. Sess. Laws 215.

<sup>40</sup>See *Schubert v. DeBard*, 398 N.E. 2d 1339, 1341 (Ind. App. 1980) (holding that self-defense was “a proper reason” for a license to carry a handgun and that discretion by the issuing

with those terms appears in the Westlaw databank, does the lack of litigation on the subject indicate that licenses were freely available? It is noteworthy that virtually no Hawaiian decisions with the search terms “firearm” in the same sentence as “without a license” appear until the 1990s and 2000s.

Today, one must show “an exceptional case” and a “reason to fear injury to [his or her] person or property” for a license to carry concealed.<sup>41</sup> A license for open carry requires that “the urgency or the need has been sufficiently indicated” and that the applicant “is engaged in the protection of life and property.”<sup>42</sup> As the record reflects, no one gets licenses to carry concealed. As applied in Hawaii County, open carry licenses are available only to “private detectives and security guards.”<sup>43</sup>

### III. PEACEABLE CARRY WAS LAWFUL IN THE ENGLISH TRADITION

#### A. The Royal Decrees Were Directed at Tumultuous Gatherings, Not Peaceable Carry

As *Heller* stated, the Second Amendment codified a pre-existing right that we “inherited from our English ancestors.”<sup>44</sup> But *Young* is intent on presenting every conceivable monarchical intrusion on the right rather than exploring the actual right as it evolved in spite of these violations. It is biased in favor of the power of the kings and against the liberties of the often-oppressed subjects. Its method would be analogous to detailing every royal law or decree that repressed the freedom of the press in order to show that the First Amendment freedom of the press is nugatory.

How fitting that *Young* begins with the royal decrees, the arbitrary diktats of often blood-thirsty monarchs who engaged in raw power struggles with their opponents and who treated their subjects as fodder to exploit and repress. The Founders would be aghast that the Bill of Rights would be interpreted according to the tyrannical decrees of medieval English kings.

The court cites several royal decrees in the years 1299-1327 to the effect that “King Edward I and his successor, King Edward II, issued a series of orders to local sheriffs that

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authority “would supplant a right with a mere administrative privilege”).

<sup>41</sup>*Young*, 992 F.3d at 775, citing HRS § 134-9(a).

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 776.

<sup>44</sup>*Young*, 992 F.3d at 786, quoting *Heller*, 554 U.S. at 599.



prohibited ‘going armed’ without the king’s permission.”<sup>45</sup> But the court is unsure about whether these decrees were, in fact, merely temporary: “Although the king regularly granted the sheriffs authority to disarm the people while in public, it is unclear from these royal orders whether that authority was absolute or if it was tied to times of potential upheaval and possible affray.”<sup>46</sup>

*Young* neglects that the context of the term “going armed” in these decrees concerned disruptive, potentially violent behavior, not the mere carrying of defensive weapons by peaceable subjects. For instance, the court partially quotes a decree of Edward I instructing the sheriff of York to prohibit “any knight, esquire or any other person from . . . going armed without the king’s special licen[s]e.”<sup>47</sup> But the full text without deletions shows that the order instructed the sheriff more specifically to prohibit:

any knight, esquire or any other person from tourneying, tilting (*burdeare*), making jousts, seeking adventures or otherwise going armed without the king’s special licence, and to cause to be arrested the horses and armour of any persons found thus going with arms after the proclamation, as the king wills that no tournaments, tiltings or jousts shall be made by any persons of his realm without his special licence.<sup>48</sup>

The meaning of the above terms puts the term “going armed” in a completely different light than *Young* suggests. The *Dictionarium Anglo-Britannicum* provides this definition: “Turnament, (F.), Justing, or Tilting, a Warlike Exercise of armed Knights, or Gentlemen fighting with one another on Horse-Back, with Lances or Spears; a Sport much us’d in former Times, but now quite laid aside.”<sup>49</sup> Peaceably carrying a dagger or bow and arrow for self-defense would not be “going armed” in the above context.

In any event, these royal decrees are wholly irrelevant. Edward I Longshanks was one of the most ruthless kings who is best known today for his cruelty toward the Scots (he ordered the indescribably gruesome execution of William Wallace of “Braveheart” fame). His son Edward II fought against reforms by the barons and was eventually forced to abdicate, after which he was murdered. The Founders would have held in contempt the idea that they must get “the king’s license” to do anything, whether carry arms or speak freely. Instead, they fired the shot heard

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<sup>45</sup>*Id.* at 786.

<sup>46</sup>*Id.* at 787.

<sup>47</sup>*Id.* at 786, quoting 4 *Calendar Of The Close Rolls, Edward I, 1296–1302*, at 588 (July 16, 1302, Westminster) (H.C. Maxwell-Lyte ed., 1906).

<sup>48</sup>4 *Calendar* at 588.

<sup>49</sup>John Kersey, *Dictionarium Anglo-Britannicum or a General English Dictionary* (1708).

‘round the world to prevent the king’s troops from confiscating their unlicensed firearms.

## B. The Statute of Northampton and Related Laws Applied to Affrays and Violent Crime

“Any doubt as to the scope of government’s authority to disarm the people in public was dispelled with Parliament’s 1328 enactment of the Statute of Northampton,” *Young* confidently announces, “which effectively codified the firearms restrictions that preceded it.”<sup>50</sup> “Firearms” restrictions? The matchlock was the first functional gun, and it appeared around 1440 in Nuremberg and in other parts of Europe in the next thirty years.<sup>51</sup> That aside, the Statute provided that no person shall “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 . . . .”<sup>52</sup>

Did this archaic language ban going armed per se, or did it do so only in affray of the peace? English courts would read it in the latter manner, as discussed below. But *Young* immediately takes a great leap forward and, citing a law review article, asserts: “To the majority of fourteenth-century Englishmen, the Statute of Northampton was generally understood to be ‘a complete prohibition on carrying weapons in public, at least in populated areas.’”<sup>53</sup> How would anyone know what “the majority” of Englishmen then understood about the Statute, if they were even aware of it? The article’s author makes no such bold claim about the public, and instead simply asserts that to have been the understanding of the Statute. His proof? Two other law review articles, one of which agreed and the other of which disagreed, stating that “the statute only prohibited going armed in defensive armor . . . .”<sup>54</sup>

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<sup>50</sup>*Id.*

<sup>51</sup>Robert Held, *The Age of Firearms* 26 (1957).

<sup>52</sup>Edw. 3, 258, ch. 3 (1328).

<sup>53</sup>*Young*, 992 F.3d at 788, citing Mark Anthony Frassetto, “To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment,” 43 S. Ill. U. L.J. 61, 67 (2018).

<sup>54</sup>Frassetto, “To the Terror of the People,” at 67. He cites, *id.* n.27, Patrick Charles, “The Faces of the Second Amendment Outside of the Home: History Versus Ahistorical Standards of Review,” 60 CLEV. ST. L. REV. 1, 11 (2012); Clayton E. Cramer, “The Statute of Northampton (1328) and Prohibitions on the Carrying of Arms (Sept. 19, 2015) (unpublished manuscript) (available at SSRN: <https://ssrn.com/abstract=2662910>) (arguing the statute only prohibited going armed in defensive armor).

*Young* next asserts, “The statute applied to anyone carrying arms, without specifying whether the arms were carried openly or secretly. In 1350, Parliament specifically banned the carrying of concealed arms.”<sup>55</sup> For that, the court purports to quote 25 Edw. 3, 320, st. 5, c. 2, § 13 (1350), as follows: “[I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other . . . it shall be judged . . . Felony or Trespass, according to the Laws of the Land.” (alteration in original).<sup>56</sup>

Astonishingly, the court deleted the essence of the crime, shown here in italics: “[I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, *to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance . . .* it shall be judged . . . Felony or Trespass, according to the Laws of the Land of old Times used . . .” The offense thus consisted of gangs riding with concealed arms to murder, rob, or kidnap. It did not prohibit a peaceable person from carrying concealed arms. The court overzealously manipulated the statute in an effort to prove what it cannot prove. Had an attorney, an officer of the court, made such a misrepresentation, sanctions would be in order.

The Statute was expanded in 1396, *Young* continues, to encompass the bearing of a Sallet, Skull of Iron, or “other Armour.”<sup>57</sup> The Sallet and Skull of Iron were medieval combat helmets.<sup>58</sup> Presumably, other armor would have been similar armor designed for the battlefield. As discussed below, these were the kinds of warlike instruments that would create terror among the public, which is what the Statute aimed to discourage. There is no evidence that it was aimed at burghers and peasants peaceably carrying arms to protect themselves from robbers and murderers.

*Young* next describes the enforcement of the Statute, but the orders given by Edward III again indicate that repression of roving bands of knights or criminals was the object. The court quotes a November 1328 order to sheriffs “to cause the statute made in the late parliament at Northampton prohibiting men coming armed before justices or other ministers of the king, or going armed, etc., to be observed,”<sup>59</sup> but ignored the related order to investigate “the malefactors who have made assemblies of men-at-arms or have ridden or gone armed in his bailiwick,

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<sup>55</sup>*Young*, 992 F.3d at 788.

<sup>56</sup>*Id.* at 788-89.

<sup>57</sup>*Id.* at 789, citing 20 Ric. 2, 92–93, ch. 1 (1396).

<sup>58</sup>“Medieval Helmets,” <https://www.pinterest.com/pin/210472982560782548/>; “Medieval Helmet,” <https://medievalbritain.com/type/medieval-life/weapons/medieval-helmet/>.

<sup>59</sup>*Young*, 992 F.3d at 789.

contrary to the statute and the king's proclamation . . . ."<sup>60</sup> Sheriffs were ordered to imprison "all those whom he shall find going armed, with their horses and armor."<sup>61</sup> That doesn't exactly sound like serfs carrying protective staffs or bows.

The court gives a snippet of a 1334 order "which reinforced the statute's exceptions for those on the king's errand,"<sup>62</sup> but leaves out the critical part informing that "the king has learned that several malefactors and disturbers of the peace, not respecting these statutes, making assemblies and illicit gatherings both by day and night in York, its suburbs and neighbourhood, go about armed and lie in wait for those coming and going to and from that city, and staying there, both the king's ministers and other lieges, and beat, wound and rob them . . . ."<sup>63</sup> The law was aimed at these aggressors, not their victims.

*Young* claims that "restrictions on carrying also permeated public life,"<sup>64</sup> but its only proof is the example that on Friday before the Feast of St. Thomas, "All guests in hostelries were to be warned against going armed in the City."<sup>65</sup> But this indicated that many guests may have arrived at the hostelries armed and were told to leave their arms there. The Feast of St. Thomas was a major event<sup>66</sup> that was likely attended by the king and his ministers, so that this was likely just a temporary restriction.

The court ends its discussion of the enforcement of the Statute by noting Richard II's 1377 order to continue enforcing the Statute.<sup>67</sup> But it left out the persons to which the Statute was aimed – those who "have gone and go armed and bearing arms wander hither and thither,

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<sup>60</sup>1 *Calendar Of The Close Rolls, Edward III, 1327-1330*, at 420 (Nov. 10 and 11, 1328) (H.C. Maxwell-Lyte ed., 1896).

<sup>61</sup>2 *Calendar Of The Close Rolls, Edward III, 1330-1333*, at 131 (April 3, 1330, Woodstock) (H.C. Maxwell-Lyte ed., 1898).

<sup>62</sup>*Young*, 992 F.3d at 789.

<sup>63</sup>Letter to Mayor and Bailiffs of York (Jan. 30, 1334), in 3 H. Maxwell-Lyte ed., *Calendar of the Close Rolls, Edward III, 1333-1337*, at 294 (London: Her Majesty's Stationery Office, 1898).

<sup>64</sup>*Young*, 992 F.3d at 789.

<sup>65</sup>1 *Calendar of Plea & Memoranda Rolls of the City of London, 1323-1364*, at 156 (Dec. 19, 1343) (A.H. Thomas ed., 1898).

<sup>66</sup>"St. Thomas's Day," <https://encyclopedia2.thefreedictionary.com/St.+Thomas%27s+Day>.

<sup>67</sup>*Young*, 992 F.3d at 790.

laying snares for men coming to or from the town and those dwelling therein, beating, wounding and evil treating them, robbing some of their property and goods, . . . in breach of the peace and to the terror of the people in those parts.”<sup>68</sup> It was not aimed at the potential victims of these crimes who might carry arms for protection.

So *Young* ends its discussion of enforcement of the Statute in 1377. What’s the significance of all of that detail? The court appears to be lining up one item after another so that it has far more citations than the dissent. What possible relevance are these orders of medieval monarchs to the Second Amendment and the Founders? None at all.

C. *Rex v. Knight*, the Decisive Precedent, Held that Going Armed was  
Lawful Unless Done in a Manner to Terrorize the Subjects

*Young* discusses two cases that bear on the Statute, the first of which is almost irrelevant and the second of which is dispositive of how the Statute was interpreted. This discussion is a low point in the opinion, coming as it does from highly educated judges who routinely apply complex precedents to adjudicate cases.

The first is *Chune v. Piott* (1615), a case decided by the King’s Bench which involved a plaintiff who sued a sheriff for an unlawful arrest arising out of the plaintiff’s attempt to help a prisoner escape. The Statute of Northampton was not involved. Justice Croke, one of four judges who opined in the case, mentioned as an analogy that “the sheriffe hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, *in terrorem populi Regis*; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.”<sup>69</sup> Thus, the carrying of the weapon must be *in terrorem populi Regis* (to the terror of the King’s subjects), and the arrest could be made even if the suspect did not break the peace in the sheriff’s presence.

*Young* correctly states: “The phrase *in terrorem populi Regis*—“to the terror of the king’s people”—might suggest one of two things: First, that there must be some proof of the carrier’s *intent* to terrorize the people or, second, that there must be some proof of the *effect* (whether intended or not) on the people.”<sup>70</sup> But it then jumps to the conclusion that neither was an element of the offense because the sheriff could arrest the person just for carrying “notwithstanding he doth not break the peace.”<sup>71</sup> Not so. *Chune* explicitly stated that if the sheriff “sees any one to

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<sup>68</sup>1 *Calendar Of The Close Rolls, Richard II, 1377-1381*, at 34 (Dec. 1, 1377, Westminster) (H.C. Maxwell-Lyte ed., 1914).

<sup>69</sup>*Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615).

<sup>70</sup>*Young*, 992 F.3d at 790.

<sup>71</sup>*Id.*

carry weapons in the high-way, *in terrorem populi Regis*,” he could arrest him even if the person didn’t separately “break the peace in his presence.” The sheriff could not make an arrest if he only “sees any one to carry weapons in the high-way” peaceably and thus *not* “*in terrorem populi Regis*.”

Hopefully the Ninth Circuit would not so sloppily misconstrue modern criminal laws in such a manner. If it did, massive numbers of criminal defendants could be convicted without any strict adherence to the actual elements of the offenses.

Next comes the court’s misconstruction of the two reported cases concerning Sir John Knight, which constitute *the* definitive interpretation by the King’s Bench of the Statute of Northampton. One version of the decision reported an information against Knight based on the Statute, which it characterized as having prohibited “going or riding armed in affray of peace . . . .” It was alleged that Knight “did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King’s subjects, *contra formam statuti*.”<sup>72</sup> The case was tried before a jury and “the defendant was acquitted.” The Chief Justice said that the meaning of the Statute “was to punish people who go armed to terrify the King’s subjects. It is likewise a great offence at the common law, as if the King were not able or willing to protect his subjects . . . .”<sup>73</sup>

So the offense was going armed “in affray of peace,” *i.e.*, in a manner “to terrify the King’s subjects.” But *Young* is unwilling to concede the obvious, ignoring those clear words and citing that part of the decision to conclude that “the meaning of the Statute of Northampton was to punish those who go armed.” It adds that, based on the comment about the King being unable to protect his subjects – which in no way changes the elements of the crime – “perhaps that Knight was acquitted because he had not intended criticism of the king’s authority or ability to keep the peace.” The “authority” for that claim is the ever-ready law review article spin that invents the claim that “Knight defended himself on the grounds of his ‘active loyalty’ to the crown rather than by denying that he had created a public terror.”<sup>74</sup> Nothing in the King’s Bench opinion even remotely insinuates that.

The other version of the Knight opinion recited counsel for defendant’s argument: “This statute was made to prevent the people’s being oppressed by great men; but this is a private matter, and not within the statute.” (Recall the turbulent times of Edward III with bodies of knights fighting it out.) The Chief Justice held: “But tho’ this statute be almost gone in desuetudinem [disuse], yet where the crime shall appear to be malo animo [with evil intent], it will come within the Act (tho’ now there be a general connivance to gentlemen to ride armed for

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<sup>72</sup>*Sir John Knight’s Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B. 1686).

<sup>73</sup>*Id.*

<sup>74</sup>*Young*, 992 F.3d at 790, quoting Frassetto, 43 S. Ill. U. L.J. at 70.

their security) . . . .”<sup>75</sup> While ignoring this parenthetical, *Young* concedes that Knight’s acquittal was due to his lack of “mal-intent to terrify the people.”<sup>76</sup>

*Young* cites a third source on the Knight case, a diary kept by Narcissus Luttrell, which noted the charge that he was “goeing with a blunderbus in the streets, to the terrifyeing his majesties subjects,” and that the jury acquitted him, “not thinking he did it with any ill design . . . .”<sup>77</sup> This just confirms again that he was charged with going armed to the terror of the subjects, and the jury acquitted him because he did not do so with evil intent.

There are other original sources that the court does not cite, and they all speak with one voice. It turns out that Knight was going armed for protection after being attacked.<sup>78</sup> And yet *Young* implies that we just don’t know what occurred – “[w]e cannot resolve this dispute in the original sources, much less in the academic literature” – and that the court bound him to his good behavior, “making Knight’s ‘acquittal’ more of a conditional pardon.”<sup>79</sup> This final attempt to muddy the water just doesn’t work. “If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation,” according to Blackstone.<sup>80</sup> Courts still had a power to bind a person to keep the peace.<sup>81</sup>

*Young* doesn’t bother to mention any subsequent English cases, including those that were right on point. The King’s Bench held in 1914 that the Statute of Northampton made it an offense “to ride or go armed without lawful occasion *in terrorem populi*,” adding:

The words “in affray of the peace” in the statute, being read forward into the “going armed,” render the former words part of the description of the statutable offence. The indictment, therefore, omits two essential elements of the offence – (1) That the going armed was without lawful occasion; and (2) that the act was *in*

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<sup>75</sup>*Rex v. Knight*, Comb. 38, 90 Eng. Rep. 330 (K.B. 1686).

<sup>76</sup>*Young*, 992 F.3d at 790, quoting 1 Narcissus Luttrell, *A Brief Historical Relation of State Affairs, September 1678 to April 1714*, at 380, 389 (Oxford Univ. Press 1857).

<sup>77</sup>*Young*, 992 F.3d at 790-91.

<sup>78</sup> Roger Morrice, *The Entring Book of Roger Morrice 1677-1691*, at 307-08 (Woodbridge, England: Boydell Press, 2007).

<sup>79</sup>*Id.* at 791.

<sup>80</sup>4 Blackstone, *Commentaries* \*335.

<sup>81</sup>*Id.* at \*249.

*terrorem populi.*<sup>82</sup>

An example of such violation, as another court held, was “firing a revolver in a public place, with the result that the public were frightened or terrorized.”<sup>83</sup> By contrast, the last decision ever to mention the Statute stated, “mere possession of a weapon, without threatening circumstances . . ., is not enough to constitute a threat of unlawful violence. So, for example, the mere carrying of a concealed weapon could not itself be such a threat.”<sup>84</sup>

#### D. English Treatises Limited the Offense to Carrying Dangerous and Unusual Weapons

*Young* begins its analysis of English treatises by reference to a guide to legal restrictions in London published in 1419 providing that only the privileged classes could carry arms.<sup>85</sup> Imagine what our Founders would have thought of such monarchical tyranny. In 1775, at Lexington and Concord, they essentially took arms against British orders not to go armed other than in the service of the King.

Next, *Young* acknowledges what William Hawkins – one of the greatest influences in the minds of the Founders – wrote on the subject. It was an affray where “a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people,” “no wearing of arms is within the meaning of this statute [of Northampton], unless it be accompanied with such circumstances as are apt to terrify the people,” and thus that “persons of quality” did not violate the statute by wearing “common weapons . . . for their ornament or defence.”<sup>86</sup> That should end the discussion.

But *Young* falls off the wagon again. A law review article to the rescue – ignoring Hawkins’ general statements, the court asserted that only “certain classes of people could carry arms” in that “public carry was not threatening when it was done by the wealthy . . . .”<sup>87</sup> The court goes on to misconstrue Hawkins to say that “proactive self-defense was not a good enough

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<sup>82</sup>*Rex v. Smith*, 2 Ir. R. 190, 204 (K.B. 1914).

<sup>83</sup>*Rex v. Meade*, 19 L. Times Repts. 540, 541 (1903).

<sup>84</sup>*I v. Director Of Public Prosecutions*, 2 Cr. App. R. 14, 226 (Lords 2001).

<sup>85</sup>*Young*, 992 F.3d at 792, quoting John Carpenter, *Liber Albus: The White Book of the City of London* 335 (Henry Thomas Riley ed., 1862).

<sup>86</sup>*Id.*, quoting 1 William Hawkins, *A Treatise of the Pleas of the Crown* 488-89 (John Curwood ed., 1824).

<sup>87</sup>*Id.*, citing Frassetto, 43 S. Ill. U. L.J. at 67–69.



reason to go armed openly.”<sup>88</sup> But Hawkins stated: “[A] man cannot excuse the wearing [of] such armour in public, by alleging that such a one threatened him, and [that] he wears it for the safety of his person from his assault.”<sup>89</sup> By “such armour,” Hawkins meant unusual, warlike armor that would alarm the subjects; by contrast, on the same page, he wrote that “persons armed with privy coats of mail” for self-defense do not violate the Statute “because they do nothing in terrorem populi.”<sup>90</sup> Exactly – privy coats of mail could not be seen because they were worn under one’s garments, and thus could not terrorize anyone.

*Young*’s next witness is Joseph Keble, but he is quoted just for saying “if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike a fear upon others that be not armed.”<sup>91</sup> The court is confused about whether that refers to “unusual weapons” – the same sentiment expressed by Hawkins above – or “to common weapons worn when one would not expect it.”<sup>92</sup> Before this decision, who ever suggested the latter?

According to Blackstone, “[t]he offence of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the Statute of Northampton.”<sup>93</sup> Ignoring the reference to dangerous or unusual weapons, *Young* changes this to mean that “the mere act of going armed in and of itself terrified the people.”<sup>94</sup> Lord Coke said that one could not “goe armed, by night or by day, &c. before the Kings Justices in any place whatsoever.”<sup>95</sup> But *Young* feels compelled to delete the context of being “before the Kings Justices” so that it reads “goe nor ride armed by night nor by day . . . in any place what[s]oever.”<sup>96</sup>

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<sup>88</sup>*Id.*

<sup>89</sup>*Id.*, quoting 1 Hawkins, *A Treatise of the Pleas of the Crown* at 489.

<sup>90</sup>1 Hawkins at 489.

<sup>91</sup>*Young*, 992 F.3d at 792-93, quoting Joseph Keble, *An Assistance to the Justices of the Peace, for the Easier Performance of their Duty* 147 (1689).

<sup>92</sup>*Id.* at 793.

<sup>93</sup>4 William Blackstone, *Commentaries* \*148-49 (1769).

<sup>94</sup>*Young*, 992 F.3d at 793.

<sup>95</sup>Edward Coke, *The Third Part of the Institutes of the Laws of England* 160 (E. and R. Brooke ed., 1797).

<sup>96</sup>*Young*, 992 F.3d at 793.

## E. The English Bill of Rights Confirmed the Ancient Right to Have Arms

“The English Bill of Rights created, for the first time, a right for certain people to possess arms, but it was a conditional right.” *Young* informs us.<sup>97</sup> Actually, it “created” nothing, and instead declared thirteen “true, ancient and indubitable rights,” including the following: “That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law.”<sup>98</sup> The Second Amendment specified no such conditions on the right of all of “the people” to bear arms. In his notes introducing the bill of rights in Congress, James Madison observed the fallacy “as to English Decl[aratio]n. of Rights” that it limited “arms to protest[an]ts.”<sup>99</sup> And St. George Tucker contrasted the English Declaration with the Second Amendment’s wording that “the right of the people to keep and bear arms shall not be infringed,” adding, “this without any qualification as to their condition or degree, as is the case in the British government.”<sup>100</sup>

*Young* ignored relevant opinions by the English courts on questions of English law. An English court gave the following jury instruction in an 1820 case: “But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business.”<sup>101</sup>

Blackstone characterized the right as “a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”<sup>102</sup> *Young* reduces this to a snippet about “due restrictions” only and attributes to Blackstone the averment that there was a “prohibition on publicly carrying weapons,”<sup>103</sup> which is not to be found in the general term “have Arms for their

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<sup>97</sup>*Id.* at 793.

<sup>98</sup>An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c.2, (1689).

<sup>99</sup>Madison, Notes for Speech in Congress, June 8, 1789, 12 *The Papers of James Madison*, Charles F. Hobson *et al.* eds., 193-94 (Charlottesville: University Press of Virginia, 1979).

<sup>100</sup>1 Blackstone, *Commentaries* \*143-44 n.40 (St. George Tucker ed. 1803).

<sup>101</sup>*Rex v. Dewhurst*, 1 State Trials, New Series 529, 601-02 (1820).

<sup>102</sup>1 Blackstone, *Commentaries* \*139.

<sup>103</sup>*Young*, 992 F.3d at 793.

Defence”<sup>104</sup> and which ignores Blackstone’s reference to “dangerous or unusual weapons.”<sup>105</sup>

Finally, our Bill of Rights is not bound by the English Declaration. Just before discussing the right to arms, Blackstone addressed “the right of petitioning the king, or either house of parliament, for the redress of grievances.” He added that no petition “for any alteration in church or state, shall be signed by above twenty persons, . . . nor shall any petition be presented by more than ten persons at a time. But, *under these regulations*, it is declared by the statute 1 W. & M. st. 2. c. 2, that the subject hath a right to petition . . . .”<sup>106</sup> St. George Tucker noted about this passage: “The right of petitioning is not subject to any limitation or restriction in the United States.”<sup>107</sup> Would the Ninth Circuit limit our First Amendment right to petition to the more limited right to petition under the English Declaration?

#### IV. AMERICA WAS FOUNDED ON A ROBUST RIGHT TO BEAR ARMS

##### A. Colonial Laws Often Mandated the Carrying of Arms

“The colonists shared the English concern that the mere presence of firearms in the public square presented a danger to the community,” *Young* asserts.<sup>108</sup> But the court presents no evidence that “the colonists” had any such concern. All it could dig up was a 1686 law of East New Jersey, which did not apply in West New Jersey, providing that no person may “privately . . . wear any pocket pistol” or certain other weapons – open carry was fine – and that “no planter shall ride or go armed” with certain weapons except when traveling.<sup>109</sup> Planters must have been deemed second-class subjects.

That law may not have survived the Glorious Revolution which led to the Declaration of Rights, as a 1694 East New Jersey law made it unlawful for a slave “to carry any gun or pistol” into the woods or plantations unless with the owner or a white man, which implied that the latter

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<sup>104</sup>An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c.2, (1689).

<sup>105</sup>4 William Blackstone, *Commentaries* \*148–49 (1769).

<sup>106</sup>1 Blackstone, *Commentaries* \*143 (St. George Tucker ed. 1803) (emphasis added). Blackstone cited 13 Car. II. st. 1. c. 5, for the limits on petitioning.

<sup>107</sup>*Id.* n.39 (Tucker ed.).

<sup>108</sup>*Young*, 992 F.3d at 794.

<sup>109</sup>*Id.*, quoting An Act against Swords, &c., 1686 N.J. Laws 289, 289-90, ch. IX.

persons could carry such arms.<sup>110</sup>

*Young*'s only other evidence was a Massachusetts Bay law of 1692 and a New Hampshire law of 1699 that prohibited going armed "offensively,"<sup>111</sup> not going armed peaceably. So much for "the colonists" being concerned about "the mere presence of firearms" in public.

*Young* then pivots to "colonial laws that not only permitted public carry, but mandated it," such as when going to church, to public gatherings, and traveling. These many laws together with the virtually non-existent restrictions leads the court to assert that "the colonies assumed that they had the power to *regulate* – whether through *mandates* or *prohibitions* – the public carrying of arms."<sup>112</sup> But nothing in the power to require implies a power to ban. The fact that going armed was so often required only shows how commonplace it was for everyone to carry arms.

Finally, the court mentions Virginia's 1786 statute providing that "no man, great nor small, . . . [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country."<sup>113</sup> But that required proof as an element of the offense not just that one went armed, but also that he did so "in terror of the Country." The law was drafted by a Committee of Revisors, of which Thomas Jefferson played the leading role.<sup>114</sup> Had it been read to ban the mere carrying of firearms, Jefferson would have been one of its biggest violators, as he regularly went armed and defended the right to do so.<sup>115</sup>

The court skips over the history of the British attempts to disarm the Americans as a leading cause of the American Revolution, the proposal of the Constitution without a bill of rights that led to an outcry for recognition of the right to bear arms, and the discussion in the public sphere leading to the ratification of the Second Amendment. It's like nothing relevant was

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<sup>110</sup>An Act concerning Slaves, &c., § 1, East New Jersey Laws, October 1694, ch.II, L&S 340-342.

<sup>111</sup>*Young*, 992 F.3d at 794-95, quoting An Act for the Punishing of Criminal Offenders, 1692 Mass. Laws No. 6, at 11–12, and 1699 N.H. Laws. 1.

<sup>112</sup>*Young*, 992 F.3d at 795.

<sup>113</sup>*Id.*, quoting 1786 Va. Laws 33, ch. 21.

<sup>114</sup>Jefferson, *The Papers of Thomas Jefferson*, Julian P. Boyd ed., 519-20 (Princeton: Princeton University Press, 1951).

<sup>115</sup>See Stephen P. Halbrook, *The Founders' Second Amendment* 131, 260, 316-18 (Lanham, Md.: Rowman & Littlefield, 2008).

said in the period 1768 to 1791 relevant to the right to bear arms.<sup>116</sup> Better to focus on medieval monarchical decrees and East New Jersey's aberration to prove that no right to bear arms was recognized. Especially don't look at the text behind the curtain.

### B. Post-Ratification Laws Only Banned Going Armed Offensively, to the Terror of the Citizens

*Young* is eager to detail what it considers to be post-ratification laws in the states, but skipped over the state declarations of rights and lack of any restrictions during the ratification and early post-ratification period. For instance, Pennsylvania's Declaration of Rights of 1776 provided: "That the people have a right to bear arms for the defense of themselves, and the state . . ." <sup>117</sup> It was strengthened in 1790 to say that the right "shall not be questioned."<sup>118</sup> Like every other state, Pennsylvania had no law that restricted the peaceable carrying of arms.<sup>119</sup> *Young* has no comment on this vast void and instead searches for what did not exist.

The court's first example is the alleged North Carolina law of 1792 that repeated the Statute of Northampton. The court should have thought something was fishy when it noted that the law "did not even remove the references to the king . . ." <sup>120</sup> The fact is that the citation – 1792 N.C. Laws 60, ch. 3 – is bogus. The actual source was a 1792 book by a lawyer who thought he was compiling the English statutes in force in North Carolina.<sup>121</sup> Later compilers wrote that this work "was utterly unworthy" as "omitting many statutes, always in force, and inserting many others, which never were, and never could have been in force . . ." <sup>122</sup>

The court's only other example is the Massachusetts law of 1795 that authorized the arrest of "such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth."<sup>123</sup> Once again, this only prohibited going armed in an offensive manner

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<sup>116</sup>See Halbrook, *The Founders' Second Amendment, passim*.

<sup>117</sup>Pennsylvania Declaration of Rights, Art. XIII (1776).

<sup>118</sup>Pennsylvania Declaration of Rights, Art. XXI (1790).

<sup>119</sup>See Stephen P. Halbrook, *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees* (1989) (analyzing the laws of the original states).

<sup>120</sup>*Young*, 992 F.3d at 797.

<sup>121</sup>François-Xavier Martin, *A Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina* 60-61 (1792).

<sup>122</sup>"Preface of the Commissioners of 1838," *Revised Code of North Carolina*, xiii (1855).

<sup>123</sup>*Young*, 992 F.3d at 797, quoting 1795 Mass. Acts 436, ch. 2.

that would induce fear or terror, all being elements of the offense.

### C. Nineteenth-Century Surety Laws Only Applied with a Showing of Reasonable Cause to Fear Injury or a Breach of the Peace

*Young* finds early nineteenth-century statutes on the manner of going armed, but not on going armed per se. Tennessee prohibited “go[ing] armed to the terror of the people, or privately carry[ing]” certain weapons; Louisiana banned having “any concealed weapon”; and Maine punished those who “ride or go armed offensively, to the fear or terror of the good citizens of this State.”<sup>124</sup>

Tennessee later passed an outlier law against “carrying . . . belt or pocket pistols, either in public or in private,”<sup>125</sup> but it would have been considered unconstitutional under that state’s high court ruling in *Simpson v. State* (1833), which held that “the people may carry arms” under the state guarantee, adding: “By this clause of the constitution, an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature . . . .”<sup>126</sup> *Young* fails to mention this decision.

Massachusetts adopted a law in 1836 that, as *Young* states, “became a template for other states.” The credibility of the court’s thesis stands or falls in how it represents this law. The law stated:

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 [sic] 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, for a term not exceeding six months, with the right of appealing as before provided.<sup>127</sup>

This law simply did not apply to the peaceable carrying of arms. One could go armed at will unless a complaint was made by a “person having reasonable cause to fear an injury, or breach of the peace,” and a magistrate would have to find that such “reasonable cause” – not mere suspicion or speculation – existed. Even if reasonable cause to fear injury or a breach of the peace was found, the person going armed would be justified if he had “reasonable cause to

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<sup>124</sup>*Id.* at 798-99.

<sup>125</sup>*Id.* at 799.

<sup>126</sup>*Simpson v. State*, 13 Tenn. Reports (5 Yerg.) 356, 360 (1833).

<sup>127</sup>1836 Mass. Acts 750, ch. 134, § 16.

fear” assault, injury, or violence to his person, family, or property. If not, he would be required to find sureties to keep the peace, after which he could continue going armed as long as he kept the peace.

The Ninth Circuit routinely interprets complex statutes today, but seems baffled by this simple law. Ignoring that there must first be a “complaint of any person having reasonable cause to fear an injury, or breach of the peace,” the court averred that public carry was limited to “persons who could demonstrate their need to carry for the protection of themselves, their families, or their property. In effect, the Massachusetts law provided that such weapons could not be carried in public unless the person so armed could show ‘reasonable cause.’”<sup>128</sup> How could this sophisticated court ignore that anyone could go armed without getting to the issue of whether the person was “without reasonable cause to fear an assault [sic] or other injury,” unless reasonable cause was first found that a specific person feared injury or breach of the peace from the person carrying arms?

Later in the opinion, *Young* returns to the Massachusetts law, but cannot get the procedure right. It states: “If a person was found with one of the enumerated weapons, . . . then ‘any person having reasonable cause to fear an injury, or breach of the peace’ could file a complaint.”<sup>129</sup> That’s upside down. One could be found with a weapon anytime without consequence. It was only when a person with reasonable cause to fear an injury filed a complaint that the process would begin. The court further read the statute to say “that it gave permission to people to carry concealable arms if they had ‘reasonable cause,’ which the statute defined as fear of assault” or other injury.<sup>130</sup> Not so. The statute did not purport to “give permission” to carry – it had nothing to do with peaceable carry and only applied if the person threatened another and was not carrying for self-defense.

“A number of states followed Massachusetts and adopted some version” of the above, *Young* correctly states, citing several of them.<sup>131</sup> That only further refutes the court’s central thesis, as all of these laws require offensive behavior and complaints before carrying would be questioned.

*Young* next partially quotes part of an 1862 Pennsylvania law as follows: “*If any person, not being an officer on duty in the military or naval service of the state or of the United States,*

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<sup>128</sup>*Young*, 992 F.3d at 799.

<sup>129</sup>*Id.* at 819.

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* at 799-800.

shall go armed with dirk, dagger, sword or pistol . . . .”<sup>132</sup> However, the deleted part includes the routine requirement of a “complaint of any person having reasonable cause to fear a breach of the peace therefrom,” and the defense of “reasonable cause to fear an assault or other injury or violence to his family, person or property . . . .”<sup>133</sup>

Finally, *Young* recites a handful of postbellum statutes primarily in the “Wild West” states and territories that actually prohibited carrying certain weapons, whether openly or concealed, or which applied that rule to towns.<sup>134</sup> This time period is getting far afield from the Founding, and some of these laws were open to constitutional challenge.<sup>135</sup> But it is definitely not the case, as the court boldly asserts, that “the states broadly agreed that small, concealable weapons, including firearms, could be banned from the public square.”<sup>136</sup> The court made no attempt to examine the law of each state nationwide – many of which had no regulation at all – and it read the laws of key states like Massachusetts completely wrong.

#### D. Courts Upheld Concealed Carry Bans Only Because Open Carry was Lawful

As the court recognizes, most of the early precedents are “largely from Southern states,”<sup>137</sup> but it doesn’t ask itself why – the answer being that there were largely no restrictions on peaceable carry in the Northern states. That confirmed that the right to bear arms was unquestioned, other than restrictions on carrying concealed, mostly in the Southern states. That of course refutes *Young*’s narrative that peaceable carry was largely banned.

Kentucky’s Constitution provided: “That the right of the citizens to bear arms in defense of themselves and the State shall not be questioned.”<sup>138</sup> Kentucky passed the first ban on concealed carry in 1813, and its high court in *Bliss v. Commonwealth* (1822) declared it unconstitutional, given that the right to bears arms “existed at the adoption of the constitution . . .

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<sup>132</sup>*Id.* at 800, citing 1862 Pa. Laws 250, § 6 (emphasis added).

<sup>133</sup>The law originally passed as the Act of March 31, 1860, P.L. 427, § 6, 19 P.S. § 23. See *Commonwealth v. Rice*, 8 Pa. D. & C. 295, 297-98 (Quarter Sess. 1926) (noting the requirement of a “complaint of *any* person having reasonable cause to fear a breach of the peace”).

<sup>134</sup>*Young*, 992 F.3d at 800-01.

<sup>135</sup>E.g., *In re Brickey*, 70 P. 609 (Idaho 1902) (declaring carry ban unconstitutional).

<sup>136</sup>*Young*, 992 F.3d at 801.

<sup>137</sup>*Id.* at 802.

<sup>138</sup>Ky. Const., Art. XII, § 23 (1792).



[and] consisted in nothing else but in the liberty of the citizens to bear arms.”<sup>139</sup> The guarantee was then revised to provide that “the general assembly may pass laws to prevent persons from carrying concealed arms.”<sup>140</sup> This obviously solidified the right to open carry. *Young* gloats that “courts in Georgia, Alabama, and Louisiana deviated from *Bliss* by holding that restrictions on concealed weapons were permissible.”<sup>141</sup> But this shows only that the few states even to ban concealed carry saw open carry as a right that could not be infringed.

The Georgia high court held that a carry ban, to the extent it “contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void.”<sup>142</sup> It relied on the Second Amendment, as Georgia had no bill of rights guarantee. Alabama’s high court held that “the Legislature cannot inhibit the citizen from bearing arms openly . . . .”<sup>143</sup> And the Louisiana high court reasoned that the right to carry arms openly “is the right guaranteed by the Constitution of the United States . . . .”<sup>144</sup> *Young* discusses these cases in support of its thesis that total carry bans are constitutional, yet they only show that the courts in the small minority of states that banned concealed carry upheld the right to carry openly.<sup>145</sup>

*Young* finally finds the statute and the decision it was looking for, but both were outliers dated *eighty years* after ratification of the Second Amendment. But it hid its eyes to an earlier decision by the same court under a stronger state constitutional guarantee. In 1859, the Texas high court wrote in *Cockrum v. State*: “The right of a citizen to bear arms, in lawful defense of himself or the State, is absolute. . . . A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the law-making power.”<sup>146</sup> That case didn’t make *Young*’s cut.

Instead, *Young* devotes a lengthy paragraph to *English v. State* (1871), in which the Texas high court upheld a ban on carrying pistols and certain other weapons (excluding long guns)

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<sup>139</sup>*Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92 (1822).

<sup>140</sup>Ky. Const., art. XIII, § 25 (1850).

<sup>141</sup>*Young*, 992 F.3d at 803.

<sup>142</sup>*Nunn v. State*, 1 Ga. 243, 251 (1846).

<sup>143</sup>*State v. Reid*, 1 Ala. 612, 619 (1840).

<sup>144</sup>*State v. Chandler*, 5 La. Ann 489, 490 (1850).

<sup>145</sup>*Young*, 992 F.3d at 803-05.

<sup>146</sup>*Cockrum v. State*, 24 Tex. 394, 401-02 (1859).

unless one had reasonable grounds to fear an unlawful attack or was traveling.<sup>147</sup> At that point, the Texas guarantee was watered down to recognize the right to bear arms only “under such regulations as the legislature may prescribe.”<sup>148</sup> Any restriction would be upheld under such a standard. As for the Second Amendment, *Young* notes the holding in *English* that the Amendment’s scope was limited to arms that were “useful and proper to an armed militia.”<sup>149</sup> Query whether *Young* would agree with *English*’s recognition of “the right to ‘keep’ such ‘arms’ as are used for purposes of war,” which included not just the musket and pistol, but also “the field piece, siege gun, and mortar.”<sup>150</sup>

*Young* next discusses the Tennessee case of *Andrews v. State* (1871), but it conflicts with the thesis that a state may ban the bearing of arms. Tennessee banned the carrying of a “belt or pocket pistol or revolver” except when on a journey. The state’s high court held this law to violate the right of the citizens “to bear arms for their common defense” as applied to a “pistol known as the repeater,” which “is a soldier’s weapon – skill in the use of which will add to the efficiency of the soldier.”<sup>151</sup> *Young* acknowledges the holding that “the carrying of [a repeater] could not be constitutionally prohibited.”<sup>152</sup>

In a later decision, the Tennessee court “upheld an indictment for carrying an army pistol that was not displayed in hand.”<sup>153</sup> Like Tennessee, Arkansas protected the right to bear arms “for the common defense,” and its high court upheld a prohibition on the carrying of “such pistol as is used in the army or navy of the United States, in any manner, except uncovered, and in the hand.”<sup>154</sup> *Young* cites these cases to show that legislatures may regulate “the permissible manner

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<sup>147</sup>*Young*, 992 F.3d at 805, citing *English v. State*, 14 Am. Rep. 374, 35 Tex. 473 (1871).

<sup>148</sup>Tex. Const., Art. I, § 13 (1868). It has been said that *English* was decided by “a court established by a State constitution (that of 1869) which was the product of military occupation and the disfranchisement of most of the State’s inhabitants . . . .” *Masters v. State*, 653 S.W.2d 944, 947 (Tex. App. 1983) (Powers, J., concurring). Selective enforcement of the law may have been the rule.

<sup>149</sup>*Id.*, quoting *English*, 35 Tex. at 474.

<sup>150</sup>*English* at 476-77.

<sup>151</sup>*Andrews v. State*, 50 Tenn. 165, 177, 186-87 (1871).

<sup>152</sup>*Young*, 992 F.3d at 806.

<sup>153</sup>*Id.* at 807, citing *State v. Wilburn*, 66 Tenn. 57 (1872).

<sup>154</sup>*Id.*, quoting *Haile v. State*, 38 Ark. 564, 565 (1882).

of carrying a weapon in public.”<sup>155</sup> But that cuts against the power to ban absolutely. Would the Ninth Circuit hold that Hawaii, if it enacted such a law, could not ban the carrying of military handguns in the hand?

But the definitive Arkansas case was *Wilson v. State* (1878), and *Young* simply disregards it. That state’s high court overturned a conviction for carrying a revolver, reasoning thus: “But to prohibit the citizen from wearing or carrying a war arm . . . is an unwarranted restriction upon his constitutional right to keep and bear arms. . . . If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.”<sup>156</sup>

*Young* ventures into the early twentieth century,<sup>157</sup> but that’s too far removed from 1791. Of the cases discussed, it correctly states that “the state courts generally agree that the legislature can prohibit the carrying of concealed weapons.”<sup>158</sup> It should be borne in mind that most Northern states had minimal restrictions on carry, which is why “the state courts” *Young* refers to are almost exclusively Southern. This limited number of courts, *Young* continues, upheld restrictions on open carry in certain places, open carry of certain weapons, and open carry without a license.<sup>159</sup> Yet other than the *English* decision from Texas, none of the precedents upheld a complete ban on the carrying of handguns. The general rule was that while the manner of carrying could be regulated, a complete ban in public of all types of handguns would be unconstitutional.

#### E. Slaves and Persons of Color Were Denied the Right to Bear Arms Because They Were Not Considered Citizens

While purporting to analyze nineteenth century laws and judicial decisions, *Young* entirely disregards restrictions on African Americans, both slaves and free persons of color. Because they were not considered as part of “the people” to whom the right to bear arms applied, the Southern states generally prohibited them from carrying arms at all or gave officials discretion to issue or not to issue carry licenses to them. Sound familiar?

A Virginia law provided that “[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead, without first

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<sup>155</sup>*Id.*

<sup>156</sup>*Wilson v. State*, 33 Ark. 557, 559-60, 34 Am. Rep. 52 (1878).

<sup>157</sup>*Young*, 992 F.3d at 807-08.

<sup>158</sup>*Id.* at 808.

<sup>159</sup>*Id.*

obtaining a license from the court” where he resided, “which license may, at any time, be withdrawn by an order of such court.”<sup>160</sup> As a Virginia court held, among the “numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States,” were “the restriction . . . upon their right to bear arms.”<sup>161</sup>

In Georgia, it was unlawful “for any slave, unless in the presence of some white person, to carry and make use of fire arms,” unless the slave had a license from his master to hunt.<sup>162</sup> It was also unlawful “for any free person of colour in this state, to own, use, or carry fire arms of any description whatever . . . .”<sup>163</sup> Georgia’s high court held: “Free persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . .”<sup>164</sup>

Delaware forbade “free negroes and free mulattoes to have, own, keep, or possess any gun [or] pistol,” except that such persons could apply to a justice of the peace for a permit to possess a gun or fowling piece, which could be granted if “the circumstances of his case justify his keeping and using a gun . . . .”<sup>165</sup> The police power was said to justify restrictions such as “the prohibition of free negroes to own or have in possession fire arms or warlike instruments.”<sup>166</sup>

North Carolina made it unlawful “if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence” from the court.<sup>167</sup> This was upheld as constitutional partly on the ground that “the free people of color cannot be considered as citizens . . . .”<sup>168</sup> The court added: “It does not deprive the free man of color of the right to carry arms about his person, but subjects it to the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of

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<sup>160</sup>Va. 1819, c. 111, § 8.

<sup>161</sup>*Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

<sup>162</sup>Digest of the Laws of the State of Georgia 424 (1802).

<sup>163</sup>§ 7, 1833 Ga. Laws 226, 228.

<sup>164</sup>*Cooper v. Savannah*, 4 Ga. 72 (1848).

<sup>165</sup>Ch. 176, § 1, 8 Laws of the State of Delaware 208 (1841).

<sup>166</sup>*State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856).

<sup>167</sup>*State v. Newsom*, 27 N.C. 250, 250 (1844) (quoting Act of 1840, ch. 30).

<sup>168</sup>*Id.* at 254.

persons, shall have a right to the licence, or whether any shall.”<sup>169</sup> This is reminiscent of today’s judicial jargon that the right of the people to bear arms is not infringed by laws granting officials discretion to deny them that very right.

*Dred Scott v. Sanford* (1857) notoriously held that African Americans were not citizens and had no rights that must be respected.<sup>170</sup> Chief Justice Taney wrote that, if African Americans were considered citizens, “it would give them the full liberty of speech . . . ; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”<sup>171</sup>

*Young* was unable to find a single nineteenth-century statute or judicial decision that subjected a person’s right to bear arms to the discretion of a governmental official. Yet it needed such precedents to support its thesis that this is permissible. Had the court considered the plight of slaves and free persons of color, it would have found the precedents it sought – except that would demonstrate that its purported rule befitted only persons who were not considered citizens or among “the people.”

#### F. None of the Early Treatises Countenanced a Carry Ban

*Young* seeks support from a number of standard treatises.<sup>172</sup> They flatly contradict the thesis that carrying arms may be generally banned or may be left to the discretion of an official.

The court begins with St. George Tucker, who stated that “[t]he right of self defence is the first law of nature”; *Young* adds, with no basis, that Tucker “is principally concerned with the regulation of military arms, such as muskets, rifles, or shotguns, which were prohibited for a time in England ‘under the specious pretext of preserving the game.’”<sup>173</sup> Here’s what Tucker actually said:

The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink

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<sup>169</sup>*Id.* at 253.

<sup>170</sup>*Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>171</sup>*Id.* at 417.

<sup>172</sup>*Young*, 992 F.3d at 808-11.

<sup>173</sup>*Id.* at 809, quoting 1 St. George Tucker, *Blackstone’s Commentaries*, at app’x 300.

of destruction.<sup>174</sup>

*Young* just invented the claim that Tucker “is principally concerned with the regulation of military arms,” although that was a concern too, but the reference to self-defense indicates concern with handguns, and the reference to preserving the game indicates concern with hunting arms. All of these uses were included in Tucker’s statement: “In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.”<sup>175</sup>

*Young* further quotes Joseph Story “on the logic that bearing arms acted as ‘a strong moral check against the usurpation and arbitrary power of rulers.’”<sup>176</sup> Yet *Young*’s thesis is that those very rulers may ban the bearing of arms.

“Most nineteenth-century American authors assumed that the state had the right to regulate arms in the public square,” *Young* boldly asserts, actually meaning “to ban” rather than “to regulate.” But its quotation from William Rawle precludes that claim: “[E]ven the carrying of arms abroad by a single individual, *attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them*, would be sufficient cause to require him to give surety of the peace.”<sup>177</sup> It quotes Francis Wharton, but leaves out the part about the crime being “where a man arms himself with dangerous and unusual weapons, *in such a manner as will naturally cause a terror to the people . . .*”<sup>178</sup>

*Young* further defeats itself by quoting Thomas Cooley, who said that “the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose.”<sup>179</sup> *Young* argues that the people need permission and that it can be arbitrarily denied. It quotes passages from New York writer Benjamin Vaughan Abbott opining against careless gun handling and carrying for defense in settled areas,

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<sup>174</sup>*Id.*, app’x 300.

<sup>175</sup>*Id.*, app’x 19

<sup>176</sup>*Young*, 992 F.3d at 809, quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* 746 (1833).

<sup>177</sup> William Rawle, *A View of the Constitution of the United States of America* at 126 (1829) (emphasis added).

<sup>178</sup> Francis Wharton, *A Treatise on the Criminal Law of the United States* 527–28 (Philadelphia: James Kay, 1846) (emphasis added).

<sup>179</sup> Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880).

but ignores what Abbott said about the actual state of the law: “Carry a pistol if you please, but you shall carry it openly. Hang it in a belt, or hold it in your hand, or keep it in sight so that people can see you go armed . . . .”<sup>180</sup> New York itself did not pass a definitive ban on carrying a concealed firearm in cities without a license until 1910.<sup>181</sup>

Lastly, *Young* quotes John Ordronaux, who wrote that “the carrying of concealed weapons may be absolutely prohibited without the infringement of any constitutional right, while a statute forbidding the bearing of arms openly would be such an infringement.”<sup>182</sup> *Young* concedes that to be the rule set forth in some of the above cases from Georgia, Louisiana, and Tennessee, but incorrectly states that the conviction in *Andrews* was upheld for openly carrying.<sup>183</sup> To the contrary, the indictment in *Andrews* was quashed because it only charged that he carried a pistol without specifying the type;<sup>184</sup> recall the holding that the state could not ban the carrying of a repeater of the type a soldier would carry.

*Young* concludes regarding the above treatises: “None of these commentaries, with the possible exception of Ordronaux, seriously questions the power of the government to regulate the open carrying of arms in public.”<sup>185</sup> To the contrary, *not a single one* of these commentators opined that the open carrying of arms in public could be banned.

#### G. The Fourteenth Amendment Sought to Do Away with Black Code Requirements that African-Americans Obtain a License to Bear Arms Subject to an Official’s Discretion

*Young* seems persistently AWOL when it comes to dramatic parts of our constitutional history that definitively repudiate the claim that government officials may have discretion to decide who, if anyone, may be licensed to carry a firearm. The black codes gave such discretion to officials as applied to the freedmen, Congress passed legislation to protect the right of African Americans to bear arms, and the Fourteenth Amendment was adopted in part to constitutionalize the right of all of the people at large to bear arms.

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<sup>180</sup>Benjamin Vaughan Abbott, *Judge and Jury* 337 (New York: Harper and Brothers, 1880).

<sup>181</sup>N.Y. Penal Law § 1897 (1910), in *People v. Warden of City Prison*, 154 A.D. 413, 139 N.Y.S. 277, 280 (1913).

<sup>182</sup>John Ordronaux, *Constitutional Legislation in the United States* 242-43 (1891).

<sup>183</sup>*Young*, 992 F.3d at 811.

<sup>184</sup>*Andrews*, 50 Tenn. at 192.

<sup>185</sup>*Young*, 992 F.3d at 811.

That issue came to the fore when slavery was abolished. As Frederick Douglass explained in 1865, “the black man has never had the right either to keep or bear arms.”<sup>186</sup> The Southern states meant to keep it that way by enacting the black codes. The first state law noted by the Supreme Court in *McDonald v. Chicago* as typical of what the Fourteenth Amendment would invalidate required a license to have a firearm that an official had discretion to limit or deny. In 1865, Mississippi provided that “no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind . . . .”<sup>187</sup>

Second Amendment deprivations were debated in bills leading to enactment of the Freedmen’s Bureau Act and the Civil Rights Act of 1866. Rep. Thomas Eliot, sponsor of the former, explained that the bill would invalidate laws like that of Opelousas, Louisiana, providing that no freedman “shall be allowed to carry fire-arms” without permission of his employer and as approved by the board of police.<sup>188</sup> He noted that in Kentucky “[t]he civil law prohibits the colored man from bearing arms . . . .”<sup>189</sup>

Senator Garret Davis said that the Founding Fathers “were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.”<sup>190</sup> Senator Samuel Pomeroy counted among the “safeguards of liberty” “the right to bear arms for the defense of himself and family and his homestead.”<sup>191</sup> Yet violations persisted, such as in Alexandria, Virginia, which continued “to enforce the old law against them [freedmen] in respect to whipping and carrying fire-arms . . . .”<sup>192</sup>

Representative William Lawrence of Ohio discussed the need to protect freedmen, quoting General D. E. Sickles’ General Order No. 1 of January 1, 1866, for the Department of South Carolina, which negated the state’s prohibition on possession of firearms by blacks and, at the same time, recognized the right of all peaceable persons to carry arms:

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<sup>186</sup>“In What New Skin Will the Old Snake Come Forth?” Address delivered in New York City, May 10, 1865, 4 *The Frederick Douglass Papers* 84 (1991).

<sup>187</sup>Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, quoted in *McDonald v. City of Chicago*, 561 U.S. 742, 771 (2010).

<sup>188</sup>Cong. Globe, 39th Cong., 1st Sess. 517 (1866).

<sup>189</sup>*Id.* at 657.

<sup>190</sup>*Id.* at 371.

<sup>191</sup>*Id.* at 1182.

<sup>192</sup>Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 21 (1866).



The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons; nor to authorize any person to enter with arms on the premises of another without his consent.<sup>193</sup>

Introducing the Fourteenth Amendment in the Senate, Jacob Howard referred to “the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . .”<sup>194</sup> The Amendment was needed, Rep. George W. Julian argued, because Southern courts declared the Civil Rights Act void and some states made it “a misdemeanor for colored men to carry weapons without a license.”<sup>195</sup>

James Lewis, a freedman in Mississippi, was arrested for carrying a musket without the required license. Chief Justice Handy of Mississippi’s highest court upheld the conviction, declaring the federal Civil Rights Act unconstitutional and holding that the state arms guarantee protected only citizens.<sup>196</sup> In a separate case, Judge R. Bullock acquitted Wash Lowe and other freedmen for carrying firearms without a license, holding the requirement violative of the right to bear arms for self-defense, which was “a natural and personal right – the right of self-preservation.”<sup>197</sup> General Ulysses S. Grant noted these decisions in a report stating: “The statute prohibiting the colored people from bearing arms, without a special license, is unjust, oppressive, and unconstitutional.”<sup>198</sup>

The Freedmen’s Bureau Act was passed by the same two-thirds-plus members of Congress who voted for the Fourteenth Amendment.<sup>199</sup> The Act declared that:

the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition

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<sup>193</sup>Cong. Globe, 39th Cong., 1st Sess., 908-09 (1866). See *McDonald*, 561 U.S. at 773 & n.21 (citing this order and commenting that “Union Army commanders took steps to secure the right of all citizens to keep and bear arms”).

<sup>194</sup>Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

<sup>195</sup>*Id.* at 3210.

<sup>196</sup>“Mississippi . . . The Civil Rights Bill Declared Unconstitutional by a State Court,” *New York Times*, Oct. 26, 1866, at 2; see *McDonald*, 561 U.S. at 775 n.24.

<sup>197</sup>*Id.*

<sup>198</sup>Cong. Globe, 39th Cong., 2d Sess., 33 (1866).

<sup>199</sup>Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* 41-43 (1998).

of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.<sup>200</sup>

The Civil Rights Act of 1871, which remains law today, provides for a civil action against a person who, under color of state law, subjects a citizen to “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”<sup>201</sup> The right to bear arms was one of the rights intended to be protected by the enactment.<sup>202</sup>

After passage of the Act, a Congressional investigation found widespread disarming of African Americans and a continuation of the old black codes whereby “a free person of color was only a little lower than a slave. . . . [and hence] forbidden to carry or have arms.”<sup>203</sup> President Grant reported that Ku Klux Klan groups continued “to deprive colored citizens of the right to bear arms and of the right to a free ballot . . . .”<sup>204</sup> The Klan targeted the black person, Senator Daniel Pratt noted, who would “tell his fellow blacks of their legal rights, as for instance their right to carry arms and defend their persons and homes.”<sup>205</sup>

*Young*’s silence about the above part of our constitutional history is deafening. Free citizens had a right to carry arms; slaves did not. Under slavery, free persons of color were prohibited from carrying arms without a license that was subject to the discretion of the authorities. Under the black codes, the same restriction was applied to all freedmen. The Civil Rights Act and Freedmen’s Bureau Act of 1866 sought to negate these state infringements, and it took the Fourteenth Amendment to constitutionalize the right to bear arms for all persons.

#### H. Twentieth-Century Aberrations Teach Nothing about the Original Understanding

*Young* states: “We are not inclined to review twentieth-century developments in detail, in part because they may be less reliable as evidence of the original meaning of the American right to keep and bear arms.”<sup>206</sup> In fact, they illustrate how some laws completely deviated from the

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<sup>200</sup> §14, 14 Stat. 173, 176-77 (1866).

<sup>201</sup> 17 Stat. 13 (1871). Section 1 survives as 42 U.S.C. § 1983.

<sup>202</sup> *McDonald*, 561 U.S. at 776, citing Halbrook, *Freedmen* 120-131.

<sup>203</sup> 1 *Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States* 261-62 (Feb. 19, 1872).

<sup>204</sup> Ex. Doc. No. 268, 42nd Cong., 2d Sess., 2 (1872).

<sup>205</sup> Cong. Globe, 42nd Cong., 2d Sess., 3589 (1872).

<sup>206</sup> *Id.*

original meaning. The very first example is Massachusetts, which did not ban carrying a loaded pistol or revolver without authorization until 1906.<sup>207</sup> Between its first settlement in 1628 and 1906, citizens could peaceably carry firearms freely.

In 1909, Alabama banned the carrying of a pistol off of one's premises. Through laws passed in 1911 and 1913, New York banned the carrying of handguns without a license. Those are *Young*'s only examples of outright bans on carrying firearms without a license. California, Pennsylvania, and the other states *Young* cites only banned the carrying of unlicensed concealed handguns.<sup>208</sup> Open carry remained the almost-universal rule nationwide. The three outlier states *Young* cites, which did not even ban unlicensed carry until the twentieth century, teach nothing about the original meaning of the right to bear arms.

### Conclusion

Young concludes its historical survey:

Our review of more than 700 years of English and American legal history reveals a strong theme: government has the power to regulate arms in the public square. . . . [T]he overwhelming evidence from the states' constitutions and statutes, the cases, and the commentaries confirms that we have never assumed that individuals have an unfettered right to carry weapons in public spaces. Indeed, we can find no general right to carry arms into the public square for self-defense.<sup>209</sup>

The court has utterly failed to make any such historical case. It begins with the false premise that the Second Amendment incorporates every medieval royal decree, it obscures the English rule that going armed was not an offense unless done so in a manner to terrify the subjects, and it reads the English Declaration of Rights in the narrowest fashion without recognizing that American freedoms are broader. The period from the pre-Revolutionary period through the ratification of the Second Amendment is not even mentioned. It fails to appreciate that peaceable carry was the rule in the nineteenth century as expressed in state statutes and court decisions, with restrictions on concealed carry being the primary exception.

The *Young* majority ignores the only antebellum laws that provided for discretionary licenses to carry – those applicable primarily to free persons of color. And it ignores the impetus for the Fourteenth Amendment being to invalidate laws banning firearm carry to freedmen without, again, a discretionary license.

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<sup>207</sup>1906 Mass. Acts 150, ch. 172, § 2.

<sup>208</sup>*Young*, 992 F.3d at 812-13.

<sup>209</sup>*Id.* at 813.

These historical failings are predictable, for most of all *Young* ignores the Second Amendment's text – “the *right of the people* to keep and *bear arms*, shall not be infringed.” The court's premise is that no such right exists, that only the few have this privilege, that bearing arms is reserved for an elite, and that banning a right is not infringement. The “history” it presents supposedly shows that “carrying arms in public was not treated as a fundamental right,”<sup>210</sup> despite the right of the people to bear arms being in the text of the Constitution.

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<sup>210</sup>*Id.* at 820.