THE RIGHT OF "THE PEOPLE" TO "BEAR ARMS": THE COMMON LAW, THE SECOND AMENDMENT, AND THE CARRYING OF FIREARMS OUTSIDE THE HOME

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Introduction

To what extent does the guarantee that "the right of the people to . . . bear arms, shall not be infringed" as guaranteed in the Second Amendment protect the liberty to carry firearms outside the home for self-defense or other lawful purposes?[1] While most states recognize a right to do so, either with or without a license and subject to place restrictions, some states grant discretion to a law enforcement agency to decide whether a specific person "needs" or has "good cause" to carry a firearm and restricts licenses to such persons. These discretionary-licensing

[1] "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." U.S. Const., Amend. II.

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schemes have become a major issue in Second Amendment litigation, with some circuits upholding such laws[2] and others invalidating them.[3]

The Supreme Court has not decided the specific issue, but essential to its interpretation of the Amendment in *District of Columbia v. Heller* (2008) is the following: "At the time of the founding, as now, to 'bear' meant to 'carry.'"[4] More specifically, to bear arms means 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.'"[5] Preservation of the militia was the Amendment's stated purpose, but most Americans valued the ancient right more for self-defense and hunting.[6]

While the Amendment guarantees "the individual right to possess and carry weapons in

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[2]*Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Woollard v. Sheridan*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 571 U.S. 952 (2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014).

[3]*Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018).

[4]*District of Columbia v. Heller,* 554 U.S. 570, 584 (2008). While "bear arms" may be used in a military context, there was no "*right* to be a soldier or to wage war," which would be an absurdity. *Id*. at 586. In historical usage, "bearing arms" meant "simply the carrying of arms," such as "for the purpose of self-defense" or "to make war against the King." But limiting "bear arms" to an exclusive military usage was inconsistent with other purposes, such as for hunting. As the Court humorously wrote: "The right 'to carry arms in the militia for the purpose of killing game' is worthy of the mad hatter." *Id.* at 589.

[5]*Id*., quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting).

[6]*Id.* at 598-99.

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case of confrontation,"[7] history and tradition do not support "a right to keep and carry any weapon whatsoever in any manner whatsoever," and longstanding prohibitions such as carrying firearms in sensitive places like schools are not in question.[8] Nor may the right be exercised in a manner as to terrify others.[9]

Heller declared the District of Columbia's ban on the possession of handguns violative of the Second Amendment. Recalling nineteenth-century state court decisions that declared bans on the open carrying of handguns unconstitutional, the Court noted: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."[10]

Heller was followed by *McDonald v. City of Chicago* (2010), which reiterated that "individual self-defense is 'the central component' of the Second Amendment right."[11] *McDonald* held that the Second Amendment applies to the States through the Fourteenth Amendment and invalidated Chicago's handgun ban.[12] And in *Caetano v. Massachusetts* (2016), the Supreme Court reversed a Massachusetts decision upholding that state's stun gun ban.[13] Since the defendant had been caught with the stun gun in a parking lot,[14] the Court assumed that

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[7]*Id*. at 592.

[8]*Id*. at 625-26.

[9]*Id*. at 588 n.10.

[10]*Id*. at 629, citing *Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. 165, 187 (1871); *State v. Reid*, 1 Ala. 612, 616-617 (1840).

[11]*McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

[12]*Id*. at 791.

[13]*Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*).

[14]*Id*. at 1029 (Alito, J., concurring).

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the Second Amendment protects the right to bear arms in public, non-sensitive places.

However, the Court has not granted certiorari in any of the circuit decisions upholding discretionary carry license laws. Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari in a Ninth Circuit decision that the Second Amendment fails to protect the right of a member of the general public to carry a concealed weapon in public, but declining to decide whether open carry is protected.[15] Justice Thomas wrote that the Court "has already suggested that the Second Amendment protects the right to carry firearms in public in some fashion," and that the denial of certiorari "reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."[16]

While the lower-court cases involve various issues about the text of the Amendment, judicial precedents, standards of review, and criminal statistics, a major bone of contention has involved the legacy of the English common law and its adaptation in the American Founding and the early Republic. A virtual cottage industry has arisen in which certain historians argue that current restrictions are consistent with the common-law history, attorneys supporting the restrictions on behalf of defendants and their amici rely on such historical writings in their briefs, and courts sift through and use or reject the arguments in either upholding or invalidating the restrictions.[17]

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[15] *Peruta v. County of San Diego*, 824 F.3d 919, 924, 927 (9th Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 1995 (2017).

[16] *Peruta*, 137 S. Ct. at 1198-99 (Thomas, J., dissenting from denial of cert.).

[17] *E.g.*, *Peruta*, 824 F.3d at 939, citing Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 7-36 (2012); *Young*, 896 F.3d at 1077 (Clifton, J., dissenting), citing Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry*, 125 Yale L.J. F. 121, 125 (2015). But see

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Litigation-driven interpretations of history to disfavor a meaningful Second Amendment pervade this enterprise. It involves what might be called "history office law" to describe historians who ignore basic elements of criminal offenses in order to show a long-standing tradition of criminalizing the keeping and bearing of arms. It also involves what might be called "law office history" conducted by attorneys who cite these historians and who cherry pick passages from historical documents and delete key portions.

The following seeks to conduct a reality check regarding this history and how it is being read and used. The English heritage extends from a medieval statute about going armed to the terror of the subjects and the Declaration of Rights of 1689 to the common law as expressed in judicial decisions and the writings of jurists. The American experience combines bills of rights declaring the right to bear arms together with laws against going armed to terrorize others, requirements to find sureties to keep the peace if armed and threatening to others, prohibitions on carrying concealed weapons, and – as applied only to slaves and persons of color – bans on keeping or bearing firearms at all. Other than that, the peaceable bearing of arms was not a crime at the Founding or in the early Republic.

The analysis would be incomplete without discussion of the understanding of the right to bear arms during Reconstruction, for that epoch gave birth to the Fourteenth Amendment, which was understood to incorporate fundamental rights found in the Bill of Rights. While the law office historians have not engaged the subject much, the history office lawyers have filed briefs

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Wrenn v. District of Columbia, 864 F.3d 650, 660–61 (D.C. Cir. 2017) ("we can sidestep the historical debate on how the first Northampton law might have hindered Londoners in the Middle Ages. Common-law rights developed over time . . . .").

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in various cases that depict bans on carrying firearms as normal during Reconstruction and thus, by implication, not violative of the Fourteenth Amendment. This article ends with a review of those arguments in light of the relevant historical sources.

I. GOING ARMED TO THE TERROR OF THE SUBJECTS: THE ENGLISH ANTECEDENTS

A. The Statute of Northampton

Edward III's Statute of Northampton of 1328 provided that no person other than the king's servants and ministers shall "come before the King's Justices . . . 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 . . . ."[18] From the current literature, one would think that this monarchal decree, written three-quarters of a century before Chaucer's *Canterbury Tales*, supersedes the explicit language of the Second Amendment recognizing "the right to bear arms."[19]

As will be seen, elements of the crime included not just going or riding armed, but also doing so in affray of the peace. In a 1615 case before the King's Bench styled *Chune v. Piott*, Justice Croke, one of four judges who opined in the case, noted 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

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[18] 2 Edw. III c. 3 (1328).

[19] "'What does the Statute of Northampton provide us in terms of evaluating the protective scope of the Second Amendment outside the home?' The answer is armed individual self-defense outside the home deserves only minimalist protection or categorical exclusion." Charles, *The Faces of the Second Amendment*, 43.

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doth not break the peace in his presence."[20] 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.

The Statute sought to consolidate the monarch's power against roving bands of knights. "For in those days this deed of Chivalry was at random, whereupon great peril ensued," in the words of Sir Edward Coke, whose *Institutes of the Laws of England* first appeared in 1628.[21] However, Coke added that the Statute did not preclude armed self-defense against those using unlawful force:

> And yet in some cases a man may not only use force and arms, but assemble company also. As any may assemble his friends and neighbors, to keep his house against those that come to rob, or kill him, or to offer him violence in it, and is by construction excepted out of this Act; . . . for a man's house is his Castle, and *domus sua cuique est tutissimum refugium* [a person's own house is his ultimate refuge]; for where shall a man be safe, if it be not in his house. And in this sense it is truly said,
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> *Armaque in Armatos sumere jura sinunt* [and the laws permit the taking up of arms against armed persons].[22]

B. *Rex v. Knight*: "The Crime Shall Appear to Be Malo Animo"

The Restoration of the Stuarts in 1660 entailed measures to disarm the political enemies of the monarchy. In 1662 Charles II passed a militia bill which empowered certain officials "to search for and seize all arms in the custody or possession of any person or persons whom the said

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[20] *Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615). The case involved a plaintiff suing the sheriff for an unlawful arrest. The court found that the plaintiff had assisted a prisoner to escape and interfered with the sheriff in attempting to apprehend him. *Id*. The Statute of Northampton does not appear to have been involved.

[21] Coke, *Third Institute* 160.

[22] *Id.* at 161-2.

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lieutenant or any two or more of their deputies shall judge dangerous to the peace of the kingdom. . . ."[23] In 1670, for the first time in English history, Charles II sought to deprive all commoners of all guns by legislation:

> That all and every Person and Persons not having Lands and Tenements . . . of the clear yearly Value of one hundred Pounds *per annum* . . . or having Lease or Leases . . . of the clear yearly Value of one hundred and fifty Pounds, other than the Son and Heir Degree . . . are hereby declared to be persons by the Laws of this Realm not allowed to keep . . . any Guns, Bows . . . or other Engines aforesaid; but shall be and are hereby prohibited to have, keep or use the same.[24]

As Blackstone observed, "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . is a reason oftener meant, than avowed, by the makers of the forest and game laws."[25] The American jurist St. George Tucker commented concerning this passage: "Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England."[26] While this statement is accurate with respect to the above statute, judicial construction in the eighteenth century supported the right of all Englishmen to have guns despite the game laws.[27]

James II assumed the Crown in 1685 and continued the same repressive policies as

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[23] 13 and 14 Car. II c.3 (1662).

[24] *An Act for the Better Preservation of the Game*, 22 Car. II c. 25, § 3 (1670).

[25] 2 Blackstone, *Commentaries* *412.

[26] I Blackstone, *Commentaries* *144, n. 41 (St. Geo. Tucker, ed. 1803).

[27] *Rex* v. *Gardner*, 7 Mod. 279, 87 Eng. Rep. 1240, 1241 (K.B. 1739) (the law did "not extend to prohibit a man from keeping a gun for his necessary defense, but only from making that forbidden use of it"); *Rex* v. *Thompson*, 2 T. R. 18, 100 Eng. Rep. 10, 12 (K.B. 1787) ("it is not an offense to keep or use a gun, unless it be kept or used for the purpose of killing game").

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Charles II, who was his older brother. Once again, that included disarming political enemies. The Statute would be one means of doing so.

The leading (and only) judicial precedent on the Statute known to the American Founders, through two reports of the same case, involved the prosecution of Sir John Knight in 1686. The information filed by the Attorney General alleged that the Statute prohibited "all persons from coming with force and arms before the King's Justices, &c., and from going or riding armed in affray of peace . . . ."[28] 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*."

As further reported, the case was tried and Knight 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 . . . ."[29]

The other reported version of this case recited the argument of Knight's counsel: "This statute was made to prevent the people's being oppressed by great men; but this is a private matter, and not within the statue."[30] 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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[28] *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B. 1686).

[29] *Id.*

[30] *Rex v. Knight*, Comb. 38, 90 Eng. Rep. 330 (K.B. 1686).

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their security) . . . ."[31] Despite his acquittal, the court required sureties to bind Knight to his good behavior.[32]

Why was Knight found not guilty? He had walked in the streets and went into a church service with a gun. But the crime was not simply going or riding armed. A further element of the crime was that one must do so – as stated above – "to terrify the King's subjects," with "malo animo," and "in affray of peace." Nothing in the allegations or evidence suggest that he threatened anyone, brandished a weapon, or started a fight. He had gone armed, but that did not suffice.

While the Statute had fallen into disuse, it had been revived by Catholic monarch James II as a political weapon to disarm Protestant opponents, one of whom was Knight. After the embarrassing acquittal, James resorted to the Game Act of 1670 to disarm a broader array of the populace.[33] Such oppressions led to the Glorious Revolution of 1689, with its Declaration of Rights. The Founders would have been aware of this context.

More is now known about the Knight case, but not from sources to which the Founders or lawmakers in the early Republic had access. Most interesting is the diary, first published in 1857, of Narcissus Luttrell (1657-1732), a historian and member of Parliament. Luttrell recorded that on November 12, 1686, "sir John Knight pleaded not guilty to an information exhibited against him for goeing with a blunderbus in the streets, to the terrifyeing his majesties

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[31] *Id*., Comb. 38-39, 90 Eng. Rep. 330.

[32] *Id*. at 331.

[33] Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge: Harvard University Press, 1994), 104-05.

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subjects."[34] Days later, Luttrell wrote:

> The 23rd, Sir John Knight, the loyall, was tried at the court of kings bench for a high misdemeanour, in goeing armed up and down with a gun att Bristoll; who being tried by a jury of his own citty, that knew him well, he was acquitted, not thinking he did it with any ill design, to the great disappointment of some persons who appeared very fierce against him; 'tis thought his being concerned in taking up a popish priest at Bristoll occasioned this prosecution.[35]

The above reinforces the decision of the King's Bench that not just going armed, but doing so in a manner to terrify the subjects was an element of the crime. Knight was acquitted not because of doubt of whether he carried a gun, but because he did so without "any ill design." That some were disappointed with the verdict suggests the political motivation behind the prosecution.

Luttrell also recorded that, three days later, the court denied Knight's motion "to discharge his recognizance, since his aquittall, but t'was refused, and he ordered to give sureties for his good behavior."[36] However, that did not suggest that he had committed a crime by going armed.

Two other entries in Luttrell's diary that date counsel against a blind assumption that every English practice was gospel to the Founders: "the lord Altham . . . convicted of speaking words against the king when he was drunk, was sentenc'd to pay 100 marks," and "Dr. Edes . . . being convicted of commending a seditious book, was adjudg'd to pay 100*l*."[37]

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[34] 1 Narcissus Luttrell, *A Brief Historical Relation of State Affairs from September 1678 to April 1714* (Oxford 1857), 380.

[35] *Id.* at 389.

[36] *Id*.

[37] *Id*.

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In support of his thesis that the Statute of Northampton was interpreted to prohibit going armed per se, Patrick Charles argues that Knight was acquitted on the basis of being "cloaked with governmental authority because he committed the act in accordance with the Mayor and Aldermen of Bristol."[38] While he certainly acted in concert with these officials against a Catholic priest, nothing in the judicial opinions suggest that Knight pled that he could go armed based on governmental immunity rather than lack of *"malo animo*." None of the details mentioned by Charles imply that going armed per se was banned or that doing so in a manner to terrify the subjects was not an element of the offense.[39]

Charles claims that "the jury acquitted Knight because he was a government official that was well-affected to the crown," for which Luttrell's above account is cited.[40] Nothing in what Luttrell said – see the above quotations from him – remotely implied any such statement. Luttrell said that the jury found that Knight had no "ill design," just as the court said he had no evil intent. In any event, Luttrell's diary was not published until 1857 and could not have shaped the Founders' reading of the Knight case.

Charles' misinterprets the above history to show that the Founder's meant to override the Second Amendment right to "bear arms" with a version of the Statute of Northampton that peaceably going armed was and should remain a crime. But the Founders were hardly fans of

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[38]Patrick J. Charles, "The Faces of the Second Amendment Outside the Home," 60 Clev. St. L. Rev. 1, 28 (2012).

[39]See *id*. at 28-30. For a detailed response to Charles, see David B. Kopel, "The First Century of Right to Arms Litigation," 14 Georgetown Journal of Law & Public Policy 127, 135-38 (2016).

[40]*Id.* at 30, citing Luttrell at 389.

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James II and did not seek to incorporate his royalist vision into the Bill of Rights. The Founders would have been familiar with the King's Bench decision in the Knight case, with its focus on going armed in a manner to terrorize others. They did not have access to the obscure sources cited by Charles, and in any event the spin he attempts to put on those sources fail to bear out his thesis.

Saul Cornell also argues that the Knight case is not precedent for any right peaceably to bear arms. Although neglecting the required element of carrying to terrify the subjects, he criticizes the jury's decision to acquit. Knight was "a militant Protestant, who opposed tolerance for Catholics," and "[t]he jury, composed of other militant Protestants drawn from Knight's community, was sympathetic to his anti-Catholicism and acquitted him."[41] While Luttrell is cited for that proposition, he said nothing about why the jury acquitted Knight. Cornell speculates that "Knight escaped punishment thanks to a sympathetic jury . . . ."[42] But the jury system is based on the requirement that a defendant be acquitted if found not guilty of the charges. Could it be that the jury acquitted Knight because they found him not to be guilty of the charge of "going or riding armed in affray of peace," with "malo animo," "to terrify the King's subjects"? That is all that was reflected in the opinion of the King's Bench as well as in Luttrell's diary.

There were no other precedents in this period that set forth any further clarification of the meaning of the Statute as interpreted.

C. Hawkins: Peaceable Wearing of Arms Not Within the Statute

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[41] Saul Cornell, "The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace," 80 Law & Contemp. Probs. 11, 27 (2017), citing Luttrell at 389.

[42] *Id.*

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William Hawkins, in an exposition of affrays in his *Treatise of the Pleas of the Crown* (first published in 1716), commented as follows:

> [N]o wearing of arms is within the meaning of the statute unless it be accompanied with such circumstances as are apt to terrify the people; from when it seems clearly to follow, that persons of quality are in no danger of offending against this statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace. And from the same ground it also follows, that persons armed with privy coats of mail, to the intent to defend themselves against their adversaries, are not within the meaning of the statute, because they do nothing *in terrorem populi*.[43]

Despite the reference to "persons of quality," the same rules applied to the poor and uninfluential. To repeat Hawkins, the wearing of arms was not a crime unless "accompanied with such circumstances as are apt to terrify the people . . . ." From that general rule, it followed that "persons of quality are in no danger of offending against this statute by wearing common weapons," but the same general rule meant that persons not considered "of quality" would not violate the statute by wearing common arms either.

Today's detractor's of Second Amendment rights selectively quote Hawkins but cannot bring themselves to recite the critical words, as if Hawkins is saying from his grave: *Read my lips*, "no wearing of arms is within the meaning of the statute unless it be accompanied with such circumstances as are apt to terrify the people." Instead, Charles and Cornell assert that wearing arms was, impliedly as it should be today under the "good cause" lexicon, reserved only to "persons of quality."[44]

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[43] 1 Hawkins, *A Treatise of the Pleas of the Crown*, ch. 28, § 9 (8th ed. 1824).

[44] Charles, "The Faces of the Second Amendment," 25-26; "The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities," 39 Fordham Urb.

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Rightly having and using arms for the defense of oneself or of others found further exposition in the law of justifiable homicide. Hawkins wrote:

> If those who are engaged in a riot or a forcible entry, or detainer, stand in their defense, and continue the force in opposition to the command of justice of peace, & c. or resist such justice endeavouring to arrest them the killing may be justified; and so perhaps may the killing of dangerous rioters by any private persons, who cannot otherwise suppress them or defend themselves from them, inasmuch as *every private person seems to be authorized by law to arm himself* for the purposes aforesaid.[45]

But the peaceable wearing of arms was not confined to such emergencies. It was allowed as long as it was not done so in a manner to terrify others.

D. The English Declaration of Rights of 1689

A paramount aim of the Glorious Revolution of 1688 was to abolish the standing army of James II and to reinstate the right of Protestants to keep and carry arms. Following the abdication of James II, Parliament enacted a bill of rights that the new limited monarchs William and Mary recognized as a condition of rule. Certain provisions of this English Bill of Rights were to be reflected and improved upon a century later in the first ten amendments of the U.S. Constitution.

On January 28, 1689, a debate ensued in the House of Commons concerning the proposed abdication of James II. Lord Somers's notes of the debate clearly demonstrate the perceived abuses under the Militia Act of 1662, which had allowed arbitrary searches and seizures of the arms of private citizens. Sergeant Maynard complained: "An Act of Parliament was made to

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L.J. 1695, 1713 n.101 (2012) ("Hawkins expressly noted that 'persons of quality,' a term that signified elite status and class rank, were not subject to arms restrictions in public.").

[45] 1 Hawkins, *Pleas of the Crown*, ch. 10, § 14.

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disarm all Englishmen, whom the Lieutenant should suspect, by day or by night, by force or otherwise."[46] Mr. Finch thought that no man would be safe under the king, adding, "The constitution being limited, there is a good foundation for defensive arms."[47]

"Militia bill. – Power to disarm all England. – Now done in Ireland," lamented Sir Richard Temple.[48] Mr. Boscawen's attack on the ministry's arbitrary power indicates that the members of Parliament themselves had no immunity: "Imprisoning without reason; disarming. – Himself disarmed."[49] "An abominable thing to disarm the nation, to set up a standing army," Sergeant Maynard agreed.[50] And Mr. Sacheverel brooded: "Disarmed and imprisoned without cause."[51]

The Declaration of Rights of 1689, coming just three years after Knight's case, further clarified that simply going armed without more was a right, not a crime. It listed among the ways that James II attempted to subvert "the Laws and Liberties of this Kingdom": "By causing several good Subjects, being Protestants, to be disarmed, at the same Time when Papists were both armed and employed, contrary to law."[52] The act accordingly declared thirteen "true, ancient and

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[46] 2 *Miscellaneous State Papers from 1501-1726* 407 (Phillip, Earl of Hardwicke compl. 1778).

[47] *Id*. at 410.

[48] *Id*. at 416.

[49] *Id*. at 416.

[50] *Id*. at 417.

[51] *Id*. at 418.

[52] *An Act Declaring the Rights and Liberties of the Subject*, 1 W. & M., Sess. 2, c.2, (1689).

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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."[53] The right of having arms for their defense was not confined to their homes.

Blackstone discussed the above in the broader context of "the principal absolute rights which appertain to every Englishman" of "personal security, personal liberty, and private property," which would be a "dead letter" without "certain other auxiliary subordinate rights of the subject . . . ."[54] In addition to the right to petition the government, those auxiliary rights included "that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st.2 c.2 [the Bill of Rights], and it is indeed, 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."[55]

To protect the rights and liberties of the Englishmen, Blackstone continued, the subjects were entitled to justice in the courts, to the right of petitioning for redress of grievances, and "to the right of having and using arms for self-preservation and defense."[56]

The above was consistent with the following also noted by Blackstone: "The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace,

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[53] *Id*.

[54] 1 Blackstone, Commentaries *136.

[55] *Id*. at *139.

[56] *Id*. at *140.

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by terrifying the good people of the land . . . ."[57] That did not include carrying weapons not considered dangerous or unusual. The nature of the crime was described more fully in the description of the power of a justice of the peace to "bind all those to keep the peace who in his presence make any affray, or threaten to kill or beat another, or contend together with hot and angry words, or go about with unusual weapons or attendance, to the terror of the people; . . . by causing the person to post a surety as security for the peace."[58] That was a far cry from having, carrying, and using arms lawfully in exercise of one's natural right of resistance and self preservation.

If the Statute of Northampton had fallen into disuse by the time of Sir John Knight's case, it was virtually non-existent in judicial decisions thereafter. Two cases in the nineteenth and twentieth centuries upheld the right to carry arms but not to do so in a manner that would terrorize others.

The right to carry arms as codified in the Declaration of Rights, but not to do so in a manner that would terrify the King's subjects, was recognized in *Rex* v. *Dewhurst* (1820), a case arising out of an armed assembly protesting against a massacre and advocating parliamentary reform.[59] The court gave the following jury instruction:

> "The subjects which are Protestants may have arms for their defence suitable to their condition, and as allowed by law."
>
> 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

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[57] 4 Blackstone, *Commentaries* *148.

[58] *Id*. at *254-55.

[59] *Rex* v. *Dewhurst*, 1 State Trials, New Series 529 (1820).

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> for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm . . . .[60]

In a 1903 decision, the meaning of going armed to the terror of the people was exemplified in the following summary: "Not only was the offense charged against the prisoner one under the Statute of Edward III, but also under the common law, by which he was liable to punishment for making himself a public nuisance by firing a revolver in a public place, with the result that the public were frightened or terrorized."[61] Other than a decision from an Irish court a decade later holding that carrying arms "*in terrorem populi*" was an element of the offence,[62] the Statute of Northampton disappeared from British law.

E. Coercive Acts Against Wales

Patrick Charles celebrates the disarming of the Welch as a people, supposedly without any requirement that a person went armed in a manner to terrify the subjects, as follows: "The tenets of the Statute were even extended to Wales in preparation of its England annexation as one of the basis of its new legal system. The 1534 Henry VIII statute forbid the carrying of any 'hand-gun, sword, staff, dagger, halberd, morespike, spear or any other weapon, privy coat or armour defensive' by any" of the following:

> [P]er[s]on or per[s]ons dwelling or re[s]iant within Wales . . . of what e [s]tate, degree or condition [s]oever he or they be . . . unto any [S]e[ss]ions or court to be holden within Wales . . . or to any place within the di[s]tance of two miles from the [s]ame [S]e[ss]ions or court, nor to any town, church, fair, market, or other congregation, except it be upon the hute and outcry made of any felony or robbery

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[60] *Id*. at 601-02.

[61] *Rex v. Meade*, 19 L. Times Repts. 540, 541 (1903).

[62] *Rex* v. *Smith*, 2 Ir. R. 190, 204 (K.B. 1914). See discussion infra.

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> done or perpetrated . . . [or] except it be by the commandment, licence or a[ss]ent of the [s]aid justices, [s]teward or other officer. . . .[63]

According to Charles, the above illustrates that carrying arms was "always conditioned on the permission of government," and that "[g]oing armed in public was not a right . . . ."[64] However, he *deleted* the requirement in the above statute that the arming be "in Affray of the King's Peace." The actual statute, 26 Hen. 8, c. 6, § 4 (1534), specifically provided that no resident of Wales:

> shall bring to bear . . . to the same Sessions or Court [in Wales], or to any Place within the Distance of two Miles from the same Sessions or Court, nor to any Town, Church, Fair, Market or other Congregation, except it be upon a Hue or Outcry . . ., nor in the Highways, *in Affray of the King's Peace*, or the King's liege People, any Bill, Long-bow, Cross-bow, Hand gun, Sword, Staff, Dagger, Halbert, Morespike, Spear or any other manner of Weapon, Privy Coat or Armour defensive, . . . except it be by the Commandment, License or Assent of the said Justices, Steward or other Officer . . . .[65]

In short, the offense consisted not just of being armed, but doing so "in Affray of the King's Peace." Peaceable bearing of arms was not banned, as was recognized in a separate provision that allowed shooting matches, but punished with a year in prison "any Games of Running, Wrestling, Leaping, or any other Games (the Game of Shooting only excepted and foreprized)."[66]

That said, it cannot be inferred that America's Founders somehow inherited and

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[63]Patrick J. Charles, "The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review," 60 Clev. St. L. Rev. 1, 20-21 (2012), citing 26 Hen. 8, c. 6, § 3 (1534) (Eng.).

[64]*Id*. at 21.

[65]26 Hen. 8, c. 6, § 4 (1534) (emphasis added). Charles miscites the provision as § 3.

[66]*Id*. § 5.

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embraced, even indirectly, English statutes such as this one, which also provided for outlawry and attainder.[67] And just after enacting this statute, the Parliament passed the Treasons Act of 1534, which imposed the death penalty on anyone who disavowed the prior Act of Supremacy making the king the head of the Church of England.[68] Sir Thomas More was beheaded for doing just that.

Ivor Bowen, who compiled all of the Welch statutes, placed them in historical context as follows: "The general character of the Acts relating to Wales and Welshmen, from 1400 until the accession of the Tudor dynasty, is that they were coercion measures, designed for the purpose of crushing the national spirit of the Welsh people."[69]

Measures enacted in 1400-02 provided that no Welshman could "henceforth chosen or received to be citizen or burgess in any City Borough or Merchant Town" and that "none of the said Welshmen from henceforth [may] bear any manner armour within such City Borough or Merchant Town . . . ."[70] It was further ordained "that from henceforth no Welshman be armed, nor bear defencible armour to Merchant Towns, Churches, nor Congregations in the same, nor in the highways, in a fray of the Peace, or of the King's liege people . . .; except those which be lawful liege people to our Sovereign Lord the King."[71] This ban included the element that the

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[67]*Id*. § 8.

[68]26 Hen. 8. c. 13.

[69]Ivor Bowen ed., *The Statutes of Wales* (London: T. Fisher Unwin, 1908), xlv. Available at https://ia801403.us.archive.org/2/items/statutesofwales00wale/statutesofwales00wale.pdf.

[70]2 Henry 4, c. 12 (1400-01).

[71]4 Henry 4, c. 29 (1402).

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bearing be "in a fray of the Peace."

Finally, it was decreed "that no Englishman nor Welshman of what Estate or condition that he be, send, or bring, by colour of merchandize or other way, any victual or armour to any parts of Wales without the special license of our Sovereign Lord the King . . . ."[72] English constables were "to inquire search and arrest all such victuals and armour."[73] This meant, Bowen noted, that "no food or armour was to be sent into Wales," and another enactment forbade "congregations and councils" without a license.[74]

These and similar cruel laws against the entire Welch people were in no sense expressions of the common law. Indeed, the American Founders were victimized by some of the same oppressive policies. This was pointed out by Edmund Burke in his Resolutions for Conciliation with America, which were debated in Parliament, and failed to pass, on March 22, 1775. Burke pointed out that some of the same injustices the Americans were suffering had been committed before in Wales:

> Sir, during that state of things, parliament was not idle. They attempted to subdue the fierce spirit of the Welsh by all sorts of rigorous laws. They prohibited by statute the sending all sorts of arms into Wales, as you prohibit by proclamation (with something more of doubt on the legality) the sending arms to America. They disarmed the Welsh by statute, as you attempted, (but still with more question on the legality) to disarm New England by an instruction. They made an Act to drag offenders from Wales into England for trial, as you have done (but with more hardship) with regard to America.[75]

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[72] 4 Henry 4, c. 30 (1402).

[73] *Id*.

[74] Bowen ed., *Statutes of Wales*, xlvi.

[75] William Cobett, *The Parliamentary History of England from the Earliest Period to the Year 1803* (London: T.C. Hansard, 1813), vol. 18, at 512.

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Burke was referring to the 1774 instruction by Lord Dartmouth, Secretary of State for America, to General Thomas Gage to consider "disarming the Inhabitants of the Massachusetts Bay, Connecticut and Rhode Island."[76] On October 19, 1774, the Crown decreed a ban on export of arms and ammunition from the Kingdom,[77] and Dartmouth ordered Gage to "take the most effectual Measures for arresting, detaining & securing any Gunpowder, or any Sort of Arms or Ammunition, which may be attempted to be imported into the Province" of Massachusetts.[78]

In sum, the English statutes that sought to disarm the Welch were not emulated by the Americans, who were on the receiving end of some of the same repressive measures. Yet to the extent the 1534 enactment of Henry VIII sought to prohibit the carrying of arms by the Welch, it required that the arming be "in Affray of the King's Peace."

F. Repressive Measures Against Ireland

In much of their tortured history, Ireland was treated as a subjugated country by England. Irish Catholics were denied the same right to keep and bear arms and other basic rights accorded to English Protestants. The repressive measures against the Irish cannot be cited as the type of English tradition that the Americans inherited.

The "Act for the better securing the government, by disarming papists" of 1695 applicable to Ireland provided that all Catholics must deliver to a justice of the peace or

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[76]Dartmouth to Gage, Oct. 17, 1774, *Correspondence of General Thomas Gage with the Secretaries of State, and with the War Office and the Treasury, 1763-1775*, Clarence E. Carter ed. (New Haven: Yale University Press, 1931-33), vol. 2, at 175.

[77]5 Acts Privy Council 401.

[78]Dartmouth to Gage, Oct. 19, 1774, *Correspondence of General Thomas Gage*, vol. 2, at 176.

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corporation officer "all their arms and ammunition, notwithstanding any licence for keeping the same heretofore granted," and officials "may search and seize all arms and ammunition of papists . . . ."[79] Any Catholic who had arms but did not declare them was subject to a fine of 100 pounds sterling or, for a second offence, would "suffer praemunire"[80] – i.e., be subject to imprisonment "at the king's pleasure" and forfeit all of his property.[81]

There were two exceptions to the gun ban. First, "Papist gentlemen who can prove themselves comprized under the Articles of Limerick may have a sword, a case of pistols, and a gun for defence of their house or for fowling."[82] That referred to a provision of the Treaty of Limerick of 1691, which ended the war between William III's forces and the Jacobites in Ireland, that provided about upper class Irish who took the oath of allegiance to the King: "Every nobleman and gentleman . . . shall have liberty to ride with a sword and case of pistols, if they think fit, and keep a gun in their houses for the defence of the same, or for fowling."[83]

The second exception from the gun ban was a provision that "the chief governors may by order of the privy council licence any person to keep such arms as shall be particularly expressed

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[79]Act for the Better Security of the Government, by Disarming the Papists, § 1, 7 W & M., c. 5 (Ireland 1695). Available at https://www.law.umn.edu/library/irishlaw/subjectlist/weapons.

[80]*Id.* § 3.

[81]4 Blackstone *117-18.

[82]Act for the Better Security of the Government, by Disarming the Papists, § 4-5.

[83]Treaty of Limerick, Civil Articles, ¶ 7 (1691). Available at https://celt.ucc.ie/published/E703001-010/text001.html.

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in such licence."[84] A license to keep and bear arms could be granted or denied at the discretion of the government.

Patrick Charles argues that under "the English licensing system" and "the common law," "a person was required to obtain the crown's license to go armed in the public concourse," and it was "based upon government acquiescence only."[85] He quotes a 1699 proclamation noting "Information That several Persons not Qualified by the Laws of this Realm, to carry Arms, have nevertheless in contempt and Violation of the Law, taken on them to Ride and Go Armed," some relying on licenses that had been voided and others having "Falsified and Counterfeited Licences to carry Arms . . . ."[86] It revoked "all Licenses whatsoever to bear Arms, formerly Granted to any Papist in this Kingdom . . . ."[87] Charles does not mention that this decree only applied in Ireland.

Charles notes that the requirement of a license to carry arms survived the "have arms" guarantee of the 1689 English Declaration of Rights,[88] neglecting that the Declaration provided only that "the Subjects which are Protestants, may have Arms for their Defence,"[89] which excluded Catholics. English Catholics who refused to take a loyalty oath were prohibited from

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[84]Act for the Better Security of the Government, by Disarming the Papists, § 7.

[85]Patrick J. Charles, "The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review," 60 Clev. St. L. Rev. 1, 26-27 (2012).

[86]*The Post Boy* (London), Dec. 19-21, 1699, at 1, quoted in *id*. at 27.

[87]*Id*.

[88]*Id.*

[89]*An Act Declaring the Rights and Liberties of the Subject*, 1 W. & M., Sess. 2, c.2, (1689).

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keeping arms even in their homes, except such arms as allowed by justices of the peace.[90] The requirement that Irish "Papists" obtain a license "to bear Arms" may be traced back to the 1695 enactment to disarm Catholics and to require licenses to keep and bear arms, which could be granted or denied at governmental discretion.

There is no end to the repressive English measures against the Irish that could be recounted. The Americans were well aware of this history and wanted no part of it. The Continental Congress adopted an address "To the People of Ireland" on July 28, 1775, noting "your grievances," stating that "[w]e sympathize with you in your distress," and referring to "the same common enemy." It complained how General Gage promised the citizens of occupied Boston, "on surrendering their arms, to permit them to depart with their other effects; they accordingly surrendered their arms, and the General violated his faith . . . ."[91] The Irish were well familiar with such methods of subjugation.

While the British firearm prohibitions against the Irish in the periods to follow are beyond the scope of this study, the Statute of Northampton was applied in calmer times at a later date, just before the founding of the Republic of Ireland in 1922. In 1914, the King's Bench in Ireland held that not even an Irishman could be convicted under the Statute for walking down a public road while armed with a loaded revolver:

> Without referring to old principles, which are admitted by all, we think that the statutable misdemeanour is to ride or go armed without lawful occasion *in terrorem populi* . . . .

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[90] An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W.&M., Sess. 1, c. 15 §4 (1689).

[91] 2 *Journals of the Continental Congress*, Ford ed., 112, 116 (1905). Available at http://avalon.law.yale.edu/18th_century/contcong_07-28-75.asp.

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> . . . . 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 terrorem populi*.[92]

That decision lays bare and should finalize any debate about the elements of the offense under the Statute of Northampton. No small wonder that no mention is made of this decision by Messrs. Cornell and Charles.

* * *

In sum, it was an offense under the Statute of Northampton to go or ride armed in a manner that creates an affray or terror to the subjects. It was not an offense simply to carry arms in a peaceable manner. A serious historian cannot snip off what were elements of the offense in support of a current agenda to represent the Statute of Northampton as demonstrating a historical tradition of banning the peaceable carrying of arms. Certain basic rules of due process in criminal procedure, including the sufficiency of indictments and the requirement that every element of an offense must be proven, are little different today than in Sir John Knight's time.

To the extent the English monarchs enacted repressive measures against minorities such as the Welch and the Irish, not to mention the English subjects, the Americans adopted no part of it and in fact rebelled against the same tyrannical measures.

II. THE RIGHT TO BEAR ARMS VERSUS GOING ARMED IN A THREATENING MANNER: THE AMERICAN FOUNDING AND EARLY REPUBLIC

At the American Founding, some but not all of the states recognized going armed to the terror of the people as a common law crime, and some made it a statutory offense. Carrying a

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[92] *Rex* v. *Smith*, 2 Ir. R. 190, 204 (K.B. 1914).

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firearm in and of itself was not an offense. Indeed, at the Founding of the Republic, four states explicitly guaranteed the constitutional right to "bear arms,"[93] and more states followed as the Republic grew. The Second Amendment would declare that "the right of the people to keep and bear arms, shall not be infringed."

Initially, there were only two kinds of laws regarding the mere possession and carrying of firearms. In all states, free males of specified age groups were required to provide arms for themselves and to carry and use them in militia service. In some states, slaves and persons of color were prohibited from possession or carrying arms without a license or at all. In later years, some states prohibited the carrying of weapons concealed.

Given that bearing arms was explicitly declared to be a constitutional right, it could not have been considered a crime. Some states reenacted a version of the Statute of Northampton, of which Virginia and Massachusetts were representative. Other states, such as North Carolina and Tennessee, recognized the common-law offense of going armed in a manner to terrorize others. The following analyzes this array of declared rights and crimes at the American Founding.

A. The Colonial Period

Most of the American colonies required able-bodied males to provide their own arms and participate in the militia, and at times required persons to carry arms to church. Carrying arms openly or concealed in a peaceable manner was not, generally speaking, prohibited. The main

[93] "That the people have a right to bear arms for the defense of themselves, and the state . . . ." Pa. Dec. of Rights, Art. XIII (1776); Vt. Const., Art. I, § 15 (1777). "That the People have a right to bear Arms for the Defense of the State . . . ." N.C. Dec. of Rights, Art. XVII (1776). "The people have a right to keep and bear arms for the common defence." Mass. Dec. of Rights, Art. XVII (1780).

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exception is that some colonies prohibited slaves from keeping or carrying firearms.[94]

One colonial law stands out as being one of a kind not found anywhere else. In 1686 the colony of New Jersey enacted an unusual law providing that no person "shall presume privately to wear any pocket pistol . . . or other unusual or unlawful weapons" – which did not affect open carry – and that "no planter shall ride or go armed with sword, pistol, or dagger . . . excepting . . . all strangers, traveling upon their lawful occasions thro' this Province, behaving themselves peaceably."[95] It is unclear why the latter provision was limited to planters.

It was also unclear whether to ride or go armed implied an element of doing so offensively,[96] as was explicit in the laws of other colonies. A 1694 Massachusetts law punished "such as shall ride or go armed Offensively . . . in Fear or Affray of Their Majesties Liege People,"[97] and a 1699 New Hampshire law instructed justices of the peace to arrest "affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed offensively . . . ."[98]

The Glorious Revolution of 1689 overthrew James II, who had disarmed Protestants, and resulted in the enactment of the Declaration of Rights, with its protection of the right to have

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[94]See generally S. Halbrook, *A Right to Bear Arms* (1989).

[95]N.J. Laws 289, ch. 9 (1686). Charles calls this "the earliest American statute prohibiting 'going armed,'" but it was unlike any other statute. Patrick J. Charles, "The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review," 60 Clev. St. L. Rev. 1, 32 (2012).

[96]In a 1682 directive, New Jersey constables pledged "to arrest all such persons, as in [their] presence, shall ride or go arm'd offensively." A Bill for the Office of Coroner and Constable, ch. 18 (Mar. 1, 1682), quoted in Eric M. Ruben & Saul Cornell, "Firearm Regionalism and Public Carry," 125 Yale L.J. Forum 121, 130 n.50 (2015).

[97]Mass. Acts 10, no. 6 (1694).

[98]N.H. Laws 1 (1699).

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arms. That led to overthrow or reform of the royal governments in some of the American colonies.[99] It is unclear how long New Jersey's 1686 law remained on the books, but it passed into oblivion.

Whatever restrictive firearm law found its way into the books hardly amounts to a long-standing regulation with relevance to the Second Amendment. Another New Jersey law, this one passed in 1694, recited that "complaint is made by the inhabitants of this Province, that they are greatly injured by slaves having liberty to carry guns and dogs, into the woods and plantations, under pretence of guning, to kill swine." It thus provided that "no slave or slaves . . . be permitted to carry any gun or pistol, or take any dog with him or them into the woods, or plantations, upon any pretence whatsoever; unless his or their owner or owners, or a white man, by the order of his or their owner or owners, be with the said slave or slaves . . . ."[100]

Further, a 1722 New Jersey law provided that any "Indian, Negro or Mullato Slave . . . carrying or Hunting with any Gun, without License from his Master, shall, at the Publick Whipping post, on the bare Back, be Whipt, not exceeding twenty Lashes . . . ."[101] That restriction may have been loosened later, as a 1798 law mandated whipping only for "any Negro

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[99]"The rule of James II hung as heavy over colonists in America as it did the people of England in 1688. . . . His arbitrary government, the colonists believed, was reflected everywhere; in Andros' regime over all of New England, New York, and New Jersey . . . ." David S. Lovejoy, *The Glorious Revolution in America* (N.Y.: Harper & Row, 1972), 235.

[100]An Act concerning Slaves, &c., § 1, East New Jersey Laws, October 1694, ch.II, L&S 340-342. Available at http://njlegallib.rutgers.edu/slavery/acts/A8.html.

[101]An Act to prevent the Killing of Deer out of Season, and against Carrying of Guns and Hunting by Persons not qualified, § 6, 2 Bush 293, 295 (May 5, 1722). Available at http://njlegallib.rutgers.edu/slavery/acts/A15.html.

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[who] . . . shall be seen to hunt or carry a gun on the first day of the week . . . ."[102]

New Jersey had no restrictions on the peaceable carrying of arms by whites in the eighteenth century. New Jersey's code with statutes passed between 1702-1776 reflected only a prohibition on shooting matches for gambling.[103] A 1776 law defined the militia as "all effective Men between the Ages of sixteen and fifty Years," and required each member to "constantly keep himself furnished with a good Musket . . . [or] a good Rifle-Gun," or if a horseman, "a Pair of Pistols and Holsters."[104]

In fact, New Jersey did not require a permit to carry a concealed firearm until 1905.[105] Open carry was perfectly legal until 1966, when a permit requirement was imposed.[106] Thus, in its entire history as a state until 1966, New Jersey allowed law-abiding citizens to carry firearms in some manner without being authorized to do so by the state.[107]

B. Going Armed in the Early Republic: The Virginia and Massachusetts Statutory Models

1. Virginia's Act on Affrays, 1786

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[102]An Act respecting Slaves. March 14, 1798, Acts 22nd G.A. 2nd sitting, ch. DCCXXVII, p. 364-373. Available at http://njlegallib.rutgers.edu/slavery/acts/A75.html#s9.

[103]*Acts of the General Assembly of the Province of New Jersey* 235 (Burlington 1776). The code published in 1800 contained certain hunting regulations and a prohibition on setting a loaded gun. *Laws of the State of New Jersey* 19-21 (1800).

[104]*Acts of the Council and General Assembly of the State of New Jersey* 168-69, 180 (Burlington 1776).

[105]Compiled Statutes of New Jersey, Vol. II. 1759 (Soney & Sage 1911).

[106]N.J. Stat. Ann. § 2A:151–41 (1966).

[107]See *Drake v. Filko*, 724 F.3d 426, 447-49 (3rd Cir. 2013) (Hardiman, J., dissenting), *cert. denied*, 134 S. Ct. 2134 (2014).

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In Virginia, a Committee of Revisors – of which Thomas Jefferson played the leading role – drafted a restatement of the statutory law which included the common law and elements of such English statutes as were deemed applicable.[108] One of the provisions reported by the Committee, presented to the General Assembly by James Madison, would be passed as an Act Forbidding and Punishing Affrays (1786).[109] It provided in pertinent part that no man shall "come before the Justices of any court, or other of their ministers of justice doing their office, with force and arms, . . . nor go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the country . . . ."[110] This offense had three pertinent elements: (1) going or riding armed, (2) in fairs, markets or "other places," which according to the canon of *noscitur a sociis* (associated words) meant other places like fairs and markets, and (3) in terror of the country.

A sufficient indictment of the above could not simply allege the first element, but would have been required to allege all three. As Virginia courts held, it was "an established rule, that in general, if an Indictment pursues the words of a Statute in describing an offence, . . . it is sufficient . . . ."[111] A demurrer (motion to dismiss) would be sustained for an insufficient

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[108]Edward Dumbauld, *Thomas Jefferson and the Law* 134-36 (1978).

[109]2 Jefferson, *Papers* 519-20 (Julian P. Boyd ed. 1951). "This Bill is a good example of TJ's retention of the language of early English statutes, with its archaic provision for the forfeiture of 'armour,' &c. It is also a good example of TJ's ability to condense the involved language of the earlier English statutes that he thought worthy of retaining in the revision . . . ." *Id*. at 520 (note by editor).

[110]*A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force*, ch. 21, at 30 (1803).

[111]*Rasnick v. Commonwealth*, 4 Va. (2 Va. Cas.) 356, 357 (1823).

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indictment.[112]

It is unclear how long the Virginia law remained on the books, and no judicial decision exists reciting its language. Had it been read to ban the mere carrying of firearms, its draftsman Thomas Jefferson would have been one of its biggest violators, as he regularly went armed and defended the right to do so.[113] As he advised his 15-year old nephew: "Let your gun therefore be the constant companion of your walks."[114]

If it was still law in 1838, the enactment was not interpreted to prohibit the habitual carrying of concealed weapons, as in that year the legislature for the first time provided: "If a free person, habitually, carry about his person hid from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, he shall be fined fifty dollars."[115] This provision would have been unnecessary if going armed was already an offense, not to mention that this provision only restricted going armed habitually and hiding the arms. Law enforcement officers were not exempt – the Virginia high court affirmed the conviction of a constable who "drew out a pistol and dirk" against a person to levy an execution.[116]

In 1847, Virginia enacted the following: "If any person shall go armed with any offensive

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[112]*Commonwealth v. Lodge*, 43 Va. (2 Gratt.) 579, 580-81 (1845).

[113]See S. Halbrook, *The Founders' Second Amendment* 131, 260, 316-18 (2008). In 1803, Jefferson wrote an innkeeper that "I left at your house . . . a pistol in a locked case," and asked that a friend pick it up. See original letter at http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=210.

[114]Jefferson, *Writings*, Merril D. Peterson ed., 816-17 (1984).

[115]Virginia Code, tit. 54, ch. 196, § 7 (1849).

[116]*Hicks v. Commonwealth*, 48 Va. (7 Gratt.) 597, 598 (1850).

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or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may be required to find sureties for keeping the peace."[117] Any person engaging in the subject conduct, if anyone complained, could continue doing if the court did not find that keeping the peace required sureties. If sureties were required, he could simply obtain them. There are no published judicial decisions on the provision.

At a more general level, courts could require a person to enter into a recognizance with sureties to keep the peace, particularly in regard to a specified person who was threatened, for a given period.[118] If a person violated the recognizance, a writ of *scire facias* could be issued alleging the violation with specificity and requiring the person to answer in court.[119] Specific threats or harm were required for a finding that sureties were needed to ensure that the person kept the peace.

Virginia's only prohibition on carrying a firearm *per se* applied to African Americans. The slave code provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive," punishable by no more than thirty-nine lashes, except those living at a frontier plantation could be licensed to "keep and use" such weapons by a justice of the peace.[120] Further, "[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 obtaining a license from the court" where he resided, "which license may, at

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[117] 1847 Va. Laws 127, 129, § 16.

[118] *Welling's Case*, 47 Va. (6 Gratt.) 670 (1849).

[119] *Randolph v. Brown*, 4 Va. (2 Va. Cas.) 351 (1823).

[120] Va. 1819, c. 111, § 7.

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any time, be withdrawn by an order of such court."[121]

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," was the restriction "upon their right to bear arms."[122] But white persons had a right to carry arms and needed no license to do so.

2. The Massachusetts Model, 1795

The Massachusetts Declaration of Rights of 1780 provided: "The people have a right to keep and bear arms for the common defence."[123] A Massachusetts Act of 1795 incorporated a version of the Statute of Northampton in the following words:

> That every Justice of the Peace, within the county for which he may be commissioned, may cause to be staid and arrested, all affrayers, rioters, disturbers, or breakers of the peace, and *such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth*, or such others as may utter any menaces or threatening speeches, and upon view of such Justice, confession of the delinquent, or other legal conviction of any such offence, shall require of the offender to find sureties for his keeping the Peace, and being of the good behaviour; and in want thereof, to commit him to prison until he shall comply with such requisition . . . .[124]

Elements of the offense included (1) riding or going armed, (2) offensively, i.e., not peaceably, and (3) to the fear or terror of the good citizens. Just peaceably riding or going armed

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[121] *Id*. § 8.

[122] *Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

[123] Mass. Dec. of Rights, Art. XVII (1780).

[124] 1795 Mass. Acts 436, ch. 2; 2 *Perpetual Laws of the Commonwealth of Massachusetts* 259 (1801) (emphasis added).

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alone was not an offense. As the Massachusetts Supreme Judicial Court stated the rule, every word defining a crime must be given meaning and charged in an indictment:

> The general principle applicable to criminal pleading requires that an indictment shall set forth, with technical particularity, every allegation necessary to constitute the offence charged; and the constitution, adopting and sanctioning this principle, provides, "that no subject shall be held to answer for any crime or offence, until the same is fully, substantially and formally described to him."[125]

The explicit definition of the crime as riding or going armed "offensively, to the fear or terror of the good citizens" is given further meaning and context by the above associated crimes referring to "affrayers, rioters, disturbers, or breakers of the peace," and those who "utter any menaces or threatening speeches."

There are no judicial opinions on the 1795 enactment. However, an 1825 decision did differentiate being armed from misuse of arms: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."[126]

3. The Refined Massachusetts Model, 1836

The 1795 Act was superceded by the Act of 1836, entitled "Of Proceedings to Prevent the Commission of Crimes," which provided:

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on

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[125] *Commonwealth v. Eastman*, 55 Mass. (1 Cush.) 189, 223 (1848). The court added: "If an indictment for murder, should allege merely that the accused had committed the crime of murder upon the person of one A. B., or, if an indictment for larceny should simply set forth, that the defendant had stolen from C. D., in neither case would the offence be set forth with the particularity and precision required by law."

[126] *Commonwealth v. Blanding,* 20 Mass. (3 Pick.) 304, 314 (1825).

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> 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.[127]

The above did not prohibit a person from going armed with the specified weapons. It required an aggrieved person to file a complaint and to show reasonable cause to fear injury or breach of the peace, and such a finding by the court would have to entail threats or other bad behavior. Even then, the subject person could show reasonable cause to fear injury. And if the court found otherwise and determined that his keeping the peace required sureties, the person could simply find sureties and continue going armed. The following explains the procedures required by the Act.

Reasonable cause to fear an injury. What would be required of a complainant to show "reasonable cause to fear an injury"? By analogy, a magistrate had to have "reasonable cause" to believe certain things to get a search warrant. "The oath to the complainant's belief, and not to his suspicion, is one of 'the formalities prescribed by the laws,' without which 'no warrant ought to be issued.'"[128] Here, reasonable cause to fear an injury, not speculation or suspicion, was required.

Similar language was used in a decision regarding an indictment for a forcible entry, which "must be accompanied with circumstances tending to excite terror": "There must at least be some apparent violence; or *some unusual weapons*; or the parties attended with an unusual number of people; some menaces, or other acts giving *reasonable cause to fear*, that the party making the forcible entry will do some bodily hurt to those in possession, if they do not give up

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[127] 1836 Mass. Laws 748, 750, ch. 134, § 16.

[128] *Commonwealth v. Lottery Tickets*, 59 Mass. 369, 372 (1850) (citation omitted).

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the same."[129] The mere presence of ordinary weapons, without more, would not suffice.

Reasonable cause to fear a breach of the peace. A breach of the peace was not considered a minor manner – one case referred to "breaches of the peace or other great disorder and violence, being what are usually considered *mala in se* or criminal in themselves . . . ."[130] Reasonable cause to fear such would entail anticipated violence or related unlawful conduct: "Breaches of the peace comprise not only cases of actual violence to the person of another, but any unlawful acts, tending to produce an actual breach of the peace . . . ."[131] Under a 1783 enactment, "justices of the peace had power to bind over to keep the peace those who are complained of as having a present intent to commit a breach of the peace, as well as those who are charged with having committed such an offence . . . ."[132]

On complaint of any person. When a complaint was made that "any person has threatened to commit an offence against the person or property of another," the magistrate was required to examine the complainant and any witnesses under oath and to prepare a written

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[129] *Commonwealth v. Shattuck*, 58 Mass. 141, 145 (1849) (emphasis added). Similarly, see *Commonwealth v. Dudley*, 10 Mass. 403, 409 (1813) ("There must be some apparent violence offered, in deed or in word, to the person of another; or the party must be furnished with unusual offensive weapons, or attended by an unusual multitude of people; all which circumstances would tend to excite terror in the owner").

[130] *Commonwealth v. Willard*, 39 Mass. 476, 478 (1839). See *Fifty Associates v. Howland*, 59 Mass. 214, 218 (1849) (reference to " such a degree of force, as would tend to a breach of the peace").

[131] *Pearce v. Atwood*, 13 Mass. 324, 332 (1816), citing 4 Bl. Com. 255.

[132] *Commonwealth v. M'Neill*, 36 Mass. 127, 141 (1837).

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complaint.[133] If the magistrate determined that "there is just cause to fear that any such offence may be committed," he issued a warrant reciting the substance of the complaint and directed an officer to apprehend the person.[134]

Finding sureties. The Act reflected general remedies available to a person who was injured or feared injury or breach of the peace by another. "When the person complained of is brought before the magistrate, he shall be heard in his defense, and he may be required to enter into a recognizance, with sufficient sureties, in such sum as the magistrate shall direct, to keep the peace" towards all persons but "especially towards the person requiring such security," for no more than six months.[135] As applied in a similar scenario, a threatened person "may apply to a magistrate, and ask that sureties to keep the peace may be required of one from whom he may apprehend any serious personal injury."[136]

Appeal. The defendant could appeal to the court of common pleas, which would hear the witnesses and could either discharge him or require him to enter into a new recognizance in a sum determined to be proper.[137]

Insufficient cause. Alternatively, if on examination the magistrate determined that it did

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[133] 1836 Mass. Laws 748, § 2. See *Commonwealth v. Wallace*, 80 Mass. 382 (1860) (a complaint would have one's full name, a sworn statement of the complaint, and a signature. It would be certified by the appropriate authority, which was "an averment by him that the signature and oath were those of the complainant . . . .").

[134] *Id*. § 3.

[135] *Id*. § 4.

[136] *Mason v. Mason*, 36 Mass. (19 Pick.) 506, 508 (1837).

[137] 1836 Mass. Laws 748, §§ 9-11.

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"not appear that there is just cause to fear that any such offence will be committed," the person was to be discharged. If the magistrate deemed the complaint "unfounded, frivolous or malicious," he could order the complainant to pay the costs of the prosecution.[138] As held in a prior decision, a groundless complaint could have further consequences: "A false complaint, made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel; and the question of malice is to be determined by the jury."[139]

The above procedures were not required for certain offenses committed in the presence of a magistrate. Any person who would "make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property," or would "contend with hot and angry words, to the disturbance of the peace," could be ordered to keep the peace or be of good behavior. No further process or other proof was required.[140] This provision identifies the types of analogous behavior included in the next section about going armed in a manner causing a person to have "reasonable cause to fear an injury, or breach of the peace."[141]

Failing to keep the peace. Generally, if a person who violated his recognizance to keep the peace such as by assaulting the complainant, the Commonwealth could prosecute an action of debt upon this forfeited recognizance, or bring a writ of *scire facias*.[142] It was decided in one

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[138] *Id*. § 7.

[139] *Bodwell v. Osgood*, 20 Mass. 379 (1825).

[140] 1836 Mass. Laws 748, § 15.

[141] *Id*. § 16.

[142] *Commonwealth v. Green*, 12 Mass. 1 (1815).

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case: "Where one, being under a recognizance to keep the peace, committed a breach of the peace, for which he was indicted and fined, it was *held* that he was nevertheless liable to an action for the penalty of the recognizance."[143]

In sum, as exemplified by Virginia and Massachusetts, the statutory offense of going armed to the terror of the people required proof that the defendant did so in an offensive manner that terrified actual persons. Further, provisions requiring persons who went armed to find sureties to keep the peace required findings of offensive behavior that threatened the peace. Peaceably carrying arms was not subject to any sanction.

C. Constitutional Declarations of the Right to Bear Arms and Commentaries on Carrying Arms Peaceably

When the colonies declared themselves independent states, they adopted their own constitutions, several of which included declarations of rights. Of those, Pennsylvania and Vermont declared: "That the people have a right to bear arms for the defense of themselves, and the state . . . ."[144] North Carolina declared: "That the People have a right to bear Arms for the Defense of the State . . . ."[145] And Massachusetts declared: "The people have a right to keep and bear arms for the common defence."[146]

When the federal Constitution was proposed in 1787 without a bill of rights, demands were made for a declaration. In the Massachusetts ratification convention, Samuel Adams

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[143] *Commonwealth v. Braynard*, 23 Mass. (6 Pick.) 113 (1828).

[144] Pa. Dec. of Rights, Art. XIII (1776); Vt. Const., Art. I, § 15 (1777).

[145] N.C. Dec. of Rights, Art. XVII (1776).

[146] Mass. Dec. of Rights, Art. XVII (1780).

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proposed "that the said Constitution be never construed to authorize Congress, . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . . ."[147] In the Pennsylvania convention, the Dissent of the Minority proposed a bill of rights, including: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . ."[148] The New Hampshire convention resolved: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[149]

In the Virginia convention, George Mason recalled that "when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised . . . to disarm the people; that it was the best and most effectual way to enslave them."[150] And Patrick Henry implored: "The great object is, that every man be armed."[151] The ensuing debate concerned defense against tyranny and invasion.

The Virginia convention proposed a bill of rights asserting "the essential and unalienable

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[147] *Documentary History of the Ratification of the Constitution*, John P. Kaminski and Gaspare J. Saladino eds. (Madison: State Historical Society of Wisconsin, 2000), vol. 6, at 1453.

[148] *Documentary History of the Ratification of the Constitution*, Merrill Jensen ed. (Madison: State Historical Society of Wisconsin, 1976), vol. 2, at 623-24.

[149] *Documentary History of the Ratification of the Constitution*, John P. Kaminski and Gaspare J. Saladino eds. (Madison: State Historical Society of Wisconsin, 1995), vol. 18, at 188.

[150] Jonathon Elliot ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: J.B. Lippincott, 1836), vol. 3, at 380.

[151] *Id*. at 386.

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rights of the people," including: "That the people have a right to keep and bear arms . . . . ."[152] In identical language, New York,[153] North Carolina,[154] and Rhode Island[155] joined in the demand for what became the Second Amendment. The right to bear arms had universal support.

James Madison drafted what became the Bill of Rights. In notes he prepared for introducing the amendments to the House of Representatives in 1789, Madison averred that "[t]hey relate 1st to private rights," and observed a fallacy "as to English Decl[aratio]n. of Rights – 1. mere act of parl[iamen]t. 2. no freedom of press – . . . arms to protest[an]ts."[156] By contrast, in America rights would be protected by the Constitution and not be subject to repeal by the legislature, and these rights would be expanded to recognize the press and not to limit the right to arms to Protestants.

Madison introduced his draft to the House on June 8, 1789. It included the provision: "The right of the people to keep and bear arms shall not be infringed . . . ."[157] While several states had proposed simply "that the people have a right to keep and bear arms," Madison

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[152] *Id*. at 658-59.

[153] *The Documentary History of the Ratification of the Constitution*, John P. Kaminski and Gaspare J. Saladino eds. (Madison: State Historical Society of Wisconsin, 1995), vol. 18, at 298.

[154] *Id.* at 316.

[155] Elliot ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 1, at 335.

[156] Madison, Notes for Speech in Congress, June 8, 1789, *The Papers of James Madison*, Charles F. Hobson *et al*. eds. (Charlottesville: University Press of Virginia, 1979), vol. 12, at 193-94.

[157] *Documentary History of the First Federal Congress of the United States of America*, Charlene Bangs Bickford ed. (Baltimore: Johns Hopkins University Press, 1986), vol. 4, at 10.

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inserted the stronger guard that this right "shall not be infringed."

Similarly, in 1790, the Pennsylvania Declaration of Rights was revised to provide: "That the right of the citizens to bear arms in defense of themselves and the state shall not be questioned."[158] James Wilson, a Justice on the U.S. Supreme Court, presided over the convention and was a member of the committee that drafted it.[159]

In his lectures on the law published in 1804, Wilson stated that "the great natural law of self preservation . . . cannot be repealed, or superseded, or suspended by any human institution," adding:

> This law, however, is expressly recognised in the constitution of Pennsylvania. "The right of the citizens to bear arms in the defence of themselves shall not be questioned." This is one of our many renewals of the Saxon regulations. "They were bound," says Mr. Selden, "to keep arms for the preservation of the kingdom, and of their own persons."[160]

Just before the above passage, Wilson copied the following from Hawkins: "In some cases, there may be affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people."[161] Ignoring the phrase "in such manner," Mr. Charles asserts that passages like this

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[158] Pennsylvania Declaration of Rights, Art. XXI; *The Proceedings Relative to Calling the Conventions of 1776 and 1790*, 305.

[159] *The Proceedings Relative to Calling the Conventions of 1776 and 1790* (Harrisburg, Pa.: John S. Wiestling, 1825), 153-54.

[160] *The Works of James Wilson* (Cambridge: Harvard Univ. Press, 1967), vol. 2, at 657, quoting Nathaniel Bacon, *An Historical and Political Discourse of the Laws and Government of England. Collected from some Manuscript Notes of John Selden, Esq*. (London: D. Browne & A. Millar, 1760), vol. 1, at 40.

[161] *Id.* at 654.

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show that "the carrying of dangerous weapons in the public concourse – without the license of government – is what placed the people in great fear or terror . . . ."[162] That further disregards the Pennsylvania's explicit declaration of "the right of the citizens to bear arms in defense of themselves . . . ."

St. George Tucker's 1801 edition of Blackstone's *Commentaries* contrasted the Second Amendment from the English Declaration as follows: "The right of the people to keep and bear arms shall not be infringed . . . and this without any qualification as to their condition or degree, as is the case in the British government . . . ."[163] Tucker called this right "the true palladium of liberty," adding that "[t]he right of self defence is the first law of nature" and that wherever the right to bear arms is prohibited, "liberty, if not already annihilated, is on the brink of destruction."[164]

Sir Matthew Hale, in *Pleas of the Crown*, noted a presumption of warlike force in the use of weapons by an assembly without the king's licence, other than in a lawful case. Tucker asked:

> But ought that circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? 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.[165]

In support of his argument that the Second Amendment guarantees no right of a citizen to

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[162]Patrick J. Charles, "The Statute of Northampton by the Late Eighteenth Century: Clarifying the Intellectual Legacy," 41 Fordham Urb. L.J. City Square 10, 21 (2013).

[163]St. George Tucker, *Blackstone's Commentaries* (Philadelphia: William Young Birch & Abraham Small, 1803), vol. 1, at *143 n.40.

[164]*Id*., Appendix, 300.

[165]*Id*., vol. 5, at 19.

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carry firearms for self-defense, Saul Cornell argues that Tucker was referring only to militiamen carrying military arms, excluding pistols, and that the practice was limited to Virginia.[166] But Tucker referred simply to a man leaving his house "on any occasion" with a firearm, contrasting him with a European gentleman carrying a sword, neither without any military context. Nor did Tucker's statement conflict with the views of any other American jurist.

Kentucky's Constitution of 1792 declared "that the right of the citizens to bear arms in defence of themselves and the state shall not be questioned."[167] A treatise by Charles Humphreys entitled *Compendium of the Common Law in Force in Kentucky* (1822) analyzed Blackstone and sought to determine what in English law was still valid and what had become obsolete in America. On the subject at hand he wrote:

> Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land, which is punishable by forfeiture of the arms, and fine and imprisonment. But here it should be remembered, that in this country the constitution guarranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.
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> We have a statute on the subject, related to concealed weapons.[168]

Again denying a Second Amendment right of individuals to bear arms, Saul Cornell

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[166]Saul Cornell, "The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities," 39 Fordham Urb. L.J. 1695, 1710-11 (2012).

[167]Ky. Const., Art. XII, § 22 (1792).

[168]Charles Humphreys, *Compendium of the Common Law in force in Kentucky* (Lexington, Ky.: William Gibbes Hunt, 1822), 482. https://books.google.com/books?id=jZRGAQAAIAAJ&dq=editions%3ASTANFORD36105064251106&q=bear+arms#v=snippet&q=bear%20arms&f=false.

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asserts that the above deviates from the common law and was unique to the South.[169] To the contrary, Humphreys stated the traditional rule that going armed was a crime only when done in a manner to terrify the people, and the Second Amendment's confirmation of that rule would discourage deviation therefrom.

Kentucky's 1813 prohibition on wearing a pocket pistol and certain edged weapons concealed was declared unconstitutional in *Bliss v. Commonwealth* (1822), which held: "Whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution."[170] In 1849, the guarantee was revised to authorize the legislature to "pass laws to prevent persons from carrying concealed arms."[171]

The federal and state constitutional declarations of the right to "bear arms" preclude any argument that somehow the common law in America prohibited peaceably going armed. Further, the passage of restrictions on concealed weapons indicate that going armed without more was already unlawful under a Northampton-type statute or common law. Meanwhile the courts would uphold such laws as long as open carry was allowedl

D. Going Armed in the Early Republic: Judicial Precedents in Tennessee and North Carolina

To what extent was the prohibition of the Statute of Northampton recognized as a common law offense in America? The courts of Tennessee and North Carolina grappled with the

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[169]Saul Cornell, "The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace," 80 Law & Contemp. Probs. 11, 35 (2017).

[170]*Bliss v. Commonwealth*, 2 Litt. (12 Ky.) 90, 91-92, 13 Am. Dec. 251 (1822).

[171]Ky. Const., Art. XIII, § 25 (1849).

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issue, the former questioning its applicability and the latter holding that it was. The latter also provided significant detail regarding how both going armed and doing so to the terror of the people were separate elements of the offense, both of which must be alleged in the indictment and proven to the jury.

In *Simpson* v. *State* (1833), the Supreme Court of Errors and Appeals of Tennessee dismissed an indictment alleging that "William Simpson, laborer, with force and arms being arrayed in a warlike manner, in a certain public street or highway situate, unlawfully, and to the great terror and disturbance of divers good citizens, did make an affray . . . ."[172] The court held that the indictment was insufficient as it failed to allege the elements of an affray of fighting between two or more persons.

The Attorney General sought to rely on Hawkins' claim that "there may be an affray . . . where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes."[173] That doctrine, averred the court, relied "upon ancient English statutes, enacted in favor of the king, his ministers and other servants, especially upon the statute of the 2d Edward III," which provided that no man "shall go or ride armed by night or by day, etc."[174]

The *Simpson* court repeated Hawkins' comment about the Statute of Northampton "that persons of quality are in no danger of offending against this statute by wearing their common

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[172] *Simpson* v. *State*, 13 Tenn. Reports (5 Yerg.) 356, 361 (1833).

[173] *Id*. at 357-58, citing Hawkins, *Pleas of the Crown*, book 1, ch. 28, sec. 4.

[174] *Id*. at 358.

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weaponsf" in places and on occasions where common.[175] The court held the English statute not to be incorporated into American common law:

> It may be remarked here, that ancient English statutes, from their antiquity and from long usage, were cited as common law; and though our ancestors, upon their emigration, brought with them such parts of the common law of England, and the English statutes, as were applicable and suitable to their exchanged and new situation and circumstances, yet most assuredly the common law and statutes, the subject-matter of this fourth section,[176] formed no part of their selection.[177]

The *Simpson* court held in the alternative that if the Statute of Northampton had been brought to America, it was abrogated by Tennessee's constitutional guarantee "that the freemen of this state have a right to keep and to bear arms for their common defence."[178] That guarantee precluded recognition of "a man's arming himself with dangerous and unusual weapons" as part of the crime of an affray. "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 . . . ." The constitution having thus said that "the people may carry arms," doing so in itself could not be the basis of the element of "terror to the people" necessary for an affray.[179]

Recall the flimsy allegations of the bare-bones indictment that the laborer Simpson with no detail other than that "with force and arms being arrayed in a warlike manner" – who knows

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[175] *Id.* at 358-59.

[176] I.e., Hawkins, book 1, ch. 28, sec. 4.

[177] *Id*. at 359.

[178] *Id*. at 360, quoting Tenn. Const., Art. 11, § 26.

[179] *Id*.

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what specific act that legalese applied to – "to the great terror" of unidentified citizens he made an "affray" with no one.[180]

By contrast to the above case, the Supreme Court of North Carolina upheld indictments with language and under reasoning reflecting the legacy of the Statute of Northampton as including both going armed and doing so in a concrete manner to terrorize specific people. In *State v. Langford* (1824), the indictment alleged that the defendants "with force and arms, at the house of one Sarah Roffle, an aged widow woman, . . . did then and there wickedly, mischievously and maliciously, and to the terror and dismay of the said Sarah Roffle, fire several guns . . . ."[181] As the court stated, "men were armed with guns, which they fired at the house of an unprotected female, thus exciting her alarm for the safety of her person and her property. This is the *corpus delicti* . . . ."[182] The court recalled the words of Hawkins that "there may be an affray when there is no actual violence: as when a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people . . . ."[183]

Similarly, in *State v. Huntley* (1843), the North Carolina Supreme Court upheld an indictment alleging that the defendant, "with force and arms, . . . did arm himself with pistols, guns, knives and other dangerous and unusual weapons, and, being so armed," publically threatened before various citizens "to beat, wound, kill and murder" another person and others,

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[180] *Id*. at 361.

[181] *State v. Langford*, 10 N.C. (3 Hawks) 381 (1824).

[182] *Id*. at 383.

[183] *Id*., quoting 1 Hawkins 136.

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causing citizens to be "terrified," all "to the terror of the people . . . ."[184] The court quoted Blackstone's references to "the offence of riding or going armed with dangerous or unusual weapons, . . . by terrifying the good people of the land," and to the Statute of Northampton.[185] It further quoted Hawkins' reference to an affray as including "where a man arms himself with dangerous and unusual weapons in such a manner, as will naturally cause a terror to the people . . . ."[186] It also noted the statement in Sir John Knight's case that the statute of Northampton was made in affirmance of the common law.[187]

The *Huntley* court next turned to the guarantee of the North Carolina bill of rights securing to every man the right to "bear arms for the defence of the State." While this "secures to him a right of which he cannot be deprived," he has no right to "employ those arms . . . to the annoyance and terror and danger of its citizens . . . ."[188] That said, "the carrying of a gun *per se* constitutes no offence. For any lawful purpose – either of business or amusement – the citizen is at perfect liberty to carry his gun."[189] However, he may not carry a weapon "to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people."[190]

Carrying a gun *per se* was a statutory offense as applied not just to slaves, but also to free

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[184] *State v. Huntley*, 25 N.C. (3 Ired.) 418, 419 (1843).

[185] *Id*. at 420-21, quoting 4 Bl. Com. 149.

[186] *Id.* at 421, quoting Haw. P. C. B. 1, ch. 28, sect. 1.

[187] *Id*. at 421, citing 3 Mod. Rep. 117.

[188] *Id*. at 422.

[189] *Id*. at 422-23.

[190] *Id*. at 423.

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blacks. In *State* v. *Newsom* (1844),[191] the North Carolina Supreme Court upheld a provision "to prevent free persons of color from carrying fire arms" on the ground that "the free people of color cannot be considered as citizens."[192] By inference, the right to carry firearms was thus considered to be a right that flowed inherently from one's citizenship. The court also opined that the Second Amendment only applied to the federal government, not to the states.[193]

Decisions on affrays were rendered by courts of other states that used some of the above familiar language without mentioning the English antecedents. *O'Neill v. State* (1849), a decision by the Alabama Supreme Court, upheld a conviction for an affray in which the apparently unarmed defendant rode up to the witness and called him a "thief, liar, rascal, &c., whereupon the witness caned him," but the defendant did not resist other than to "to throw up his hands to protect his head . . . ."[194] Reversing the conviction, the court held that quarrelsome words did not constitute an affray, adding in *dictum*: "It is probable, however, that if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows."[195]

E. Prohibitions on Carrying Concealed Weapons

It was not an offense at common law or in the statutes of any state at the Founding

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[191] 27 N.C. 203 (1844).

[192] *Id.* at 204.

[193] *Id*. at 207.

[194] *O'Neill v. State*, 16 Ala. 65, 65 (1849).

[195] *Id*. at 67, citing 1 *Russell on Crimes* 271.

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peaceably to carry a concealed weapon. Going armed without the arm being seen inherently could not cause terror to anyone. In the early Republic, some states enacted laws prohibiting the carrying of arms in a concealed manner. That they found it necessary to do so further demonstrates that there was no preexisting common law offense of going armed *per se.*

Given that a ban on concealed carry was unprecedented, it was no small wonder that the first judicial decision thereon by a state court declared it unconstitutional. In *Bliss v. Commonwealth* (1822), a cased mentioned above, the Kentucky Supreme Court reasoned that "in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise."[196] What if the legislature banned open carry, the court asked? It reasoned that the rule could not be that whichever mode of carry was banned first was thereby constitutional.[197]

The sister courts of other states rejected that view and upheld the bans on concealed carry because open carry was allowed. The Alabama Supreme Court said it this way in upholding the conviction of a sheriff for carrying a concealed pistol: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."[198]

The Georgia Supreme Court overturned the conviction of a defendant "for having and keeping about his person, and elsewhere, a pistol, the same not being such a pistol as is known

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[196] *Bliss v. Commonwealth*, 2 Litt. 90, 92 (Ky. 1822).

[197] *Id*. at 93.

[198] *State v. Reid*, 1 Ala. 612, 616-17 (1840).

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and used as a horseman's pistol," but where it was not alleged that he carried it concealed.[199] While Georgia had no state constitutional guarantee to bear arms, the court reasoned: "The language of the *second* amendment is broad enough to embrace both Federal and state governments . . . . Is it not an unalienable right, which lies at the bottom of every free government?"[200]

By contrast, the Supreme Court of Indiana, in a one-sentence opinion, stated: "It was *held* in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional."[201]

While holding that a statute prohibiting the carrying of concealed weapons was not in violation of the Second Amendment, the Louisiana Supreme Court reasoned that the right to carry arms openly "placed men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defense of themselves, if necessary, and of their country . . . ."[202] As this suggests, the open carry rule was tied into the social norms of the day.

Eric Ruben and Saul Cornell argue that *Nunn* and the other above decisions, except for the Indiana case, are tainted because they were from "the slaveholding South" and that no right

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[199] *Nunn* v. *State*, 1 Ga. 243, 247 (1846).

[200] *Id*. at 250.

[201] *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833) (emphasis in original).

[202] *State* v. *Chandler*, 5 La. Ann 489, 490 (1850). *And see State v. Jumel*, 13 La Ann. 399 (1858).

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peaceably to carry firearms was recognized in the North.[203] But there were no decisions on the right to bear arms from courts in the North because the Northern states did not restrict the peaceable carrying of arms, concealed or openly. Ruben and Cornell point to such laws as the 1836 Massachusetts enactment analyzed extensively above, seeing no significance to the provision requiring a person to file a complaint that he or she had "reasonable cause to fear an injury, or breach of the peace" by the person going armed.[204]

In sum, the passage of prohibitions in some states on carrying concealed weapons and the decisions thereon upholding open carry again illustrate that there was no recognized common law offense simply of going armed without more. It would have been unnecessary to restrict concealed carry if both concealed and open carry were already crimes under the common law. Moreover, more of the judicial decisions holding carry bans unconstitutional were rendered by Southern courts only because the Northern states had no prohibitions on peaceably carrying arms.

III. RECONSTRUCTION AND THE FOURTEENTH AMENDMENT: THE RIGHT TO BEAR ARMS FOR AFRICAN AMERICANS

A. Securing the Right to Bear Arms, From the Freedmen's Bureau Act to the Fourteenth Amendment

As the Supreme Court noted in the *Heller* decision: "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free

[203]Eric M. Ruben and Saul Cornell, "Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context," 125 Yale L.J. Forum 121, 123 (2015).

[204]*Id*. at 130.

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slaves."[205] In that decision and in *McDonald*, the Court cited numerous statements to the effect that the Second Amendment was seen as protective of the right to carry firearms and that the Fourteenth Amendment would guarantee that right against infringement by the states.[206]

Indeed, the very first state law cited by *McDonald* as an infringement the Fourteenth Amendment was intended to invalidate was a discretionary licensing law providing 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, or any ammunition, dirk or bowie knife."[207]

McDonald found that "the most explicit evidence of Congress' aim" in regarding protection of the right to bear arms by the Fourteenth Amendment was the Freedmen's Bureau Act of 1866, which provided 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 of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery."[208]

In litigation where discretionary licensing laws are currently being challenged, amici curiae briefs filed on behalf of certain historians argue that, based on the original understanding

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[205]*District of Columbia v. Heller,* 554 U.S. 570, 614 (2008), citing S. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998).

[206]*McDonald*, 561 U.S. at 762 & n.9, 771-78.

[207]Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, quoted in *McDonald* at 771.

[208]§ 14, 14 Stat. 176-177, quoted in *McDonald*, 561 U.S. at 773.

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of the Fourteenth Amendment, no right to bear arms outside the home exists and, in the alternative, that government officials may designate who has a "need" to carry arms in public and may license those found to have such need. Also these historians do not appear to have published academic articles using the historical references cited in such briefs, the arguments and references appear in cookie-cutter briefs filed in multiple cases. Tellingly, the historians ignore the extensive literature on the right to bear arms during Reconstruction and the discussions in *Heller* and *McDonald* thereon.

The following will analyze a typical brief that will be referred to as the Historians' Brief that was filed in defense of the discretionary licensing regime in Massachusetts.[209] The Brief relies on military orders issued during Reconstruction, selected state laws enacted during 1870-1890, and certain judicial decisions during that period. These sources and arguments are discussed below.

B. Military General Orders

The Historians' Brief argues: "During Reconstruction, states in the South returned to the common law tradition through general orders and statutes broadly prohibiting the public carrying of firearms."[210] It cites three general orders issued by military authorities in 1867 in the South.

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[209]Brief of Professors of History and Constitutional Law As Amici Curiae in Support of Appellees and Affirmance, at 23 (hereafter "Historians' Brief", filed in *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018). The Brief includes an Appendix of Historical Laws (hereafter "App.") with copies of the cited items.

[210]Brief of Professors of History and Constitutional Law As Amici Curiae in Support of Appellees and Affirmance, at 23 (hereafter "Historians' Brief", filed in *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018). The Brief includes an Appendix of Historical Laws (hereafter "App.") with copies of the cited items. Cookie cutter briefs are filed by the same amici in other carry cases.

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Two of these orders had nothing to do with the peaceable carrying of arms by individuals, which explains why the Historians fail to quote from them. An order effective in Mississippi and Arkansas prohibited "the assembling of *armed* organizations or bodies of citizens under any pretense . . . ."[211] A decree effective in Louisiana recited that "the assembling of armed men, for political or other purposes, is of frequent occurrence," and that citizens were subjected to "annoyance from armed persons posted as sentinels or videttes," and thus the order prohibited "all armed men posted as sentinels, pickets, or videttes, or pretending to be on guard duty for any purpose, or by any authority, not authorized by law."[212]

The only order actually quoted by the Historians, which was effective in South Carolina, stated: "The practice of carrying deadly weapons, except by officers and soldiers in the military service of the United States, is prohibited. The concealment of such weapons on the person will be deemed an aggravation of the offense."[213] This was issued by command of Major Gen. D. E. Sickles, most likely in the context of martial law. It did not reflect prevailing views, including those in Congress or of Sickles himself, of the Second Amendment.

The year before, Representative William Lawrence of Ohio discussed the need to protect freedmen, quoting General D. E. Sickles' General Order No. 1 (dated 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 bear arms:

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[211]Fourth Military District General Order No. 28, Miss. & Ark., Sept. 9, 1867. App. 139-40.

[212]Louisiana General Order No. 11, District of La., Sept. 16, 1867. App. 141-42.

[213]Second Military District General Order No. 10, Charleston, S.C., April 11, 1867. App. 143.

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> I. To the end that civil rights and immunities may be enjoyed, . . . the following regulations are established for the government of all concerned in this department: . . .
>
> XVI. 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. No one shall bear arms who has borne arms against the United States, unless he shall have taken the Amnesty oath . . . . And no disorderly person, vagrant, or disturber of the peace shall be allowed to bear arms.[214]

The Supreme Court in *McDonald* cited the above as exemplifying the fact that "Union Army commanders took steps to secure the right of all citizens to keep and bear arms . . . ."[215]

General Order No. 1, repeatedly printed in the headlines of the *Loyal Georgian*,[216] a prominent black newspaper, was thought to have been "issued with the knowledge and approbation of the President if not by his direction."[217] The first issue to print the order included the following editorial:

> Have colored persons a right to own and carry fire arms?
>
> A Colored Citizen
>
> Almost every day we are asked questions similar to the above. We answer *certainly* you have the *same* right to own and carry arms that other citizens have. You are not only free but citizens of the United States and as such entitled to the same privileges granted to other citizens by the Constitution. . . .
>
> Article II, of the amendment to the Constitution of the United States, gives the people the right to bear arms, and states that this right shall not be infringed. Any person, white or black, may be disarmed if convicted of making an improper or dangerous use of weapons, but no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others. All men, without distinction of color, have the right to keep and bear arms

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[214]Cong. Globe, 39th Cong., 1st Sess. 908-09 (Feb. 17, 1866).

[215]*McDonald v. City of Chicago*, 561 U.S. 742, 773 & n.21 (2010).

[216]*The Loyal Georgian* (Augusta), Feb. 3, 1866, at 1, col 2.

[217]*Id*. at 2, col. 2.

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to defend their homes, families or themselves.[218]

The above was quoted in *McDonald* as embodying what the Fourteenth Amendment would protect.[219]

In sum, the Historians cite a single military order, likely issued during a period of great unrest, restricting the carrying of arms. They simply ignore the prevalence of military decrees that protected Second Amendment rights, including the right to carry arms openly.

C. Outlier State Laws, 1870-1890, and Decisions Thereon

The Historians' primary evidence includes four restrictive laws passed in four Southern states between 1870 and 1890.[220] Two supposedly were "prohibitions on all public carry, without exceptions." But South Carolina's 1870 law only applied to "all who go armed offensively, to the terror of the people . . . ."[221] In a decision about another provision of the same law, the court held that the crime alleged in an indictment "should be clearly and distinctly set forth," and that the jury must understand what question "they were passing upon."[222] The separate elements of being armed, offensively, and to terrorize must be proven.

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[218] *Id.* at 3, col. 4 (emphasis in original). The last above paragraph was Circular No. 5, Freedmen's Bureau, Dec. 22, 1865.

[219] *McDonald*, 561 U.S. at 848-49 (Thomas, J., concurring).

[220] Historians' Brief, at 23, citing 1870 S.C. Acts 402, no. 288, § 4; 1890 Okla. Sess. Laws 495, ch. 25, art. 47, §§ 2, 5; 1871 Tex. Gen. Laws 1322, art. 6512; 1871; Tenn. Pub. Acts 81, ch. 90, § 1.

[221] S.C. Acts 402, no. 288, § 4 (1870). App. 112-14.

[222] *State v. McKettrick*, 14 S.C. 346, 353-54 (1880).

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The South Carolina law is still on the books,[223] and yet South Carolina has a robust shall-issue handgun carry licensing system.[224] When they carry, license holders are obviously not considered as going armed offensively to the terror of the people.

The Territory of Oklahoma's 1890 law made it unlawful "to carry upon or about his person" a pistol, revolver, or other listed weapon.[225] Such a territorial law has little significance here, especially given that it was likely selectively enforced against Indians.

The Historians inaccurately assert that the 1871 Tennessee law "banned public carry without good cause," when in fact it made it unlawful "to publically or privately carry a . . . belt or pocket pistol or revolver *other than an army pistol* . . . ."[226] Carrying an army pistol was not a crime at all and required no good cause justification.

Moreover, the application of the statute to a "revolver" was held unconstitutional by *Andrews v. State* (Tenn. 1871) to the extent it was 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. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand . . . ."[227] The decision noted that the legislature would have no authority to

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[223]"Magistrates may cause to be arrested (a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people . . . ." S.C. Code § 22-5-150 (Supp. 2013).

[224]S.C. Code 1976 § 23-31-215.

[225]Okla. Sess. Laws 495, ch. 25, art. 47, §§ 2, 5 (1890). App. 99-100.

[226]Tenn. Pub. Acts 81, ch. 90, § 1 (1871) (emphasis added). App. 118.

[227]*Andrews v. State*, 50 Tenn. 165, 187 (1871).

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prohibit wearing arms in "circumstances essential to make out a case of self-defense,"[228] but contrary to Historians did not say the right was "limited only to" such circumstances.[229]

That leaves the 1871 Texas law punishing a person for "carrying on or about his person . . . any pistol . . ., unless he has reasonable grounds fearing an unlawful attack on his person," with an exception for persons traveling and "carrying arms with their baggage . . . ."[230] This was upheld under the broad provision of the Texas Constitution recognizing a right to bear arms only "under such regulations as the legislature may prescribe."[231] No other state had such a broad ban or such sweeping authorization to regulate.[232] Even so, the exceptions were significant, and long guns were not restricted.

Moreover, *English* upheld the law on grounds the Historians would find unacceptable. The court recognized "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."[233]

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[228] *Id.* at 191.

[229] Historians' Brief, at 24-25.

[230] Tex. Gen. Laws 1322, art. 6512 (1871). App. 119-121.

[231] *English v. State*, 35 Tex. 473 (1871), quoting Tex. Const. art. I, § 13 (1869). Historians assert that the "law was widely enforced," adding that in 1870-72 "the state police had made more than 6,000 arrests," but the source for that statistic referred to total arrests of all kinds, not specifically arrests for this offense. See Historians' Brief, at 24, quoting Mark Frassetto, "The Law & Politics of Firearms Regulation in Reconstruction Texas," 4 Tex. A&M L. Rev. 95, 108 (2016).

[232] Such outlier laws and opinions provide no guidance for interpretation of other constitutional rights, such as a free press. See, e.g., *Thompson v. State*, 17 Tex. App. 257 (1884) (upholding a ban on selling "the illustrated Police News" and similar "indecent" publications).

[233] *Id*. at 476-77.

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Elsewhere it was held that the law did not "prevent persons traveling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense . . . ."[234]

The Historians cite only the above three state laws and one territorial law for the post-Reconstruction period through 1890. Revealingly, no mention is made of the 1893 Florida law that made it unlawful, without a license, to carry a pistol or repeating rifle. That law had a candid judicial explanation, not found in opinions cited by the Historians, about the true reason for some such laws. Justice Rivers H. Buford wrote that the act "was passed when there was a great influx of negro laborers in this State" in 1893 "for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population . . . ."[235] He added that "it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested."[236]

Conclusion

While it would be a reach to argue that the Second Amendment implicitly incorporated the Statute of Northampton of 1328, no question exists that the right to bear arms does not include the carrying of dangerous and unusual weapons to the terror of one's fellow citizens. To what extent may a State prohibit the peaceable bearing of arms, or limit the right to select persons determined by law enforcement officials to have a "need" to do so? To date, the Supreme Court has not decided the validity of such a prohibition, but should do so.

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[234] *Maxwell v. State*, 38 Tex. 170, 171 (1873).

[235] *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

[236] *Id*.

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