To Bear Arms for Self-Defense: A "Right of the People" or a Privilege of the Few?

By Stephen P. Halbrook

Civil Rights Practice Group

Part One of a Two-Part Series

About the Author:

Stephen P. Halbrook is a former assistant professor of philosophy at Tuskegee University, Howard University, and George Mason University. He is a Senior Fellow at the Independent Institute. He argued *Printz v. United States*, 521 U.S. 898 (1997) and represented a majority of members of Congress as amici curiae in *District of Columbia v. Heller*, 554 U.S. 570 (2008); he was counsel for plaintiffs-appellants in subsequent proceedings in separate *Heller* litigation. He has written many books, including *The Founders' Second Amendment*; *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms* (reissued as *Securing Civil Rights*); *Firearms Law Deskbook*; *That Every Man be Armed*; *A Right to Bear Arms*; *Gun Control in the Third Reich: Disarming the Jews and "Enemies of the State"*; and *Gun Control in Nazi-Occupied France*.

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Other Views:

• Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc), *available at* https://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/09/10-56971.pdf.

• Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 43 (2012), *available at* https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1001&context=clevstlrev.

• Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465114.

During oral argument in the seminal case of *District of Columbia v. Heller*, Supreme Court Justice Anthony Kennedy asked counsel for the government whether the Second Amendment's second clause—"the right of the people to keep and bear arms"[1]—concerned something besides the militia. When counsel replied that those words referred only to "a military context," Justice Kennedy appeared to disagree by asking the further question, "It had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?"[2] This question suggested that he read the Amendment to protect individual rights. But it also implied that the right extends outside the home, where unfriendly humans and animals would be encountered.

On April 19, 1775, a group of Americans bearing their own firearms stood before a contingent of British Redcoat soldiers representing the greatest military power on Earth. These Americans did not bear arms in their living rooms or before their fireplaces, but carried and bore their private firearms prominently in public—specifically, on the town common of Concord, Massachusetts. In Ralph Waldo Emerson's words: "Here once the embattled farmers stood / And fired the shot heard round the world."[3] Thus was launched the American Revolution and, before long, a new country that became the United States of America.

The Founders who drafted the Bill of Rights in 1789 recalled the British efforts to confiscate private firearms from the American colonists as well as the use of such firearms to start and help win the American Revolution. They were also well aware that the same firearms were used for protection against persons and wild animals that would do harm. They would thus enshrine in the Second Amendment the right to bear arms.

In this article, I address the extent to which the Second Amendment guarantee that "the right of the people to . . . bear arms, shall not be infringed" protects the liberty to carry firearms outside the home for self-defense or other lawful purposes.

Today, the overwhelming majority of states already recognize a right to carry a loaded and unlocked handgun in public, either with or without a license and subject to place restrictions. Only six states—California, Hawaii, Maryland, Massachusetts, New Jersey, and New York—grant discretion to the government, acting through law enforcement agencies, to restrict that right to only those few persons it decides "need" or have "good cause" to carry a firearm. These outlier states make it a felony to bear arms for self-defense and routinely incarcerate their own citizens and

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.

2 Transcript of Argument, *District of Columbia v. Heller*, No. 07-290, at 8 (Mar. 18, 2008).

3 Ralph Waldo Emerson, *Concord Hymn* (1837).

unsuspecting travelers for gun possession. These discretionary licensing schemes have become a major issue in Second Amendment litigation, with some federal circuits upholding such laws and others invalidating them.

The right to bear arms has deep roots in America's history and tradition. It was considered a right of Englishmen, and the American Founders extended its scope, as they did with other rights recognized in the state and federal constitutions. In the antebellum period, going armed was no offense unless it was done in a manner and with the intent to terrorize others. State laws prohibiting the carrying of concealed weapons were upheld on the basis that open carry was lawful. Slaves were generally prohibited from having arms altogether, and in the Southern states, free persons of color were prohibited from keeping or carrying arms unless they had a license issued at the discretion of the government. After the Civil War, the Fourteenth Amendment sought to extend the right to bear arms and other fundamental rights to all Americans.

Today, the handful of states that prohibit carrying arms are the distinct minority. Open carry requires no permit in thirty states, requires a permit in fifteen states, and is prohibited in only five states.[4] Forty-one states (arguably forty-four) and the District of Columbia, are "shall issue" states, which means that permits to carry concealed firearms on one's person are available to all law-abiding persons who meet training or other requirements. Vermont does not issue permits, but both concealed and open carry are lawful. Nine states have "constitutional carry," meaning that both concealed and open carry without a permit are lawful. Only eight states (arguably six) are "may issue," i.e., officials may issue a permit if they decide a person "needs" to carry a firearm.[5] It is in those "may issue" states where the question of whether the Second Amendment literally guarantees the right to "bear arms" is in litigation, mostly in the federal courts.

The U.S. Supreme Court has yet to speak directly on whether "may issue" regimes in these outlier states are constitutional, but in *District of Columbia v. Heller* (2008)[6] and *McDonald v. Chicago* (2010)[7] it had a lot to say about the meaning of the right to *bear* arms. The lower courts upholding carry restrictions have misapplied these precedents to state laws that limit the right to bear arms to a privileged elite. Well before those decisions, state courts decided numerous cases on the nature of the right to bear arms, most often under state bills of rights.

This paper is divided into two parts. Part One begins with an analysis of the text of the Second Amendment. What could be confusing about the prohibition on "the infringement" of "the right," not the privilege, of "the people," not a tiny elite, to "bear arms"? Some of the recent lower court decisions seem to suggest that judges in the outlier states find the text either confusing or irrelevant.

Second, the English origins of the right are traced. The Statute of Northampton of 1328, which was construed in a 1686 precedent as prohibiting one from going armed in a manner to terrify one's fellow subjects, is today advanced by courts in these minority jurisdictions as somehow overriding the right to bear arms. But the Declaration of Rights of 1689 recognized the right of Protestants to "have Arms for their Defence" as allowed by the common law. The Americans would expand on this and other rights of Englishmen.

Third, this paper analyzes the right to bear arms at the American Founding and in the early Republic. While the right was constitutionalized in state bills of rights and the Second Amendment, going armed in a manner that terrorized others was considered an offence under certain statutes and the common law. Some states restricted the carrying of concealed weapons, but open carry was recognized as a constitutional right. Yet slaves were subject to near total bans on possession or carrying of arms, while free persons of color were subject to discretionary licensing requirements under which officials would determine their suitability to bear arms.

Part Two of this paper (which will be published separately) begins when slavery was abolished after the Civil War and the Southern states began enacting the black codes that applied discretionary licensing regimes to all African Americans. Congress sought to protect the right to bear arms for all through the Civil Rights and Freedmen's Bureau Acts of 1866. The Fourteenth Amendment was proposed and ratified to protect the right to keep and bear arms from state violation, and the Civil Rights Act of 1871 provided for enforcement of the right. The courts responded with mixed results to carry bans that were enacted during Reconstruction and in the Jim Crow and Anti-Immigrant eras.

Next, this paper addresses state judicial decisions in the modern era that found carry bans to violate the right to bear arms. We then delve into the U.S. Supreme Court's opinions in *Heller*, which held that to "bear arms" means to carry them and rejected the use of interest balancing tests by courts; *McDonald*, which found the right protected under the Second Amendment to be fundamental and not a second-class right; and *Caetano*, which assumed the right to exist outside the home.

Since *Heller* was decided and the issue moved to the federal courts, some circuits have found discretionary issuance laws to violate the right to keep and bear arms as a textual matter. Others have upheld the denial of the right to ordinary citizens under a limbo-like version of intermediate scrutiny—already rejected by the Supreme Court—asking how low the standard can go.

The most extreme example of a restriction and of a judicial decision to uphold it was New York City's rule prohibiting the transport of a handgun from one's licensed premises to other locations and the Second Circuit's upholding of the rule because a police official said such transport would violate public safety. After the Supreme Court granted certiorari in the case, the City revised the law in an effort to moot the case. Oral argument, which focused on standing, took place in December 2019. However that case turns out, petitions are pending in various carry cases.[8]

4 *Open Carry*, OpenCarry.org https://opencarry.org/maps/map-open-carry-of-a-properly-holstered-loaded-handgun/.

5 *Concealed Carry Permit Information By State*, USA Carry, https://www.usacarry.com/concealed_carry_permit_information.html.

6 District of Columbia v. Heller, 554 U.S. 570 (2008).

7 McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).

8 For various approaches to the issue, see Joseph Greenlee, *Concealed Carry and the Right to Bear Arms*, 20 Federalist Soc'y Rev. 32 (2019).

I. What's Confusing About "the right of *the people* to . . . *bear* Arms"?

The Second Amendment unequivocally guarantees the right of "the people" to "bear arms": "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."[9] This guarantees not only the right to "keep" arms, such as in one's house, but also to "bear" arms, i.e., to carry arms without reference to a specific place. If the framers meant to protect nothing more than keeping arms in the home, there would have been no point in including a right to bear arms.

Textually, the right to keep and bear arms is no more restricted to the home than are the First Amendment rights to the free exercise of religion, freedom of speech and the press, and "the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Exercise of those rights might be restricted in some government buildings or on private property, but it may not be limited to one's house.

When a provision of the Bill of Rights is restricted to a house, it says so—the Third Amendment's restrictions on quartering soldiers "in any house" do not apply to buildings that are not houses.[10] Nothing in the Second Amendment's text limits bearing arms to one's house, a place where the right to "keep" arms fits more appropriately. The Fourth Amendment mentions houses, but also refers to other entities or things in protecting "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[11]

The unitary phrase "the right of the people" appears in the First, Second, and Fourth Amendments. The right to assemble and petition the government for a redress of grievances, and security from unreasonable searches and seizures, are rights of the people, and may not be limited to a select few determined by government officials to have a special need. So too, "the right of the people to . . . bear arms" extends to the populace at large and is not restricted to a subset of people favored by government to bear arms. "The people" who have "rights" reappear in the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[12] Whatever those rights are, they extend to the people at large and may not be denied or disparaged to all except an elite chosen by government.

When a subset of "the people" is intended, the Bill of Rights is clear. The Second Amendment itself distinguishes "the people" from the subset "well regulated militia." A subset of the militia appears in the Fifth Amendment, which exempts "the militia, when in actual service in time of War or public danger," from the requirement of an indictment to answer for serious crimes.[13] That would occur when the militia is called forth "to execute the laws of the Union, suppress insurrections and repel invasions."[14] The distinction is thus made between "the people" at large (who have the "right" to bear arms), the general "well regulated militia," and that part of the militia "when in actual service."

The amendments related to criminal procedure also refer to specific subsets of the people. The Fifth Amendment refers to persons held to answer for certain crimes, subjected to jeopardy, who have rights against self-incrimination and to due process, and from whom private property is taken. The Sixth Amendment refers to the rights of the accused in criminal prosecutions. The Eighth Amendment only applies to persons subject to bail, fines, and punishments. All of these provisions refer to protections for persons who are identified and targeted by the government to deprive them of life, liberty, or property.

But "the right of the people" to assemble, bear arms, be secure from unreasonable searches, and retain unenumerated rights is not limited to a subset of the people chosen by the government to enjoy special privileges.

Despite that clear text, a number of courts engage in judicial hocus pocus, call it "intermediate scrutiny," and hold that "the people" in fact have no "right" to bear arms. But in the words of Justice Frankfurter, "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."[15]

II. English Origins

A. The Statute of Northampton and the Common Law Prohibited Only the Carrying of Arms In a Manner to Terrorize Others

The American Revolution began in part because the colonists sought to protect what they perceived to be the rights of Englishmen. Later, the Bill of Rights expanded on those rights and guarded them from legislative violation. The Americans took from the English common law and developed it into their own, and the common law as refined by Americans entailed a right peaceably to go armed, but not to do so in a manner to terrorize others.

Edward III's Statute of Northampton of 1328 provided that no person 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 . . . ."[16] Some commentators suggest that this decree of a monarch, written three-quarters of a century before Chaucer's *Canterbury Tales*, supersedes the explicit language of the Second Amendment.[17] Some courts cite it to justify upholding

9 U.S. Const., amend. II.

10 U.S. Const., amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.").

11 U.S. Const., amend. IV.

12 U.S. Const., amend. IX.

13 U.S. Const., amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . .").

14 "The Congress shall have power . . . To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel Invasions." U.S. Const., art. I, § 8, cl. 15.

15 Ullmann v. United States, 350 U.S. 422, 428-29 (1956).

16 2 Edw. III c. 3 (1328).

17 "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

discretionary licensing regimes.[18] But case law opining on the meaning of the Statute actually supports the right peaceably to bear arms outside the home.

The leading (and only) judicial precedent on the Statute known to the American Founders involved the prosecution of Sir John Knight in 1686. The information alleged that the Statute prohibited persons "from going or riding armed in affray of peace," and 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*."[19] 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."[20] He also stated, "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 their security) . . . ."[21]

Why was Knight found not guilty? He had walked in the streets and gone into a church service with a gun. But the crime was not simply going or riding armed. The other element of the crime was that one must do so "to terrify the King's subjects," with "malo animo," and "in affray of peace." Nothing in the evidence suggested that he had threatened anyone, brandished a weapon, or started a fight. He had gone armed, but that did not suffice.[22]

William Hawkins, in an exposition of affrays in his *Treatise of the Pleas of the Crown* (first published in 1716), commented that "no wearing of arms is within the meaning of the statute [of Northampton] unless it be accompanied with such circumstances as are apt to terrify the people," adding that "persons of quality are in no danger of offending against this statute by wearing common weapons . . . ."[23] The same general rule would have applied to persons not considered "of quality." The Founders were familiar with Hawkins, but this passage goes unmentioned by proponents of the Northampton-overrides-the-Second-Amendment theory.

No English judicial decision mentions the Statute of Northampton in the eighteenth or nineteenth centuries. Nor did members of Parliament mention it in deliberations. In debate on the 1843 Irish arms act, Lord John Russell noted that "the right to bear arms, which is the universal right in England, and qualified only by individual circumstances, is reversed in Ireland; the right to bear arms here being the rule, the right to bear arms in Ireland being the exception."[24] He added that it was "the general rule in England without any licence that every individual should be entitled to bear arms."[25]

The Statute was briefly referenced in two cases in the early twentieth century. It was found to apply to a person who was "firing a revolver in a public place, with the result that the public were frightened or terrorized."[26] It did not apply to a person peaceably walking down a public road with a loaded revolver, because there were "two essential elements of the offence—(1) That the going armed was without lawful occasion; and (2) that the act was *in terrorem populi*."[27]

The Statute's most recent English mention was in a 2001 case, decided by the House of Lords in its judicial function, holding that a gang of youths who carried petrol bombs but did not terrorize anyone were not guilty of an affray.[28] The court endorsed the view that "mere possession of a weapon, without threatening circumstances . . ., is not enough to constitute a threat of unlawful violence. So, for example, the mere carrying of a concealed weapon could not itself be such a threat."[29] While the defendants might have been charged under a newer statute on carrying weapons, a person should not be charged with an affray "unless he uses or threatens unlawful violence towards another person actually present at the scene and his conduct is such as would cause fear to a notional bystander of reasonable firmness."[30]

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. These tenets reflected and formed the basis of the common law right to bear arms and the common law crime of going armed in an offensive manner.

B. The Declaration of Rights of 1689 Codified the Individual Right to Possess Arms for Self-Defense as Allowed by the Common Law

The Restoration of the Stuarts in 1660 entailed measures to disarm the monarchy's political enemies. In 1662 Charles II passed a militia bill empowering officials "to search for and seize all arms" possessed by a person judged to be "dangerous to the peace of the kingdom."[31] His Game Act of 1670 provided that any person without lands and tenements valued at 100 pounds or leases of 150 pounds per annum were "not allowed to keep . . . any Guns . . .; but shall be and are hereby prohibited to have,

only minimalist protection or categorical exclusion." Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 43 (2012).

18 *E.g.*, Peruta v. County of San Diego, 824 F.3d 919, 929-32 (9th Cir. 2016) (en banc).

19 Sir John Knight's Case, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B. 1686).

20 *Id.*

21 Rex v. Knight, Comb. 38, 39, 90 Eng. Rep. 330 (K.B. 1686).

22 More is now known about the Knight case, but not from sources to which the Founders or lawmakers in the early Republic had access. A diary confirmed that the jury acquitted Knight "not thinking he did it [going armed] with any ill design . . . ." 1 Narcissus Luttrell, A Brief Historical Relation of State Affairs from September 1678 to April 1714 380 (1857). No evidence suggests that he was acquitted because he had governmental immunity. *Cf. Peruta*, 824 F.3d at 931.

23 1 Hawkins, A Treatise of the Pleas of the Crown ch. 28, § 9 (8th ed. 1824).

24 70 Hansard's Parliamentary Debates 66 (June 16, 1843).

25 *Id.*

26 Rex v. Meade, 19 L. Times Repts. 540, 541 (1903).

27 Rex v. Smith, 2 Ir. R. 190, 204 (K.B. 1914).

28 I v. Director Of Public Prosecutions, 2 Cr. App. R. 14, 216 (Lords 2001).

29 *Id.* at 226.

30 *Id.* at 232.

31 13 and 14 Car. II c.3 (1662).

keep or use the same."[32] The reason for such laws, Blackstone observed, was "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . ."[33]

James II continued the same repressive policies, which eventually sparked the Glorious Revolution of 1688. Debating his proposed abdication, members of Parliament argued that the militia act "was made to disarm all Englishmen, whom the Lieutenant should suspect" of disloyalty, and gave the "Power to disarm all England."[34] One member was himself disarmed.[35]

The Declaration of Rights of 1689 listed the ways that James II attempted to subvert "the Laws and Liberties of this Kingdom," including: "By causing several good Subjects, being Protestants, to be disarmed, at the same Time when Papists were both armed and employed, contrary to law."[36] The act accordingly declared thirteen "true, ancient and indubitable rights," including "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law."[37] The term "suitable to their Condition" referred to statutes such as the Assize of Arms, which required persons to arm themselves for militia duty based on economic status. "As are allowed by Law" appears to have referred to the common law, not to any statute that might be passed that would negate the right.[38] Exercise of the right was not confined to houses.

Blackstone pointed to the "absolute rights" of "personal security, personal liberty, and private property," which would be a "dead letter" without "certain other auxiliary subordinate rights . . . ."[39] In addition to the right to petition, those auxiliary rights included "that of having arms for their defence," which was "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."[40] Again, the right was not home-bound.

Quoting the arms right from the Declaration, a judge gave the following jury instruction in an 1820 case: "But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business."[41]

Members of Parliament alluded to the Declaration when pertinent bills came up. In debate on the Irish arms act of 1843, M. J. O'Connell expressed the general view that "by the bill of rights, the right to carry arms for self-defence was not created, but declared as of old existence."[42]

The Declaration of Rights included among the "true, ancient and indubitable rights" that of having arms for defense, which no one suggested was confined to the home. The Americans would hold tightly to this fundamental right of Englishmen when it was threatened and violated by George III.

III. The Founding and Early Republic

A. Constitutionalizing the Fundamental Right to Bear Arms

"The right to keep and bear arms was considered . . . fundamental by those who drafted and ratified the Bill of Rights," the Supreme Court said in *McDonald*.[43] In the Founding period, no laws restricted the peaceable carrying of arms. Militia laws required adult males to provide themselves with firearms and bring them to muster. The great exception was the slave codes, which prohibited the keeping and bearing of firearms by African Americans.[44]

When the colonies declared themselves independent states, they adopted their own constitutions, several of which included declarations of rights. Those of Pennsylvania and Vermont declared, "That the people have a right to bear arms for the defense of themselves, and the state . . . ."[45] North Carolina's declared, "That the People have a right to bear Arms for the Defense of the State . . . ."[46] And Massachusetts's declared, "The people have a right to keep and bear arms for the common defence."[47] All four of these declarations guaranteed the right to "the people" and did not limit it to the militia.

Ratification conventions demanded a bill of rights when the federal Constitution was proposed in 1787 without one. In the Massachusetts ratification convention, Samuel Adams 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 . . . ."[48] In the

32 22 Car. II c. 25, § 3 (1670).

33 2 William Blackstone, Commentaries *412.

34 2 Miscellaneous State Papers from 1501-1726 407, 416 (1778).

35 *Id.* at 416.

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

37 *Id.*

38 *See* Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 120-21 (1994). On the Assize of Arms of 1181, see Stephen P. Halbrook, That Every Man Be Armed 36-38 (2013).

39 1 William Blackstone, Commentaries *136.

40 *Id.* at *139.

41 Rex v. Dewhurst, 1 State Trials, New Series 529, 601-02 (1820).

42 69 Hansard's Parliamentary Debates 1151 (May 30, 1843).

43 *McDonald*, 561 U.S. at 768 (citing, inter alia, Stephen P. Halbrook, The Founders' Second Amendment 171-278 (2008) (hereafter "*Founders*")).

44 *See Founders*, *supra* note 43, *passim.*

45 Pa. Const., Dec. of Rights, art. XIII (1776); Vt. Const., art. I, § 15 (1777).

46 N.C. Const., Dec. of Rights, art. XVII (1776).

47 Mass. Const., Dec. of Rights, art. XVII (1780).

48 6 Documentary History of the Ratification of the Constitution 1453 (2000).

Pennsylvania convention, the Dissent of the Minority demanded a written bill of rights, including the proposal:

> 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 . . . .[49]

Until that point, the Federalists had argued that, since the federal government would have only limited powers, a bill of rights was unnecessary. However, the New Hampshire convention then proposed one, including a guarantee that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[50]

In *The Federalist* No. 46, James Madison heralded "the advantage of being armed, which the Americans possess over the people of almost every other nation," adding: "Notwithstanding the military establishments in the several kingdoms of Europe, . . . the governments are afraid to trust the people with arms."[51] What became the Second Amendment was demanded as a formal embodiment of this trust of the people with arms.

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."[52] And Patrick Henry implored: "The great object is, that every man be armed."[53] The ensuing debate concerned defense against tyranny and invasion.

The Virginia convention proposed a bill of rights asserting "the essential and unalienable rights of the people," including "That the people have a right to keep and bear arms . . . . ."[54] In identical language, New York,[55] North Carolina,[56] and Rhode Island[57] joined in the demand for what became the Second Amendment. The right to bear arms had universal support.

Some recent commentators have attempted to justify the treatment of the Second Amendment as a second-class right by arguing that the Amendment was adopted to protect slavery.[58] Not only is there not a shred of evidence for this, but the Northern states—which were less reliant on slavery—led the effort to guarantee the right to bear arms. Pennsylvania, which recognized the right to bear arms in its Declaration of Rights of 1776, passed the first state abolition act in 1780.[59] Vermont's Declaration of Rights of 1777 both abolished slavery and declared the right to bear arms.[60] In Massachusetts, slavery was declared unconstitutional in judicial cases in 1781-83.[61] New Hampshire's 1783 Constitution was read by many to abolish slavery, and its 1790 census counted few slaves.[62] While New York did not enact a law to abolish slavery until 1799, its 1777 constitutional convention resolved to end slavery.[63] Rhode Island abolished slavery in 1784.[64]

The attempt by the British to disarm the Americans and the need to guard against tyranny and invasion were the only concerns voiced during the critical debates in the Virginia convention. The defect in the early American polity was that, because of slavery, the liberties in the Bill of Rights did not extend to all persons.

James Madison introduced his draft of what became the Bill of Rights to the House of Representatives on June 8, 1789. It included the provision: "The right of the people to keep and bear arms shall not be infringed . . . ."[65] While several states had proposed simply "that the people have a right to keep and bear arms," Madison inserted the stronger guard that this right "shall not be infringed." The provision was not controversial. Rep. Roger Sherman expressed the common view in 1791 that it was "the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made."[66]

St. George Tucker's 1801 edition of Blackstone's *Commentaries* contrasted the Second Amendment with the English Declaration of Rights by saying, "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 . . . ."[67] Tucker called this right "the

49 2 Documentary History of the Ratification of the Constitution 623-24 (1976).

50 18 Documentary History of the Ratification of the Constitution 188 (1995).

51 15 Documentary History of the Ratification of the Constitution 492-93 (1984).

52 3 Jonathon Elliot ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution 380 (1836).

53 *Id.* at 386.

54 *Id.* at 658-59.

55 18 Documentary History of the Ratification of the Constitution 298 (1995).

56 *Id.* at 316.

57 1 Elliot, *supra* note 52, at 335.

58 Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998).

59 An Act for the Gradual Abolition of Slavery - March 1, 1780, http://www.phmc.state.pa.us/portal/communities/documents/1776-1865/abolition-slavery.html.

60 Vt. Const., Ch. I, §§ 1 & 15 (1777).

61 Massachusetts Constitution and the Abolition of Slavery, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery#-the-quock-walker-case-.

62 Slavery in New Hampshire, http://slavenorth.com/newhampshire.htm.

63 Emancipation in New York, http://slavenorth.com/nyemancip.htm.

64 An Act authorizing the Manumission of Negroes, Mulattoes and others, & for the gradual Abolition of Slavery, Feb. 26, 1784, https://americasbesthistory.com/abhtimeline1784m.html.

65 4 Documentary History of the First Federal Congress 10 (1986).

66 14 Documentary History of the First Federal Congress 92-93 (1995).

67 1 St. George Tucker, *Blackstone's Commentaries* *143 n.40 (1803).

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."[68] Exercise of the right to bear arms was commonplace: "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."[69]

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."[70] An 1822 treatise on the common law in Kentucky noted the crime of "[r]iding or going armed with dangerous or unusual weapons, . . . by terrifying the people of the land," but added 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."[71]

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. That is further verified by statutes and judicial decisions on going armed aggressively or in doing with concealed weapons.

B. Going Armed: Statutes and the Common Law Prohibited the Carrying of Arms in Public When Done In a Manner to Terrorize Others

Thomas Jefferson drafted, James Madison proposed, and the Virginia legislature enacted an Act Forbidding and Punishing Affrays (1786).[72] Reflecting the Statute of Northampton, it provided in part that no man shall "go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the country . . . ."[73] Going armed was not an offense, as had been held in the case of Sir John Knight, unless accompanied by the separate "in terror" element. Had the act been read to ban the mere carrying of firearms, Jefferson would have been one of its most frequent violators, as he regularly went armed and defended the right to do so.[74] He advised his 15-year old nephew, "Let your gun therefore be the constant companion of your walks."[75]

In 1838, the Virginia legislature forbade the habitual carrying about the person of weapons hidden from common observation, so the 1786 law cannot have been interpreted to forbid concealed carry without the additional "in terror" element.[76] The later provision would have been unnecessary if going armed was already an offense, not to mention that this provision only restricted *habitually* going armed and doing so only with concealed weapons. In 1847, Virginia enacted the following: "If any person shall go armed with any offensive 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."[77] This means that a person doing so, if anyone complained, could continue if the court did not find that keeping the peace required sureties. If sureties were required, he could simply obtain them.

A Massachusetts act of 1795 punished "such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth . . . ."[78] Going armed was an offense only if done in this manner. As stated in an 1825 judicial decision, "the right to keep fire arms . . . does not protect him who uses them for annoyance or destruction."[79] Massachusetts passed a more refined act in 1836 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 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.[80]

This did not prohibit going armed per se. It required an aggrieved person to file a complaint and to prove reasonable cause to fear injury or breach of the peace. Even then, the subject person could show reasonable cause to fear injury. If he could not and if the court found that his keeping the peace required sureties, the person could do so and continue going armed.

In addition to statutes like the above, going armed was recognized by the courts as a common law offense, if at all, only if done in a manner to terrify others. In *Simpson v. State* (1833), Tennessee's high court held going armed not to be a crime at common law.[81] It recalled Hawkins' comment that wearing common weapons did not violate the Statute of Northampton,[82] which the court said was not incorporated into American common law.[83] Merely carrying arms could not itself cause "terror to the

68 *Id.*, Appendix, 300.

69 *Id.*, vol. 5, at 19. *See also* Stephen Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty,"* 3 Tenn. J.L. & Pol'y 120 (2007).

70 Ky. Const., art. XII, § 22 (1792).

71 Charles Humphreys, Compendium of the Common Law in Force in Kentucky 482 (1822).

72 2 Jefferson, Papers 519-20 (Julian P. Boyd ed. 1951).

73 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).

74 *See Founders, supra* note 43, at 131, 260, 316-18. 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.

75 Jefferson, Writings 816-17 (Merril D. Peterson ed. 1984).

76 Virginia Code, tit. 54, ch. 196, § 7 (1849).

77 1847 Va. Laws 127, 129, § 16.

78 1795 Mass. Acts 436, ch. 2; 2 Perpetual Laws of the Commonwealth of Massachusetts 259 (1801).

79 Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 314 (1825).

80 1836 Mass. Laws 748, 750, ch. 134, § 16.

81 Simpson v. State, 13 Tenn. Reports (5 Yerg.) 356, 361 (1833).

82 *Id.* at 358-59.

83 *Id.* at 359.

people" so as to constitute an affray, as under the state 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 . . . ."[84]

In *State v. Huntley* (1843), the North Carolina Supreme Court upheld an indictment alleging that the defendant went armed with "dangerous and unusual weapons" and threatened to murder various persons, causing them to be "terrified."[85] While the state constitution secured the right to bear arms, a person has no right to "employ those arms . . . to the annoyance and terror and danger of its citizens . . . ."[86] 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."[87]

C. Restrictions on the Manner of Carrying Arms Did Not Prohibit the Peaceable, Open Carry of Firearms in Public

It was not an offense at common law or in the statutes of any state at the Founding peaceably to bear arms openly or concealed. Before 1846, only eight states—seven Southern states and Indiana—of the 29 states in the Union enacted laws prohibiting the carrying of specified arms in a concealed manner.[88] By 1861, when there were 34 states in the Union, Ohio was the only additional state to restrict concealed weapons.[89] None of the other Northern or Southern states had such laws before the Civil War. Other than a law struck down by the Georgia Supreme Court, no state prohibited the open carry of firearms in this period.

The first judicial decision on such a law by a state court declared that Kentucky's 1813 ban on carrying concealed weapons violated the state constitution. In *Bliss v. Commonwealth* (1822), the Kentucky Supreme Court reasoned that the ban "prohibit[ed] the citizens wearing weapons in a manner which was lawful to wear when the constitution was adopted," and "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."[90] The state constitution was later revised to authorize the legislature to "pass laws to prevent persons from carrying concealed arms."[91]

The Supreme Court of Indiana, the next court to opine on the issue, held in a one-sentence opinion that a statute "prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional."[92] Perhaps being unable to refute the logic of the Kentucky court's decision, this judicial ipse dixit offered no reasoning to justify the prohibition.

The Alabama Supreme Court upheld a concealed weapon ban because open carry was allowed, cautioning that "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."[93]

That was followed by *Nunn v. State* (1846), in which the Georgia Supreme Court held that the Second Amendment applied to the states and invalidated a ban on open carry of pistols. The court wrote, "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree . . . ."[94]

Upholding a concealed weapon ban in 1850, 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 . . . ."[95] The open-carry rule was tied into the social norms of the day.

Other than the above Indiana decision, there were no decisions on the right to bear arms from courts in the North because Indiana and Ohio were the only Northern states that restricted the peaceable carrying of arms, concealed or openly. And as noted above, only some of the Southern states had laws restricting concealed, but not openly-carried, weapons.

D. African Americans: Prohibitions and Licensing Requirements

From colonial times until slavery was abolished, slaves were prohibited from keeping and bearing arms in most circumstances or altogether. In the same period, several states prohibited free blacks from carrying arms unless they obtained a license, which was subject to an official's discretion. Such laws reflected that African Americans were not trusted or recognized to be among "the people" with the rights of citizens.

Virginia law provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun," except those living at a frontier plantation could be licensed to "keep and use" such weapons by a justice of the peace.[96] 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, . . . which license may, at any time, be withdrawn by an order of such court."[97] 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,

84 *Id.*

85 State v. Huntley, 25 N.C. (3 Ired.) 418, 419 (1843).

86 *Id.* at 422.

87 *Id.* at 422-23.

88 *See* Clayton E. Cramer, Concealed Weapon Laws of the Early Republic 143-52 (1999).

89 An Act to Prohibit the Carrying or Wearing of Concealed Weapons, Acts of the State of Ohio 56 (1857).

90 Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92, 13 Am. Dec. 251 (1822).

91 Ky. Const., art. XIII, § 25 (1849).

92 State v. Mitchell, 3 Blackf. 229 (Ind. 1833).

93 State v. Reid, 1 Ala. 612, 616-17 (1840).

94 Nunn v. State, 1 Ga. (1 Kel.) 243, 251 (1846).

95 State v. Chandler, 5 La. Ann 489, 490 (1850). *See also* State v. Jumel, 13 La. Ann. 399 (1858).

96 Va. 1819, c. 111, § 7.

97 *Id.* § 8.

both of this State and of the United States," were "the restriction upon the migration of free blacks into this State, and upon their right to bear arms."[98]

In Georgia, it was unlawful "for any slave, unless in the presence of some white person, to carry and make use of fire arms," unless the slave had a license from his master to hunt.[99] It was also unlawful "for any free person of colour in this state, to own, use, or carry fire arms of any description whatever . . . ."[100] Georgia's high court held that "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office."[101]

Maryland made it unlawful "for any negro or mulatto . . . to keep any . . . gun, except he be a free negro or mulatto . . . ."[102] It was unlawful "for any free negro or mulatto to go at large with any gun,"[103] but that did not prevent him "from carrying a gun . . . who shall . . . have a certificate from a justice of the peace, that he is an orderly and peaceable person . . . ."[104] The Court of Appeals of Maryland described "free negroes" as being treated as "a vicious or dangerous population," as exemplified by laws "to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness."[105]

Delaware forbade "free negroes and free mulattoes to have, own, keep, or possess any gun [or] pistol," except that such persons could apply to a justice of the peace for a permit to possess a gun or fowling piece, which could be granted if "the circumstances of his case justify his keeping and using a gun . . . ."[106] The police power was said to justify restrictions such as "the prohibition of free negroes to own or have in possession fire arms or warlike instruments."[107]

The above is just a sampling of some of the slave code provisions and how they also applied to free blacks. Licensing was discretionary based on the issuing authority's determination of the applicant's circumstances or need to keep or carry a firearm.

North Carolina judicial decisions explained in more detail the basis of discretionary licensing for free persons of color. The state made it unlawful "if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence" from the court.[108] This was upheld in *State v. Newsom* (1844) as constitutional partly on the ground that "the free people of color cannot be considered as citizens . . . ."[109] The court added:

> It does not deprive the free man of color of the right to carry arms about his person, but subjects it to the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of persons, shall have a right to the licence, or whether any shall.[110]

This is reminiscent of today's judicial jargon that the right of the people to bear arms is not infringed by laws granting officials discretion to deny them that very right.

Averring that having weapons by "this class of persons" was "dangerous to the peace of the community," a later decision explained the basis of the discretionary issuance policy:

> Degraded as are these individuals, as a class, by their social position, it is certain, that among them are many, worthy of all confidence, and into whose hands these weapons can be safely trusted, either for their own protection, or for the protection of the property of others confided to them. The County Court is, therefore, authorised to grant a licence to any individual they think proper, to possess and use these weapons.[111]

The court could not only deny a license outright, but also could limit a license to carry to certain places. In *State v. Harris* (1859), a free person of color had a license to carry a gun on his own land, but he was hunting with a shotgun outside of his land with white companions.[112] The court held that "the county court might think it a very prudent precaution to limit the carrying of arms to the lands of the free negro" and that the act did not "prevent the restriction from being imposed."[113]

In short, free persons of color were not entitled to the right to keep and bear arms because they were not considered to be citizens. That status was reflected in the requirement that they obtain a license, subject to the issuing authority's subjective decision of whether the applicant was a proper person with a proper reason.

The above was bolstered by the U.S. Supreme Court in *Dred Scott v. Sanford* (1857), which notoriously held that African Americans were not citizens and had no rights that must be respected.[114] Chief Justice Roger Taney wrote that, if African Americans were considered citizens, "it would give them the full liberty of speech . . .; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."[115] This

98 Aldridge v. Commonwealth, 2 Va. 447, 449 (Gen. Ct. 1824).

99 Digest of the Laws of the State of Georgia 424 (1802).

100 § 7, 1833 Ga. Laws 226, 228.

101 Cooper v. Savannah, 4 Ga. 72 (1848).

102 Chap. 86, § I (1806), in 3 Laws of Maryland 297 (1811).

103 *Id.* at § II, 298.

104 *Id.*

105 Waters v. State, 1 Gill 302, 309 (Md. 1843).

106 Ch. 176, § 1, 8 Laws of the State of Delaware 208 (1841).

107 State v. Allmond, 7 Del. 612, 641 (Gen. Sess. 1856).

108 State v. Newsom, 27 N.C. 250, 250 (1844) (quoting Act of 1840, ch. 30).

109 *Id.* at 254.

110 *Id.* at 253.

111 State v. Lane, 30 N.C. 256, 257 (1848).

112 State v. Harris, 51 N.C. 448 (1859).

113 *Id.* at 449.

114 Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

115 *Id.* at 417.

result was seen as unacceptable. The Fourteenth Amendment, of course, would overrule *Dred Scott.*

* * *

Part Two of this paper will trace the history of the Fourteenth Amendment and its aftermath as applied to the right to bear arms. This will entail analysis of the discretionary licensing schemes of the black codes, protection of the right under the Civil Rights Act of 1871, and carry bans in Reconstruction and in the Jim Crow and anti-immigrant eras.

State courts recognized the right to bear arms in the modern era. In Heller*, the U.S. Supreme Court read "bear" arms to mean "carry" arms and rejected interest balancing. Applying the right to the states,* McDonald *found the right to be fundamental, not second class. Yet the circuits are split, with some applying the clear text and others playing a limbo game to see how low the standard can go. The game played out most recently when the Supreme Court granted certiorari regarding New York City's ban on transporting a handgun outside one's licensed premises, and the City sought to moot the case.*