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## The First Century of Right to Arms Litigation

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## The First Century of Right to Arms Litigation

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# The First Century of Right to Arms Litigation

By David B. Kopel<sup>1</sup>

The Supreme Court’s Second Amendment jurisprudence has paid careful attention to the Second Amendment in the nineteenth century. *District of Columbia v. Heller* cited with approval antebellum cases which struck down handgun bans, or which upheld restrictions on concealed handgun carry, while affirming the right of open carry.<sup>2</sup> Both *Heller* and *McDonald v. Chicago* looked closely at the civil rights movement after the Civil War, when Congress enacted legislation and the people ratified the Fourteenth Amendment, partly for the purpose of making the Second Amendment enforceable against state and local governments.<sup>3</sup> *Heller* also said that some “longstanding” gun controls could be considered “presumptively lawful.”<sup>4</sup> So scholars have been mining nineteenth-century statutes and cases to understand what types of gun laws have nineteenth-century roots.

This Article examines state court cases involving the right to arms, during the first century following ratification of the Amendment in 1791. This is not the first article to survey some of those cases.<sup>5</sup> This Article includes additional cases, and details the procedural postures and facts, not only the holdings. With three important exceptions from Illinois in 1879,<sup>6</sup> none of the right to

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<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570, 585, 611–14 (2008).

<sup>3</sup> *Heller* at 614–19; *McDonald v. City of Chicago*, 561 U.S. 742, 771–81 (2010); *id.* at 827–50 (Thomas, J., concurring).

<sup>4</sup> *Heller* at 626–27.

<sup>5</sup> *E.g.*, David B. Kopel & Clayton Cramer, *State court standards of review for the right to arms*, 50 SANTA CLARA L. REV. 1113 (2010) (examining standards of review used by courts in the nineteenth and twentieth centuries); David B. Kopel, *What State Constitutions Teach about the Second Amendment*, 29 N. KY. L. REV. 845 (2002) (surveying constitutional texts and judicial decisions to determine whether or not they protect an individual right); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (lengthy survey of nineteenth century treatises, political statements, leading cases, and other sources); *see also* CLAYTON E. CRAMER, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS* (1994) (chronological survey of cases); STEPHEN P. HALBROOK, *FIREARMS LAW DESKBOOK* (2014-15 ed.). The first scholarly article to survey state arms cases was Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177 (1982).

<sup>6</sup> Text at notes *infra*.

arms cases appears to have arisen as a test case: they were ordinary criminal or civil cases in which lawyers raised right to arms issues. The Article closely examines how the Supreme Court integrated the nineteenth century arms cases into *Heller* and *McDonald* to shape modern Second Amendment law.

Part I briefly explains two English cases which greatly influenced American legal understandings. *Semayne's Case* is the foundation of “castle doctrine”—the right to home security which includes the right of armed self-defense in the home.<sup>7</sup> *Sir John Knight's Case* fortified the tradition of the right to bear arms, providing that the person must bear arms in a non-terrifying manner.<sup>8</sup>

Part II examines American antebellum cases; these are the cases to which *Heller* looked for guidance on the meaning of the Second Amendment. Part III looks at cases from Reconstruction and the early years of Jim Crow through 1891. As with the antebellum cases, the large majority of post-war cases are from the Southeast, which during the nineteenth century was the region most ardent for gun control. The heart of gun control country was Tennessee and Arkansas; courts there resisted some infringements of the right to arms, but eventually gave up.<sup>9</sup> *Heller* and *McDonald* did not look to the Jim Crow cases as constructive precedents on the Second Amendment.

## I. The Colonial Heritage

Two English cases were particularly important in shaping the American understanding of the right to keep and bear arms. *Semayne's Case* (1604) was about the home, stating that “every man’s home is his castle.” This became a foundation of American self-defense law, the “Castle Doctrine.” The other case, *Sir John Knight* (1685), affirmed that the peaceable public carrying of arms is lawful, and that carrying with malicious intent to terrify people is not.

### A. *Semayne's Case*, the Castle Doctrine

When George Berisford died, he owed a debt to Peter Semayne.<sup>10</sup> Berisford had lived in a house with Richard Gresham, as joint tenants. After Berisford

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<sup>7</sup> Text at notes infra.

<sup>8</sup> Text at notes infra.

<sup>9</sup> Text at notes infra.

<sup>10</sup> 77 Eng. Rep. 194, 5 Coke Rep. 91a (K.B. 1604). The case had previously been argued and decided. According to the report of *Semayne v. Gresham*, 80 Eng. Rep. 21; Yelverton, 29 (1603), the King’s Bench Justices agreed that Semayne would lose, but disagreed on the rationale. One Justice, Fenner, argued that the sheriff had a right to try to break down the door, but “it was the sheriff’s fault that he did not break it.” Semayne could not sue Gresham just because the sheriff did not succeed in breaking the door. *Id.* The decision in *Semayne v. Gresham*, is described in second report, in addition to the report written by Justice Yelverton. The final sentence of the other report seems to indicate that when Justice David Williams joined the court (Feb. 4, 1604), the decision was made to issue a new opinion, with the same result. *Semayne v. Gresham*, 72 Eng. Rep. 828; Moo. K. B. 668 (no. 917) (1604) (“Mes fuit adjudge quant Williams vient al bench sur l’argument des Judges overtsmt, que l’acçon no gist, et quod querens nihil capiat per breve.”). The final part of the sentence means “that the action did not

died, the house passed fully to Gresham, by survivorship. Berisford had owned various goods and papers which he had kept at home; Gresham retained them.<sup>11</sup>

Semayne secured a writ for the Sheriff of London to seize Berisford's goods to satisfy the debt. But when the Sheriff came to Gresham's home, Gresham shut the door, and would not let him in. Semayne sued Gresham for frustrating the execution of the writ.<sup>12</sup>

The King's Bench ruled against him: Gresham had a right to keep his doors locked, and to exclude anyone who did not knock, announce, and demonstrate lawful authority to enter.<sup>13</sup>

The court explained "[t]hat the house of every one is his castle and fortress, and if thieves come to man's house to rob or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing."<sup>14</sup>

*Semayne's Case* was consistent with a 1499 precedent that had used similar language to hold that a person can gather "his friends and neighbors to help him" defend his home; but a person may not go to markets with an assembly of bodyguards.<sup>15</sup>

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lie, and that the plaintiff should take nothing by his brief." For Justice Williams' tenure, see JOHN SAINTY, *THE JUDGES OF ENGLAND 1272 -1990: A LIST OF JUDGES OF THE SUPERIOR COURTS* 31 (1993). The final opinion, *Semayne's Case*, was unanimous, and carefully supported by cited authority.

Most English case reports in the seventeenth century, and all English reports in the fourteenth through sixteenth centuries, were originally written in a specialized language called "Law French." English translations were published much later. In the quote above, "overtsmt" should have a tilde above the "m." (Or in Law French, a "tittle"). Unfortunately, modern font sets are not designed with Law French even a little in mind. In Law French, a tittle indicates the omission of some preceding and/or succeeding letters. J.H. BAKER, *MANUAL OF LAW FRENCH* 18 (2d ed. 1990).

<sup>11</sup> *Id.*, 77 Eng. Rep. at 194–95.

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

<sup>13</sup> *Id.* at 199.

<sup>14</sup> *Id.*, 77 Eng. Rep. at 194.

<sup>15</sup> Y.B. Trin. 14 Hen. 7 (1499), reported in Y.B. 21 Henry 7, fol. 39, Mich., pl. 50 (1506) ("Anonymous." No case name):

If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace. But a man's house is his castle and defense, and where he has a peculiar right to stay.

"Surety of the peace" was a procedure by which a threatening person could be required to post bond for good behavior (or to have other persons post a bond on his behalf). *Surety of the peace*, BLACK'S LAW DICT. 1671 (Byron Garner ed.) (10th ed. 2014). The procedure was used in the United States for persons who carried arms while threatening a particular individual. See note — *infra*.

Most of *Semayne's Case* detailed the conditions about when and how sheriffs could enter homes. The foundational rule was: "In all cases when the King is party, the sheriff may break the house, either to arrest or to do other execution upon the King's process, if otherwise he cannot enter. But he ought first to signify the cause of his coming, and to make request to open doors."<sup>16</sup>

*Semayne's* maxim that "a man's house is his castle" is in twenty-first century America probably the best-known language from any English case. In the U.S. Bill of Rights, the Second, Third, and Fourth Amendments are a cluster which protects pre-eminently (but not exclusively) the sanctity of the home.<sup>17</sup> So Castle Doctrine is a foundation of the Fourth Amendment. In 1761, Great Britain's Parliament authorized "writs of assistance," which allowed the British army to conduct warrantless searches in order to crack down on the widespread import/export smuggling (for tax avoidance) that was taking place in New England. James Otis was the Advocate-General (like an Attorney General) of Massachusetts. Rather than defend the legality of the writs of assistance, he resigned. He then became the attorney for plaintiffs challenging the writs.

His oral argument against the writs, which quoted Castle Doctrine, was widely reprinted, and became the most famous legal speech in colonial America.<sup>18</sup> The speech's principles were enshrined in the Fourth Amendment.<sup>19</sup> Much later, the great progressive and future Supreme Court Justice Louis Brandeis would rely on Castle Doctrine in his seminal article arguing for judicial recognition of the right of privacy.<sup>20</sup>

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<sup>16</sup> 77 Eng. Rep. at 194.

<sup>17</sup> Cf. David I. Caplan, *The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments*, 2 J. FIREARMS & PUB. POL'Y 165 (1989).

<sup>18</sup> James Otis, *Against Writs of Assistance* (Feb. 24, 1761, argument before Superior Court of Massachusetts), in CHARLES FRANCIS ADAMS, 2 THE WORKS OF JOHN ADAMS 524 (1856) (John Adams's notes recording Otis's speech), available at [http://constitution.org/bor/otis\\_against\\_writs.htm](http://constitution.org/bor/otis_against_writs.htm):

Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

<sup>19</sup> See William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 3d 371 (1980).

<sup>20</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890) ("The common law has always recognized a man's house as his castle, impregnable. . .").

*Semayne's Case* provided the standard American rule for the right to use deadly force against home invaders.<sup>21</sup> The Supreme Court has studied *Semayne's Case* repeatedly, recognizing its principle about repelling violent intruders, and examining the opinion closely to discern the meaning of the Fourth Amendment.<sup>22</sup> Today, many states have passed laws to affirm the common law doctrine that a person who is violently attacked by a home invader has no duty to retreat before using deadly force. These laws are often called "Castle Doctrine."

During the first century of the American Bill of Rights, nearly all of the cases that involved Castle Doctrine related to when and how sheriffs or other government officers could enter homes.<sup>23</sup> The right of armed home defense was uncontested in this period (except for slaves and for free people of color in some slave states);<sup>24</sup> the few cases exploring the self-defense contours of Castle

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<sup>21</sup> *E.g.*, 1 WHARTON ON CRIMINAL LAW § 633 (11th ed. 1912) ("Where one is assaulted in his home, or the home itself is attacked, he may use such means as are necessary to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life. In this sense, and in this sense alone, are we to understand that maxim that, 'Every man's house is his castle.'") (some internal quotation marks omitted).

<sup>22</sup> There are thirteen citations since the Warren Court, including three in the twenty-first century. *See* *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) ("an unannounced entry may provoke violence in supposed self-defense by the surprised resident"); *Georgia v. Randolph*, 547 U.S. 103, 123 (2006) (Stevens, J., concurring); *United States v. Banks*, 540 U.S. 31, 41 (2003); *Wilson v. Layne*, 526 U.S. 603, 609–10 (1999); *id.* at 622 (Stevens, J., dissenting); *Minnesota v. Carter*, 525 U.S. 83, 95 (1998); *id.* at 99–100 (Kennedy, J., concurring) ("The axiom that a man's home is his castle...has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition."); *Wilson v. Arkansas*, 514 U.S. 927, 931, 932 n.2, 935–36 (1995) ("knock and announce" is a factor in determining Fourth Amendment reasonableness of a search; *Semayne* reaffirmed an ancient common law rule); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 488 n.3 (1986) (Stevens, J., concurring in part and concurring in the judgment); *Steagald v. United States*, 451 U.S. 204, 217–19 (1981); *id.* at 228–30 (Rehnquist, J., dissenting); *Payton v. New York*, 445 U.S. 573, 592–93, 596–97, 615 n.11 (1980) ("The zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty."); *id.* at 604–05 (White, J., dissenting); *Ker v. State of Calif.*, 374 U.S. 23, 47, 54 n.8, 57 n.11 (1963) (Brennan, J., concurring in part); *Miller v. United States*, 357 U.S. 301, 308 (1958).

For analysis of *Semayne's Case* as it relates to modern self-defense rights, see David I. Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. REV. 1073 (2005).

<sup>23</sup> For a summary of American doctrine on this, see *When a House is not a Castle*, 6 ALBANY L.J. 379 (1872–73).

<sup>24</sup> *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 844–50 (2010) (Thomas, J., concurring) (collecting statutes and cases); David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. LEGISL. (2015, forthcoming) (additional statutes and cases), <http://ssrn.com/abstract=2665432>

Doctrine held that it applied to felons invading the home, and not to other situations, such as civil trespassers on land.<sup>25</sup>

## B. Sir John Knight's Case, lawful peaceable carry.

England's 1328 Statute of Northampton statute had provided:

Item, it is enacted, that no man great nor small, of what condition soever he be, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night or by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.<sup>26</sup>

As of 1328, the government in England was near collapse. The previous year, King Edward II was had been deposed by an invasion led by his wife, Queen Isabella (a French Princess). Isabella and her ally Roger Mortimer took over the government, which was nominally led by Edward III, the son of Edward II and Isabella. The monarchy's ability to enforce the law was close to non-existent.<sup>27</sup>

As indicated by the statutory language, the primary concern was "the gentry...using armed force to defeat the course of justice."<sup>28</sup> For decades there had been a problem of "magnates maintaining criminals."<sup>29</sup>

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<sup>25</sup> See, e.g., *Lee v. State*, 92 Ala. 15 (1891) (no-retreat rule applies in the home and curtilage); *Watkins v. States*, 89 Ala. 82 (1890); *Mitchell v. Commonwealth*, 10 Ky. L. Rptr. 910 (1889) (applies to cellar); *Wright v. Commonwealth*, 85 Ky. 123, 2 S.W. 904, 908 (1887) ("He was not required to flee from his dwelling, but had the right to stand his ground, and use all the force necessary..."); *State v. Patterson*, 45 Vt. 308 (1873); *Pierce v. Hicks*, 34 Ga. 259 (1866) (applies to a licensed tippling house, which was also part of defendant's home); *Curtis v. Hubbard*, 4 Hill 437, 439 (N.Y. 1824) ("For a man's house is his castle, not for his own personal protection merely, but also for the protection of his family and his property therein, while it is occupied as his residence.");

<sup>26</sup> I THE STATUTES: REVISED EDITION, HENRY III TO JAMES II, A.D. 1235-6—1685 at 258 (1870); 2 Edw. 3, c. 3 (1328).

<sup>27</sup> Anthony Verduyn, *The Politics of Law and Order during the Early Years of Edward III*, 108 ENG. HIST. REV. 842 (1993).

<sup>28</sup> W. R. Jones, *Rex et ministri: English Local Government and the Crisis of 1341*, 13 J. BRIT. STUDS. 1, 19 (1973).

<sup>29</sup> Verduyn at 849.



The House of “Commons’ complaints about armed noblemen” were congenial to Queen Isabella and her consort Roger Mortimer. Fearful of being overthrown, the Queen did not want armed men coming to Parliament, or traveling armed to meet the Queen.<sup>30</sup> They favored a measure to render it “politically necessary to check dissent against the increasingly unpopular regime.”<sup>31</sup>

In 1330, Edward III seized power from his mother, and faced many of the same problems: “one of the most profound causes of disorder was the continued bond of many noblemen with malefactors.”<sup>32</sup> As the young king understood, “many offenders were stronger than royal officials, not only because they had the support of the nobility, but also because they were members of the gentry or could draw upon the local criminal fraternity.”<sup>33</sup>

Edward III undertook to “reinforce his officials with men-at-arms and to ride with them if necessary.”<sup>34</sup> By 1332, there was sufficient feeling “that disorder had abated” so that Edward III could launch a war against Scotland, without feeling any political need to provide for keeping the peace during his absence.<sup>35</sup>

While the Statute of Northampton was primarily concerned with armed nobles frustrating judicial process, the statutory language was not solely about nobles or courts. The “no part elsewhere” language could be read as general carry prohibition; yet that reading would render the preceding details (about particular places and officials) surplusage. Moreover, we know that the most common arm, a knife, was routinely carried, as a necessary tool for everyday activities such as cutting food, and necessarily available for self-defense in an emergency. English law required villages to provide target practice areas, and required families to teach their sons archery; later, the archery mandate was replaced with a musket mandate<sup>36</sup> That in itself would necessarily make it common for people to walk around carrying arms. The 1328 statute seems primarily aimed at noblemen who appeared before the king or his ministers wearing armor; that may be why the first penalty for violators was “to forfeit their armour.”<sup>37</sup>

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<sup>30</sup> Verduyn at 849.

<sup>31</sup> Verduyn at 856.

<sup>32</sup> Verduyn at 860.

<sup>33</sup> Verduyn at 860–61.

<sup>34</sup> Verduyn at 860.

<sup>35</sup> Verduyn at 864.

<sup>36</sup> 33 Henry VIII, c. 3 (1541); 33 Henry VIII, c. 9 (1541); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 6 (1994) (mandatory longbow practice was later replaced by mandatory musket practice).

<sup>37</sup> *Cf.* CALENDAR OF THE CLOSE ROLLS, EDWARD III, 1337-1339 104–05 (Feb. 20, 1337, Hatfield) (H.C. Maxwell-Lyte ed., 1900) (order to the Sheriff of Berks explaining that men had been plotting “to beat, wound and ill-treat jurors” and that the Sheriff should enforce the law that “no one, except the king’s serjeants and ministers, shall go armed or ride with armed power before the justices at the said day and places, nor do anything against the peace.”).

Any doubts of the meaning were resolved shortly before the Glorious Revolution of 1688. Tensions had been rising because King James II was trying to disarm the entire English population, except for his political supporters. Sir John Knight was an Anglican and a fierce opponent of the Catholic King. Along with three friends, he allegedly “did walk about the streets armed with guns, and that he went into church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King’s subjects.”<sup>38</sup> This resulted in arrest, prosecution, and then acquittal by a jury. Two different reporters wrote about the case.<sup>39</sup> According to the first reporter, the Chief Justice stated that the statute “was to punish people who go armed to terrify the King’s subjects.”<sup>40</sup> The latter reporter elaborated that the Chief Justice of the King’s Bench said “this statute be almost gone in *desuetudinem*”<sup>41</sup> for “now there be a general connivance to gentlemen to ride armed for their security.”<sup>42</sup> However, “where the crime shall appear to be *malo animo*”<sup>43</sup> it will come within the act.”<sup>44</sup> Under both reports, only malicious, terrifying carry was illegal. As quoted by the court, the Statute of Northampton applied to arms-carrying before judges and other government officials (“coming with force and arms before the King’s Justices, &c.”) or to “going or riding armed in affray of the peace.”<sup>45</sup> The prosecution had a similar, narrow view of the Statute. The criminal Information stated that the Statute was about persons whose particular manner was “to terrify the King’s subjects.”<sup>46</sup> Although the prosecutor thought that Knight had been carrying in terrifying manner, the jury disagreed.<sup>47</sup>

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<sup>38</sup> Sir John Knight’s Case, 87 Eng. Rep. 75, 76, 3 Mod. 117 (K.B. 1685).

<sup>39</sup> The latter reporter divided the case into two parts. The first part, dealing with the meaning of the Statute of Northampton, is *Rex v. Sir John Knight*, 90 Eng. Rep. 330; Comberbach, 38 (1686).

<sup>40</sup> 87 Eng. Rep. at 76. The case is also called *Rex v. Knight*.

<sup>41</sup> A term for a statute that has become obsolete from disuse. BLACK’S LAW DICTIONARY 404 (5th ed. 1979).

<sup>42</sup> 90 Eng. Rep. at 330.

<sup>43</sup> “With an evil mind; with a bad purpose or wrongful intention, with malice.” BLACK’S DICT. at 864.

<sup>44</sup> 90 Eng. Rep. at 330.

<sup>45</sup> 87 Eng. Rep. at 75–76.

<sup>46</sup> 87 Eng. Rep. at 76.

<sup>47</sup> One scholar argues that Sir John Knight was within the statute’s exemption of the “king’s ministers.” Patrick J. Charles, *The Faces of the Second Amendment Outside The Home: History versus Ahistorical Standards of Review*, 60 CLEVELAND ST. L. REV. 1, 28, 30 (2012). One indication that Knight was not engaged in law enforcement activity on behalf of the King was that Knight was personally prosecuted by the Attorney General. 90 Eng. Rep. at 331. This is not exactly a sign of that King James II approved of what Knight was doing.

Second, Charles has overlooked the second half of one of the case reports. The second part of the report is *Rex v. Sir John Knight*, 90 Eng. Rep. 331, Comberbach, 41 (1686). As the second part explains, after Knight was acquitted, the Attorney General nevertheless moved that Knight be required to post a bond for good behavior. The King’s Bench upheld the bond. *Id.* As discussed below, American courts also required bonds for persons whose arms-carrying behavior, even if not criminal, was threatening in manner. *See text at notes –.* The decision of

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the King's Bench, that John Knight should be required to post bond for good behavior, strongly indicates that Knight was not engaged in law enforcement.

Going beyond the case reports, Charles cites a diary that was written in a secret code, and finally decoded and published in the twenty-first century. The *ENTRING BOOK OF ROGER MORRICE* (Mark Goldie ed., 2009), cited in Charles at 28–30 (12 footnotes). The diary says that at trial, Knight had pointed out some recent threats against him, from Irish Catholics. However, the Statute of Northampton had no exemption for persons subject to identifiable threats. The existence of a particular threat was relevant because the statute applied solely to persons who carried with malignant intent.

Charles' assertion that Knight was acquitted "because he was a government official who was well-affected to the crown." is not supported by cited source, a diary published in 1857. *Id.* at 30. The diary tells that on June 12, 1686, Knight "pleaded not guilty to an information exhibited against him for going with a blunderbuss in the streets, to the terrifyeing [of] his majesties subjects." 1 NARCISSUS LUTTRELL, *A BRIEF HISTORICAL RELATION OF STATE AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714*, at 380 (1857). On December 23 of that year,

sir John Knight, the loyall, was tried at the court of kings bench for a high misdemeanor, in going armed up and down with a gun at Bristoll; who being tried by a jury of his own city, 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.

*Id.* at 389. So Knight was acquitted because he had no "ill design"—exactly the principle which the Chief Justice affirmed in describing the Statute of Northampton as applying only to carry *malo animo*.

Charles also contends that Knight himself "even cited Richard II's statute exempting governmental officials from punishment." Charles at 30 (citing without elaboration "90 Eng. Rep. 330). Knight's attorney made no such argument. According to the report of the case, "Winnington, pro defendente. This statute was made to prevent the people's being oppressed by great men; but this is a private matter, and not within the statute. Vide stat. 20 R. 2." 90 Eng. Rep. at 330. Rather than claiming to have been carrying arms to serve the king, Knight had claimed that his arms carrying was "a private matter." He argued that the Statute of Northampton was only intended to cover heavily armed nobles who oppressed the public.

Charles believes that the citation to a statute from King Richard II meant that Knight was invoking a law enforcement exemption. The statute cited by Knight's lawyer was 20 Richard II ch. 1 (1396–97); 2 *STATUTES OF THE REALM* 93 (1816). Contrary to Charles, King Richard's statute did not create an exemption for people in government service. That exemption already existed in the Statute of Northampton ("the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office"). Richard II stated the rule more succinctly ("save and except the King's Officers and Ministers in doing their Office."). The only novel feature of Richard II's order was that it specifically and completely prohibited "launcegays"—a type of spear that was an "offensive weapon." *Id.*; 2 THOMAS EDLYNE TOMLIN, *THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS AND PRESENT STATE OF THE BRITISH LAW* (London 1820) (unpageinated); GEORGE CAMERON STONE, *A GLOSSARY OF THE CONSTRUCTION, DECORATION AND USE OF ARMS AND ARMOR IN ALL COUNTRIES AND IN ALL TIMES* 410 (1999) ("Lance-ague, lancegay. A light lance, occasionally used as a dart. It was carried in place of the war lance in the 14th century; the latter at the time was about fourteen feet long and very heavy."). An offensive weapon used exclusively by mounted nobles was very different from the common blunderbuss (a primitive firearm) carried by Knight.

In sum, there is no basis in the case reports, or in Luttrell's diary, for Charles's assertion that Knight was acquitted because he was a government agent.

Everyone in the case agreed that the Statute of Northampton outlawed only carrying in a terrifying manner.<sup>48</sup> This was in accordance with long-established construction, as expressed, for example in Michael Dalton's widely-read 1622 manual of Justice of the Peace, *The Country Justice*,<sup>49</sup> and likewise

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Of course information in personal diaries had no effect on the development of legal doctrine in America in the decades and centuries following *Sir John Knight's Case*. The legal sources available to American judges and commentators were the case reports themselves, or treatises, such as Hawkins.

<sup>48</sup> Two weeks after Knight's acquittal, King James II, ordered full enforcement of the Game Act of 1671; that act, ostensibly enacted to protect commoners from hunting on aristocrats' lands, set high property qualifications for gun ownership. The King's repression intensified the political crisis which led to his being overthrown in 1688, and to Parliament in 1689 enacting a Bill of Rights, which protected the right to arms. MALCOLM. In England, a statute allowed a Catholic to keep firearms with permission from a local justice of the peace "for the defence of his House or person." 1 Wm. & Mary, ch. 15 (1689). According to James Madison's notes for his speech introducing the proposed U.S. Bill of Rights in Congress, among the defects of the English Bill of Rights was that it was a "mere act of parl." (and thus could be constricted by a future Parliament), and that is protected only protected only "arms to Protestts." James Madison, Notes for Speech in Congress Supporting Amendments, June 8, 1789, in THE ORIGIN OF THE SECOND AMENDMENT 645 (David E. Young ed., 1991).

<sup>49</sup> MICHAEL DALTON, THE COUNTRY JUSTICE (London, William Rollins & Samuel Roycroft 1622). Citing the Statute of Northampton, Dalton explained that the question was one of intent:

And therefore if divers in one companie, going to the Church, Faire, or Market, shall goe armed, or one going to the Session, or other like assembly, shall go with his servants in Harnesse (to the terror of the people) though hee, or they, have no intent to fight, or to commit any Ryot, het this is a Rout by the manner of his or their going, being needlesse, disorder, and against the law. See the statute 2 Ed. 3. Ca. 3.

But in the former cases, if they had gone in privie coats of Plate, shirts or Maile, or the like, to the intent to defend themselves some adversarie, this seemeth not punishable with these statutes, for that there is nothing openly done, in terrorum populi.

*Id.* at 205 (chapter on Riots); *see also id.* at 31 (chapter on Armour) (citing Statute of Northampton, and its restatement for Richard II, for rule that Justice of the Peace should arrest "If any person shall ride, or go Armed offensively...."); MICHAEL DALTON, OFFICIUM VICECOMITUM: THE OFFICE AND AUTHORITIE OF SHERIFS 14 (The Lawbook Exchange 2009) (1623) (Sheriffs "mae and ought to arrest all such persons as goe or ride armed offensively").

Dalton's treatise was very influential in England, and was also used in America. THOMAS GARDEN BARNES, SHAPING THE COMMON LAW 136–51 (Allen D. Boyer ed., 2008). It was "The most popular and authoritative justice manual during the early period" of American history. John A. Conley, *Doing it by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 261 (1985).

Surprisingly, Charles does not cite Dalton. Instead, he cites some later, lesser manuals. Charles at 23–26. There is no evidence cited that any of these manuals ever crossed the Atlantic. One of these manuals explains that constables were required to organize men to keep "Watch" of towns from sunrise to sunset; the Watchmen were required to detain suspicious persons. The Watchmen had to be "sufficiently Armed." P.B., A. HELP TO MAGISTRATES, AND MINISTERS OF JUSTICE 107 (2d ed., London 1700) (ch. 53). The watchmen's duties included that

in a 1584 treatise explaining that concealed carry was lawful, since its manner could not terrify anyone.<sup>50</sup>

When Parliament wanted to ban carrying in general, it knew how to do so, as in a 1695 statute against arms carrying (and possession) by Catholics in

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“The Watch in this Case are to Apprehend such as ride, or go Armed, Scouts, Evesdroppers, Noctivagrants, Night-walker, and all sorts of Rogues and Vagabonds, &c. 1 Dalton Chap. 60. Folio 140. 5 Hen. 7. 5. 5 Edw. 3. 14.” *Id.* This indicates that armed watchmen were, during the night, expected to detain suspicious characters; it does not support Charles’ assertion that arms-carrying was forbidden, day or night. More fundamentally, practical manuals written for law enforcement officers, and based on ancient statutes, are not controlling law, whereas the authoritative decisions of the King’s Bench Justices are.

<sup>50</sup>

Thomas figet chivaler ale armed south se drapes al Westminster, sur que suit attache, & il dit que bn Sir John Trevert luy manace, a pur sa vie saver il eitroit arme, & non obitant ses fuet soqs. Per agary, & fuit prise, & il fuit comanuv sur quant que it poit fors. Q il ne ferra male as dit Sir Thomas. 23.C.3.33 per hoc appiert, que home ne alera armed overtment, coment que soyt pur son defence, me semble que home poit aler armed ouu privie coate de plate south son coate, ou &c. car ceo ne poit encuter alcun feare al people, *Quare tamen.*

RICHARD CROMPTON, L’OFFICE ET AUCTHORITIE DE IUSTICES DE PEACE 58 (2014) (London 1584) (numerous diacriticals omitted, as they are not in modern font sets). The gist of analysis is that “a man will not go armed overtly, event though it be for his defense, but it seems that a man can go armed under his private coat of plate, underneath his coat etc., because this cannot cause any fear among people.” Judge Posner made a similar point. *Moore v. Madigan*, 702 F.3d 933, 936–37 (7th Cir. 2012) (“Some weapons do not terrify the public (such as well-concealed weapons”).

Crompton’s treatise may reflect a sensibility of the late sixteenth century, in favor of concealed carry. This is congruent with twenty-first century American sensibilities, and just the opposite of nineteenth century American sensibilities. *See text at notes -----.*

Four decades after Crompton’s treatise was published, King James I, in the first year of his reign, proclaimed that “the bearing of Weapons covertly, and specially of short Dagges [daggers], and Pistol...had ever beene...straitly forbidden,” the practice had “is suddenly growen very common.” Accordingly, the carrying or import of daggers or guns shorter than twelve inches was forbidden. 1 ROYAL PROCLAMATION OF KING JAMES I, 1603–1625, at 285 § 126 (1973) (proclamation Jan. 16, 1613). The proclamation may have been motivated by reports of Spain (England’s mortal enemy) smuggling pocket pistols into England. *Id.* at 284 n.1. The same month, the King ordered the disarmament of all Catholics. *Id.*

Ireland.<sup>51</sup> This was compliant with Bill of Rights, which had recognized an arms right only for “protestants.”<sup>52</sup>

A treatise published in 1694, less than a decade after *Sir John Knight’s Case* was decided, said that the Statute of Northampton allows persons to carry arms “in their own defence against Illegal Violence.”<sup>53</sup>

A leading treatise on criminal law was by William Hawkins, published in 1716.<sup>54</sup> It confirmed that the Statute of Northampton was for “dangerous and unusual” arms, not common ones: “That in some Cases there may be an 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 cause a Terror to the People, which is said to have been always an Offence at the Common Law, and is strictly prohibited by many Statutes.”<sup>55</sup>

A half-century later, Blackstone explained the Statute:

The offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the king’s pleasure: in like manner as, by

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<sup>51</sup> An Act for the better securing the government, by disarming papists (1695) (forbidding arms and ammunition possession by Irish Catholics); cf. DALTON at 94 (arms of convicted “popish Recusants” may be seized).

Charles cites two articles from *The Post Boy*, a newspaper in Dublin, Ireland, regarding arms licenses, and argues that they show that a stringent system of gun licensing persisted even after the enactment of the English Bill of Rights in 1689. Charles at 27–28. He overlooks the fact that *The Post Boy* was reporting on events in Ireland, where the Catholic population, as expressly stated in the English Bill of Rights, had no right to arms. Notably, his quotation from *The Post Boy* about the recall of carry licenses (many of which had been obtained fraudulently) applied to “all Licenses whatsoever to bear Arms, formerly Granted to any Papist in this Kingdom.” THE POST BOY, Dec. 19–21, 1699 at 1, col. 1.

<sup>52</sup> “The subjects which are protestants may have arms for their defence suitable to their conditions as and allowed by law.” James Madison, of course, expressly intended that the Second Amendment would abolish the arms restrictions on religious minorities. See note *supra*.

<sup>53</sup> JAMES TYRRELL, BIBLIOTHECA POLITICA 639 (London, W. Rawlins, S. Roycroft & H. Sawbridge 1694). The language quoted above was in the context of Tyrell’s argument that if the king acted contrary to the law, such as by murdering or robbing his subjects, the subjects had a right of armed resistance. *Id.* at 459–65. One reason was that “Prior to all Civil Law” is “the Right of Self-Defence or Preservation.” *Id.* at 464.

<sup>54</sup> WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (1716). Charles cites an English constable’s manual from 1692, and two manuals from earlier in that century, for the proposition that constables should arrest anyone who does armed. Charles at 23–24. Yet the 1708 third edition of the manual contains no such instruction. It simply says that constables should search for arms possessed by persons who are “dangerous” or “papists.” ROBERT GARDINER, THE COMPLEAT CONSTABLE 18 (3d ed. 1708).

<sup>55</sup> *Id.* at 110.

the laws of Solon, every Athenian was finable who walked about the city in armour.<sup>56</sup>

Subsequent case law confirmed that peaceable carry was lawful.<sup>57</sup> American state statutes likewise respected peaceable carry; for example, Massachusetts and Virginia adopted their own versions of the principle embodied in the Statute of Northampton, and they expressly limited it to carrying which was “offensive” or meant to cause “terror.”<sup>58</sup> This did not foreclose some regulation of the manner of carry. New Jersey was the first to ban concealed carry, in 1686.<sup>59</sup> Not until 1966 did New Jersey limit open carry.

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<sup>56</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND \*148–49 (1st ed. 1769).

<sup>57</sup> See *Rex v. Dewhurst*, 1 State Trials, N.S. 529, 601–02 (1820) (“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 travelling or going for the ordinary purposes of business.”); see also *Rex v. Smith*, 2 Ir. Rep. 190, 204 (K.B. 1914) (law allows peaceably walking down the road with a revolver); *Rex v. Meade*, 19 L. Times Rep. 540, 541 (1903) (right to peaceable carry does not apply to “firing a revolver in a public place, with the result that the public were frightened or terrorized.”).

<sup>58</sup> See, e.g., 2 Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807 652, 653 (enacted Jan. 27, 1795) (Boston: 1807) (Justices of the Peace should arrest “all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensive, to the fear or terrour of the good citizens of this Commonwealth, or such others may utter any menaces or threatening speeches”; upon conviction, such a person shall be required “to find sureties for his keeping the peace”).

North Carolina’s only statutory restriction on persons going “armed” was for slaves. COMPLETE REVISAL OF ALL THE ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE 152–53 (enacted 1753) (1773). A 1792 treatise quoted the Statute of Northampton as among the English statutes in effect in North Carolina. FRANCOIS-XAVIER MARTIN, A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 60–61 (Newbern 1792). An 1838 North Carolina statute abrogated the effect of all English statutes in North Carolina. Even so, the North Carolina Supreme Court said that the statute had merely reflected a common law principle. The common law did not forbid peaceable carry. *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422–23 (1843) (“the carrying of a gun per se constitutes no offence.... He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.”). See also text at notes *infra*.

Likewise, Virginia’s 1786 analogue to the Statute of Northampton said that persons must not “go nor ride armed by night or by day, in fairs or markets, or in other places, in terror of the Country.” A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 30 (enacted Nov. 27, 1786) (Richmond 1803); cf. see also GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 92 (Williamsburg 1736) (A constable “may take away Arms from such who ride, or go, offensively armed, in Terror of the People” and may bring the person and the arms before a Justice of the Peace). Webb’s treatise was endorsed by Virginia Attorney General John Clayton. *Id.* at ii. It was the first Justice of Peace manual to integrate American and English law. Conley at 273–75.

<sup>59</sup> See THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 289–90 (enacted 1686) (1758) (“no Person or Persons after Publication hereof shall presume privately to wear any Pocket Pistol, Skeines, Stilladoes [stilettoes], Daggers or Dirks,

American courts have cited the Statute of Northampton, sometimes with consideration of how it was construed by *Sir John Knight's Case* and Blackstone, and occasionally not.<sup>60</sup> The earliest American decision was the Tennessee Supreme Court's *Simpson v. State* (1833), affirming that carrying arms in public is lawful. That case is discussed *infra*.<sup>61</sup> The Supreme Court in *Heller* echoed the spirit (although not the exact doctrine) of Hawkins's and Blackstone's explication of *Sir John Knight's Case*: "dangerous and unusual" weapons, such as machine guns or sawed-off shotguns, may be prohibited. The American cases on which *Heller* drew will be discussed below.

## II. Antebellum Cases

From the Early Republic through the Jacksonian Era and then up to the Civil War, almost every right to arms case came from the South.<sup>62</sup> This was probably because the South at the time was far more ardent about arms control than was the rest of the nation. This would become all the more true in the decades following the Civil War. The main line of the antebellum Southern cases, many of which are cited with approval in *District of Columbia v. Heller*, is that bans on concealed carry are constitutional as long as people can carry openly; in contrast, banning all or most handguns is unconstitutional. Based on *Heller*, most of the antebellum cases are examples of correct interpretation of the right to arms.

The main line of these cases establish the following rules:

- The right to arms belongs to everyone, not just the militia.
- A law which bans all or most handguns violates the right.

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or other unusual or unlawful Weapons..."). A skein (or skain, skeyn, scjan, skean) was a double-edged dagger, associated with Ireland and Scotland. LOGAN THOMPSON, DAGGERS AND BAYONETS (1999); STONE at 566–67. Charles misreads the statute; he quotes from the preamble, which is a broad complaint about challenges for duels. Charles at 32. He neglects the operative language of the statute, which applied to the "Pocket Pistol" but not to larger handguns, and which only prohibited wearing the listed weapons "privately."

<sup>60</sup> See, e.g., *Moore v. Madigan*, 702 F.3d 933, 936–37 (7th Cir. 2012) (examining *Sir John Knight's Case*, Blackstone, and Edward Coke to conclude that the statute only banned arms-carrying in certain places, or by large assemblies. "Some weapons do not terrify the public (such as well-concealed weapons)...") (parenthetical in original); *State v. Huntly*, 25 N.C. (3 Ired.) 418, 421 (1843) (declaring the Statute to be part of the common law, and applying the limitation expressed in *Sir John Knight's Case*); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds* 319 U.S. 463 (1943) (Not addressing commentary, citing Statute for the point that "Weapon bearing was never treated as anything like an absolute right by the common law."). At *Tot's* level of generality, the statement is consistent with *Sir John Knight's Case*; the right is not "absolute" since a person may not exercise the right in a manner calculated to terrify the public.

<sup>61</sup> Text at notes *infra*.

<sup>62</sup> One exception is an 1829 case upholding Indiana's ban on concealed carry. The very short opinion provides no information and no reasoning. It simply announces the result in a single paragraph. *State v. Mitchel*, 3 Blackf. 229 (Ind. 1833).



- Concealed carry may be prohibited as long as open carry is lawful.
- Enhanced punishment for using especially dangerous arms in a violent crime does not violate the right to arms.
- The right to keep and bear arms may not be destroyed under the guise of regulation.

We also see, in Tennessee after 1837, the deleterious effects of prohibiting popular arms which people are determined to own: courts must invent fanciful interpretations in order to uphold the bans; laws criminalizing otherwise law-abiding citizens for carrying common arms may be enforced with harsh mandatory sentence, which ensnare persons who lawfully defend themselves. Although Tennessee’s bad example had little influence before the Civil War, after the War Tennessee grew worse, and its influence did spread, as we shall see in Part III.

### A. Kentucky

*Bliss v. Commonwealth* (Ky. 1822).<sup>63</sup> Bliss carried a sword-cane—that is, a short sword concealed inside a walking stick.<sup>64</sup> This violated a state statute. Although the case report does not provide information about how Bliss came to the attention of the prosecutor, the statute provided that “the informer” would receive half of the fine.<sup>65</sup>

The Commonwealth’s Attorney argued that the concealed carry ban was permissible because open carry was still lawful.<sup>66</sup> The Kentucky Supreme Court disagreed. It was true “That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defense of themselves and the state.”<sup>67</sup> However, “[n]ot merely all legislative acts, which purport to take it away; but all which diminish or impair it as it existed

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<sup>63</sup> *Bliss v. Commonwealth*, 12 Ky. (2 Lit.) 90 (1822). “Bliss appears to be the first appellate decision construing a state constitutional arms provision.” *State v. Christian*, 249 Or. App. 1, 38; 274 P.3d 262, 283 (2012) (Edmonds, J., dissenting). The *Christian* dissent contains a very thorough analysis of many of the nineteenth century cases. *Id.* at 32–45. For a careful analysis of the 1799 Kentucky right to arms, and its successors see *Posey v. Commonwealth*, 185 S.W.3d 170, 183–203 (Ky. 2006) (Scott, J., concurring in part and dissenting in part).

<sup>64</sup> *Bliss*, 12 Ky. at 90.

<sup>65</sup>

That any person in this commonwealth who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined in any sum not less than one hundred dollars; which may be recovered in any court having jurisdiction of like sums, by action of debt or on the presentment of a grand jury; and a prosecutor in such presentment shall not be necessary. One half of such fine shall be to the use of the informer, and the other to the use of this commonwealth.

*Bliss*, 12 Ky. at 90.

<sup>66</sup> *Id.* at 91.

<sup>67</sup> *Id.*

when the constitution was formed, are void.”<sup>68</sup> So Bliss’s conviction was overturned.<sup>69</sup> *Bliss* is cited in *Heller* for the principle that the right to arms includes self-defense, not solely militia service.<sup>70</sup>

The *Heller* Court also cited a Kentucky treatise, for the same individual right point as *Bliss*.<sup>71</sup> The Treatise summarized the standard interpretation of the Statute of Northampton, according to *Sir John Knight’s Case*, and under the American right to keep bear arms:

Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land .... 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.<sup>72</sup>

## B. Tennessee

*Simpson v. State* (Tenn. 1833).<sup>73</sup> According to the grand jury indictment, on April 1, 1833, William Simpson, a “laborer,” made an affray on a public street by carrying arms so as to terrorize the public.<sup>74</sup> Two other people, “A. O., tailor, and B. O., blacksmith,” were involved in the affray, but were not indicted.<sup>75</sup> The Tennessee Supreme Court of Errors and Appeals ruled the indictment unconstitutional.<sup>76</sup> The indictment did not specify what Simpson had done. Merely saying that he had “made an affray” was too general.<sup>77</sup> The common law crime had to be narrowly construed, and the “affray” had to be described with particularity, so as not to violate the constitutional right to carry arms.<sup>78</sup> Therefore the conviction was reversed and indictment was quashed.<sup>79</sup> *Simpson* is cited in *Heller* for the same principle as was *Bliss*.<sup>80</sup>

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<sup>68</sup> *Id.* at 92.

<sup>69</sup> *Id.* at 94.

<sup>70</sup> *Heller* at 585 n.9.

<sup>71</sup> *Heller*, 554 U.S. at 588 n.10.

<sup>72</sup> CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (Lexington: 1822). The treatise observed, “We have a statute on the subject, relating to concealed weapons.” Published in 1822, the treatise was apparently written before the 1822 decision in *Bliss*, holding the Kentucky concealed carry statute unconstitutional.

<sup>73</sup> *Simpson v. State*, 13 Tenn. 356 (1833).

<sup>74</sup> “Affray” is “The fighting of two or more persons in some public place to the disturbance of the people, e.g., where two or more persons voluntarily or by agreement engage in any fight....” BLACK’S LAW DICTIONARY 56 (5th ed. 1979).

<sup>75</sup> *Simpson*, 13 Tenn. at 361.

<sup>76</sup> *Id.* at 362.

<sup>77</sup> *Id.* at 361.

<sup>78</sup> *Id.* at 359-60.

<sup>79</sup> *Id.* at 362.

<sup>80</sup> *Heller* at 585 n.9.

*Aymette v. State* (Tenn. 1840).<sup>81</sup> *Aymette* “had fallen out with one Hamilton.” At

about ten o’clock, p.m., he went in search of him to a hotel, swearing he would have his heart’s blood. He had a bowie-knife concealed under his vest and suspended to the waistband of his breeches, which he took out occasionally and brandished in his hand. He was put out of the hotel, and proceeded from place to place in search of Hamilton, and occasionally exhibited his knife.<sup>82</sup>

*Aymette* was convicted of violating a state statute which prohibited concealed carrying of Bowie knives.<sup>83</sup> He was sentenced to three months in jail and a \$200 fine.<sup>84</sup>

The Tennessee Supreme Court upheld the state statute. It construed the Tennessee Constitution’s right to arms clause (and by analogy in dicta, the U.S. Second Amendment) as protecting an “unqualified right” of citizens to keep arms of types which would be suitable for militia use: those “usually employed in civilized warfare,” which “constitute the ordinary military equipment.”<sup>85</sup> In contrast, the right to arms did not encompass weapons “which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin.”<sup>86</sup> The court did not think a bowie knife was suitable for military use, although the 1836 Texan War of Independence had already proven that incorrect, and the Civil War would again show the militia utility of such knives.<sup>87</sup>

As for carrying arms, the court said that to “bear” arms meant only to bear them while serving in the militia and not a general right to carry arms.<sup>88</sup> The U.S. Supreme Court in *Heller* expressly rejected *Aymette*, labeling it an “odd” decision which nevertheless supported the *Heller* majority’s view that the

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<sup>81</sup> *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

<sup>82</sup> *Id.* at 154.

<sup>83</sup> *Id.* at 154; ACTS PASSED AT THE FIRST SESSION OF THE TWENTY-SECOND GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: 1837–8, at 200–01 (Nashville: S. Nye & Co., 1838) (“that, if any person shall wear any bowie-knife, or Arkansas toothpick, or other knife or weapon that shall in form, shape, or size resemble a bowie-knife or Arkansas toothpick, under his clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not less than two hundred dollars, and shall be imprisoned in the county jail not less than three months and not more than six months.”).

<sup>84</sup> *Aymette*, 21 Tenn. at 154.

<sup>85</sup> *Id.* at 158, 160.

<sup>86</sup> *Id.* at 158.

<sup>87</sup> *Id.* at 158; David B. Kopel, Clayton Cramer & Joseph P. Olson, *Knives and the Second Amendment*, 47 MICH. J.L. REFORM 175, 189–90 (2013).

<sup>88</sup> *Aymette*, 21 Tenn. at 161.

Second Amendment protects an individual right.<sup>89</sup> The *Aymette* decision was not particularly influential in its own time, but became influential in the South following the Civil War.<sup>90</sup> Several post-Civil War cases adopted the civilized warfare test: arms suitable for the militia (e.g., rifles, swords, large handguns) are protected by the right to arms; arms supposedly suitable only for robbers and assassins (e.g., bowie knives, daggers) are not protected.

*Aymette* reached its peak of influence in the U.S. Supreme Court's 1939 *United States v. Miller*.<sup>91</sup> The case involved collusion between the U.S. Attorney, the U.S. District Court Judge and (perhaps) the defense attorney to bring a case to the Supreme Court to uphold the National Firearms Act of 1934.<sup>92</sup> Defendants Jack Miller and Frank Layton were career criminals who had been caught with a sawed-off shotgun, which they had not registered and for which they had not paid the appropriate tax.<sup>93</sup> The defendants filed no brief and urged the Court to rely on the government's brief.<sup>94</sup> Citing *Aymette* (and no other case), the Court stated "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."<sup>95</sup> So the Court reversed the district court's quashing of the indictment, and remanded the case "for further proceedings."<sup>96</sup> Layton pled guilty and was sentenced to probation; Miller was murdered before he could be reprosecuted.<sup>97</sup>

Although *Miller* did not use the term "civilized warfare," the case was a straightforward application of the test that had been used by *Aymette* and its successors.<sup>98</sup> However, the test would soon become unusable. During World War II, a typical American soldier carried a self-loading M1 Garand rifle or M1 Carbine (a shorter, lighter type of rifle).<sup>99</sup> After the war, these firearms became

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<sup>89</sup> *Heller* at 613–14.

<sup>90</sup> Michael P. O'Shea, *The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597 (2014).

<sup>91</sup> *United States v. Miller*, 307 U.S. 174 (1939).

<sup>92</sup> Brian Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U.J.L. & LIBERTY 48 (2008). Cited in *Heller* at 623 (describing procedural history of the case).

<sup>93</sup> *Miller* at 175; Frye at 52–60.

<sup>94</sup> *Heller* at 623 (citing Frye at 65–68).

<sup>95</sup> *Miller* at 177.

<sup>96</sup> *Miller* at 183. Since the indictment had been quashed before trial, the "further proceedings" would have been a criminal trial. Although the militia utility of a short shotgun was not within judicial notice, at a trial the defendants could have introduced evidence to attempt to prove the weapon's utility.

<sup>97</sup> Frye at 68–69.

<sup>98</sup> Michael P. O'Shea, *The Second Amendment Wild Card: The Persisting Relevance of the "Hybrid" Interpretation of the Right to Keep and Bear Arms*, 81 TENN. L. REV. 597 (2014); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U.L. REV. 585 (2012).

<sup>99</sup> BRUCE N. CANFIELD, *THE M1 GARAND RIFLE* (2013); BRUCE N. CANFIELD, *BRUCE CANFIELD'S COMPLETE GUIDE TO THE M1 GARAND AND THE M1 CARBINE* (1999); JOEY POYER & CRAIGH RIESCH, *THE M1 GARAND, 1936-1957* (1997); LEROY THOMPSON & PETER DENNIS, *THE M1 CARBINE* (2011).

mainstream arms for American citizens, partly because the Army's Civilian Marksmanship Program put large numbers into citizen hands at steeply discounted prices.<sup>100</sup> Applying *Miller* and the civilized warfare test, these arms would be at the core of Second Amendment protection. This is an unproblematic result; as the Supreme Court noted in *Staples v. United States*, semiautomatic rifles (including the AR-15 at issue in *Staples*) "traditionally have been widely accepted as lawful possessions."<sup>101</sup> As *Staples* also pointed out, "machineguns... have the same quasi-suspect character we attributed to owning hand grenades."<sup>102</sup>

The problem with the "civilized warfare" test is that starting in the Korean War, the U.S. military began transitioning to automatic firearms (commonly called "machine guns"). Invented in 1884, automatics had never become popular with ordinary Americans.<sup>103</sup> For most people, including judges, it was inconceivable that machine guns would be protected by the core of the Second Amendment. Consistent with public opinion, *District of Columbia v. Heller* recast the right in terms of self-defense, and discarded the civilized warfare test; under *Heller*, the paradigmatic Second Amendment arms are those for ordinary self-defense, not machine guns for warfare.<sup>104</sup>

*Day v. Tennessee* (Tenn. 1857).<sup>105</sup> Richard Day was indicted "for maliciously drawing a bowie-knife, from a place of concealment about his person, with intent to awe and intimidate one Sterling T. Bacon."<sup>106</sup> He was also indicted for having intended to stab Bacon. Day had been at Bacon's house; there was an altercation, and Bacon ordered Day to leave. Day did so. Bacon followed him to the door-step, with a large bottle in his hand. "[D]efendant approached him and, laying his left hand upon Bacon's shoulder, told him not to rush upon him, at the same time drawing a large knife from beneath his vest, which he held in his right hand behind him, but made no effort to use."<sup>107</sup> Day was convicted by the jury, and sentenced to three years in the penitentiary, the mandatory minimum.

The court noted the 1838 statute banning the sale or concealed carry of bowie knives, and the severe penalties. Yet, these laws were "generally disregarded in our cities and towns."<sup>108</sup>

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<sup>100</sup> LARRY L. RUTH, 2 WAR BABY! COMES HOME: THE U.S. CALIBER .30 CARBINE (R. Blake Stevens ed., 1993); Joseph P. Tartaro, *The Great Assault Weapon Hoax*, 20 U. DAYTON L. REV. 619, 622 (1995) ("[T]he M1 carbine [is] beloved by millions of war veterans, collectors, and recreational shooters."); *About the CMP*, CIV. MARKSMANSHIP PROGRAM, <http://thecmp.org/about/>.

<sup>101</sup> *Staples v. United States*, 511 U.S. 600, 611–12 (1994).

<sup>102</sup> *Id.*

<sup>103</sup> JOHN ELLIS, *THE SOCIAL HISTORY OF THE MACHINE GUN* 151 (1975)

<sup>104</sup> *Heller*, 554 U.S. at 627.

<sup>105</sup> *Day v. Tennessee*, 37 Tenn. (5 Sneed) 496 (1857).

<sup>106</sup> *Id.* at 496.

<sup>107</sup> *Id.* at 496–97.

<sup>108</sup> *Id.* at 499.

The trial court had instructed the jury that it should convict Day if it found that he had drawn the bowie knife for self-defense. The Supreme Court interpreted the statute severely, finding that left no room for self-defense. “We regret the fate of the defendant, but the law must be enforced against offenders for the general good.”<sup>109</sup> This was consistent with *Aymette*’s holding that since the Tennessee constitutional right to arms referred only to “defence of the state,” the right did not involve carrying for personal self-defense.<sup>110</sup> Before the Civil War, Tennessee courts were the only ones to take this position.

*Heller*, however, takes a much broader view. The Second Amendment encompasses all legitimate uses of arms:

- “Americans valued the ancient [militia] right; most undoubtedly thought it even more important for self-defense and hunting.”<sup>111</sup>
- “[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace.”<sup>112</sup>
- “The traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense.”<sup>113</sup>
- The right applies to arms “typically possessed by law-abiding citizens for lawful purposes.”<sup>114</sup>
- While it is agreed that the Second Amendment protects militia use of arms, “whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case.”<sup>115</sup>

*McDonald* summarized “our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”<sup>116</sup> While self-defense in the home is central to the Second Amendment right, it is not the sole purpose of the right.

### C. Alabama

*State v. Reid* (Ala. 1840).<sup>117</sup> Reid, the Sheriff of Montgomery County, faced a serious threat arising out of the performance of his official duties:

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<sup>109</sup> *Id.* at 501.

<sup>110</sup> *Aymette* at 160–61.

<sup>111</sup> *Heller* at 599.

<sup>112</sup> *Id.* at 614 quoting *Andrews v. State*, 50 Tenn. 165, 178 (1871)).

<sup>113</sup> *Id.* at 624.

<sup>114</sup> *Id.* at 625.

<sup>115</sup> *Id.* at 636–37.

<sup>116</sup> *McDonald* at 780.

<sup>117</sup> *State v. Reid*, 1 Ala. 612 (1840).

while making a settlement as sheriff, he had been attacked by an individual of a dangerous and desperate character, who afterwards threatened his person, and came to his office several times to look for him. It was also proved, that these threats were communicated to the defendant, and the pistol brought to him by a friend, who conceived his life was in danger.<sup>118</sup>

Sheriff Reid was convicted of carrying a concealed handgun, and sentenced to six hours in jail, plus a \$50 fine, plus court costs.<sup>119</sup>

He argued that the state statute against concealed carry was unconstitutional.<sup>120</sup> The Alabama Supreme Court decision reflected the strong judicial sentiment of the day that anyone engaged in concealed carry must be up to no good; “it is only when carried openly, that they [arms] can be efficiently used for defence.”<sup>121</sup> Modern experience with state laws which provide for fair and objective standards for the issuance of concealed carry permits plainly disprove the Alabama court’s assertion. There are many instances in which concealed carry permittees have used their concealed handguns for lawful self-defense against violent attackers.<sup>122</sup>

The *Reid* court cautioned that any “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.”<sup>123</sup> On the particular facts involving Sheriff Reid, however, the court pointed out that

There was no evidence adduced, tending to show that the defendant could not have defended himself as successfully, by carrying the pistol openly, as by secreting it about his person: it is difficult to conceive, how one could be placed in such an attitude, consistently with the law which recognizes the right of self-protection.<sup>124</sup>

Besides, Reid had the power as Sheriff to summon the *posse comitatus* (able-bodied and armed men of the county) to help him enforce the law.<sup>125</sup>

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<sup>118</sup> *Id.* at 612–13.

<sup>119</sup> *Id.* at 612.

<sup>120</sup> ACTS PASSED AT THE ANNUAL SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ALABAMA (Tuscaloosa: Hale & Eaton, 1838 [1839]), chap. 77, 67-68.

<sup>121</sup> *Reid*, 1 Ala. at 619 (brackets added).

<sup>122</sup> *E.g.*, CLAYTON CRAMER, TOUGH TARGETS: WHEN CRIMINALS FACE ARMED RESISTANCE FROM CITIZENS (2012). For a list of some defensive gun use cases see <http://www.cato.org/guns-and-self-defense/>.

<sup>123</sup> *Reid*, 1 Ala. at 616–17.

<sup>124</sup> *Reid*, 1 Ala. at 621.

<sup>125</sup> *Id.* at 621–22. For more on the posse as a past and present institution subject to the summons of a Sheriff, see David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 671 (2015)



The court acknowledged the theoretical possibility that some other person might be able to show sufficient facts as to why concealed carry, rather than open carry, was necessary for that person—although the court was skeptical that such a situation could really exist.<sup>126</sup>

*Reid* is twice cited with approval in *Heller* for the principle that there is an individual right to carry arms, and that the legislature may not destroy the right under the pretense of regulation.<sup>127</sup> *Reid*'s approach to concealed carry was also followed not only by *Heller*, but also by the 1897 U.S. Supreme Court case *Robertson v. Baldwin*.<sup>128</sup> Interpreting the Thirteenth Amendment's prohibition on "involuntary servitude,"<sup>129</sup> the Court held that a merchant seaman who deserted could be forced back into service; the Court reasoned that all constitutional rights had implicit exceptions. For example, the First Amendment does not prohibit punishment for libel; the Fifth Amendment's Double Jeopardy clause does not prohibit a second prosecution if the first jury cannot reach a verdict.<sup>130</sup> Likewise, the Second Amendment "is not infringed by laws prohibiting the carrying of concealed weapons."<sup>131</sup>

#### D. Arkansas

*State v. Buzzard* (Ark. 1842).<sup>132</sup> *Buzzard* was indicted for violating the Arkansas statute against concealed carry.<sup>133</sup> The Circuit Court judge quashed the indictment on grounds that the statute violated the right to arms.<sup>134</sup> By a 2-1 decision, the Arkansas Supreme Court reversed.<sup>135</sup> The opinion for the court by Chief Justice Ringo held that the concealed carry statute was a legitimate regulation of the right to arms.<sup>136</sup> A concurring opinion introduced

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(describing Sheriffs' use of posses, from ancient England to modern Colorado).

<sup>126</sup> *Reid*, 1 Ala. at 622.

<sup>127</sup> *Heller* at 585 n.9, 629.

<sup>128</sup> *Robertson v. Baldwin*, 165 U.S. 275 (1897).

<sup>129</sup> U.S. CONST., amend. XIII, § 1.

<sup>130</sup> *Robertson* at 281-82.

<sup>131</sup> *Id.*

An 1856 Alabama statute made it illegal to "sell, or give, or lend, to any male minor" a pistol, air gun, bowie knife "or knife of the like kind or description." No. 26, 1855-56 Ala. Laws 17 (Feb. 2, 1856). The statute has obvious constitutional problems, but those were not raised by the defendant in *Coleman v. State*, 32 Ala. 581 (1858). There, the court simply found that Coleman's conduct came within the scope of "lend." Coleman was a storekeeper who let his nephew take a pistol that Coleman was storing for another man. *Id.*

<sup>132</sup> *State v. Buzzard*, 4 Ark. 18 (1842).

<sup>133</sup> *Id.* at 18, citing REV. STATS. ARK., Div. VIII, Ch. 44, at 280 ("every person who shall wear any pistol, dirk, butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor.").

<sup>134</sup> *Buzzard*, 4 Ark. at 18-19.

<sup>135</sup> *Id.* at 28, 33.

<sup>136</sup> *Id.* at 27 ("The act in question does not, in my judgment, detract anything from the power of the people to defend their free state and the established institutions of the country. It inhibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified.").



into American law the notion that the Second Amendment and its Arkansas analogue are not individual rights, but merely affirmations of government power over the militia.<sup>137</sup> This new theory was not heard of again until a 1905 Kansas Supreme Court decision.<sup>138</sup>

### E. North Carolina

*State v. Huntly* (N.C. 1843).<sup>139</sup> According to the indictment, Robert S. Huntly, a “laborer,” on September 1, 1843, armed himself “with pistols, guns, knives and other dangerous and unusual weapons,” exhibited his arms openly during day and night on a public highway of Anson, N.C., and declared his intent “to beat, wound, kill and murder” James H. Ratcliff.<sup>140</sup> The dispute between Huntly and Ratcliff involved some slaves, which Huntly demanded that Ratcliff turn over to him.<sup>141</sup> Huntly was convicted of the common law offense derived from the Statute of Northampton, namely of going armed in public with the purpose of terrifying the public.

The North Carolina Supreme Court upheld the conviction, while adding a reminder that gun carrying in itself was lawful. According to the Court, “No man amongst us carries it [a gun] about with him, as one of his every day accoutrements--as a part of his dress.”<sup>142</sup> The Court hoped that this would never change.<sup>143</sup> Even so,

[I]t is to be remembered that 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. It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.<sup>144</sup>

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<sup>137</sup> *Buzzard* at 32–33 (Dickinson, J., concurring.)

<sup>138</sup> *Salina v. Blaksly*, 72 Kan. 230, 83 P. 619 (1905); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359. The Kansas Court went far out of its way to nullify the state and federal right to arms. Neither party had made a right to arms argument. Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?* 36 OKLA. L. REV. 65, 77 (1983).

<sup>139</sup> *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843).

For analysis of the North Carolina right, see Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 314 (1985); Carl W. Thurman, III, Note, *State v. Fennell: The North Carolina Tradition of Reasonable Regulation of the Right to Bear Arms*, 68 N.C. L. REV. 1078 (1990).

<sup>140</sup> *Huntly*, 25 N.C. at 418–19.

<sup>141</sup> *Id.* at 419.

<sup>142</sup> *Id.* at 422.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 422–23.

*Heller* cites *Huntly* for its “broad public-safety understanding” of the scope of the individual right to arms, as a right not solely for the militia.<sup>145</sup>

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<sup>145</sup> *Heller* at 586 n.9, 601. Patrick Charles argues that *Huntly* “provides substantiated evidence that the tenets of the Statute of Northampton survived well into the nineteenth century.” Charles, *supra*, at 36. This is true in one narrow sense. The North Carolina legislature in 1838 had declared that no English statute had any continuing legal effect in the state. *Huntly* at 420. However, the *Huntly* court found that the common law prohibition against carrying arms in a threatening manner (as *Huntly* had done), still had force in the state. *Id.* at 420–21. This was consistent with *Sir John Knight’s Case*, which said that the legality of carrying arms depended on whether the manner was maliciously calculated to terrify the public. Text at notes *supra*.

Charles, however, goes further, and argues that *Huntly* indicates that carrying arms for self-defense was unlawful. Charles at 37. He bases this argument on the *Huntly* court’s statement that arms carrying is a constitutional right, for “any lawful purpose—either of business or amusement.” *Id.*; *Huntly* at 422. According to Charles, “business or amusement” does not include self-defense. Charles at 37. This is a strained and narrow reading overlooks the phrase that “business or amusement” was a legal term of art, to encompass all activity. That was how Chief Justice Marshall used the phrase. See *The Schooner Exchange v. Mcfaddon & Others*, 7 Cranch 116 (1812) (“the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement...”); *Johnson v. Tompkins*, 13 F. Cas. 840, No. 741 (Baldwin, Circuit Justice, Cir. Ct. E.D. Penn. 1833) (“any traveller who comes into Pennsylvania upon a temporary excursion for business or amusement”); *Baxter v. Taber*, 4 Mass. 361, 367 (1808) (“he may live with his family, and pursue his business, or amusements, at his pleasure, either on land or water...”); *Republica v. Richards*, 2 U.S. 224 (Penn. 1795) (same language as *Johnson v. Tompkins*).

Charles also cites a nineteenth century English treatise as demonstrating the acceptance of a restrictive interpretation of the Statute of Northampton in nineteenth century America. Charles at 40 n.211 (in section on “The Statute of Northampton in Nineteenth Century America”) (citing the treatise by Sir William Oldnall Russell). This overlooks the fact that the American reprint of Russell’s English text explained “for through there is much statute law inapplicable to this country, yet the cases decided on the construction of these statutes are very interesting...”. G.S. *Advertisement to the Ninth American Edition*, in 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS vii (9th Amer. ed., Phil., T. & J. W. Johnson & Co.1877).

More to the point on American law, Charles cites Chancellor Kent. Charles at 40, n.212. But although Charles says that Kent was expressing “the legal tenets imbedded in the Statute of Northampton,” the quoted text is simply Kent urging a prohibition on “the practice of carrying concealed weapons.” *Id.* Notably, Charles is quoting Kent’s eighth edition, from 1854, about laws which “would be very desirable.” This indicates that Kent did not consider laws against concealed to be the rule in most states. To the contrary, on the very page cited by Charles, Kent wrote:

As to the Constitution of the United States, and the constitution of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons, when not on a journey, or as travellers, from wearing or carrying concealed weapons, be constitutional. There has been a great difference of opinion on the question.

JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW \*405–06 note a (8th ed., N.Y., William Kent 1854). At the end of the footnote is sentence quoted by Charles, urging the desirability of

*State v. Newsom* (N.C. 1844).<sup>146</sup> Elijah Newsom, “a free person of color,” was convicted by a jury of carrying a shotgun without having obtained a license from Cumberland County’s Court of Pleas and Quarter Sessions.<sup>147</sup> This violated an 1841 state statute barring free people of color from possessing firearms without a license.<sup>148</sup> The Superior Court judge arrested the judgment of conviction because the statute was unconstitutional.<sup>149</sup>

The North Carolina Supreme Court ruled the statute consistent with longstanding state laws which had imposed disabilities on the free black population, such as a 1777 statute prohibiting “colored persons within the fourth degree from being heard as witnesses against a white man.” Similarly, an 1835 state constitutional amendment had stripped voting rights from free blacks. The decision of the court below was reversed.<sup>150</sup>

## F. Georgia

*Nunn v. State* (Ga. 1846).<sup>151</sup> Nunn was prosecuted for violating an 1837 statute which banned sale, possession, and carrying of all handguns, except “horsemen’s pistols.”<sup>152</sup> After conviction, he appealed to the Georgia Supreme Court, which reversed his conviction and quashed the proceeding.

The court ruled that insofar as the 1837 statute banned concealed carry, it was constitutional, but the indictment had not charged that Nunn had carried

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prohibiting *concealed* arms. The full footnote from Kent thus demonstrates the opposite of Charles’s theory that the 1328 Statute of Northampton prohibited all defensive arms carrying (open or concealed) in nineteenth century America.

<sup>146</sup> *State v. Newsom*, 27 N.C. (5 Ired.) 250 (1844).

<sup>147</sup> *Id.* at 250–51.

<sup>148</sup> An Act to prevent Free Persons of Colour from carrying Fire-arms, ch. 30, 1840-1841 N.C. Laws 61 (Jan. 11, 1841).

<sup>149</sup> *Newsom*, 25 N.C. at 251.

<sup>150</sup> *Id.* at 252–54.

There are other cases from the antebellum period involving firearms disabilities (either bans or licensing statutes) for slaves and for free persons of color, since such persons had few if any constitutional rights. *E.g.*, *Aldridge v. Commonwealth*, 4 Va. 447, 449 (Gen. Ct. 1824) (noting the many restrictions on free blacks, including “upon their right to bear arms”). *Waters v. State*, 1 Gill 302, 309 (Md. 1843) (among the many restrictions on free blacks are laws “to make it unlawful for them to bear arms”). Both *Aldridge* and *Waters* were cited in *Heller* for recognition that the right to arms is an individual right, not for militia only. *Heller* at 611–12. These laws are of course no legitimate precedent for modern gun control; they exemplify the error of depriving persons of constitutional rights because of race or similar characteristics.

In dissent, Justice Stevens argued the *Aldridge* quote might have referred only to blacks being forbidden to bear arms when they were serving in the state militia. *Id.* at 662 n.29 (Stevens, J., dissenting). Justice Scalia replied that blacks had been excluded from the Virginia militia for thirty years before *Aldridge* was decided. *Id.* at 612 n.21 (maj. op.)

<sup>151</sup> *Nunn v. State*, 1 Ga. 243 (1846).

<sup>152</sup> ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA PASSED IN MILLEDGEVILLE AT AN ANNUAL SESSION IN NOVEMBER AND DECEMBER, 1837, 90-91 (Milledgeville: P. L. Robinson, 1838) (“An Act to guard and protect the citizens of this State against the unwarrantable and too prevalent use of deadly weapons”).

his handguns concealed.<sup>153</sup> The ban on open carry of handguns was unconstitutional.<sup>154</sup> So was the handgun ban, and the fact that horse pistols were still allowed did not save it.<sup>155</sup>

The *Heller* Court applauded *Nunn* because it “perfectly captured” the relationship between the first and second parts of the Second Amendment.<sup>156</sup> The longest block quote in *Heller* is from *Nunn*:

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; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!<sup>157</sup>

As of 1846, there was no right to arms in the Georgia Constitution.<sup>158</sup> Notwithstanding *Barron v. Baltimore*,<sup>159</sup> the *Nunn* court ruled that the Second Amendment did apply to the Georgia state courts:

The language of the *second* amendment is broad enough to embrace both Federal and State governments-nor is there anything in its terms which restricts its meaning....[D]oes it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? Is this a right reserved to the *States* or to *themselves*? Is it not an

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<sup>153</sup> *Nunn*, 1 Ga. at 250.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 247. “Horse pistols” were large handguns, usually sold in a pair, along with a double holster that was meant to be draped over a saddle. They were too large for practical carry by a person who was walking. Lewis & Clark Fort Mandan Foundation, *Horse Pistols*, <http://www.lewis-clark.org/content/content-article.asp?ArticleID=2380>.

<sup>156</sup> *Heller* at 612.

<sup>157</sup> *Nunn* at 251 (emphasis in original); *Heller* at 612–13.

<sup>158</sup> In 1865, a new Georgia Constitution copied the Second Amendment verbatim. GA. CONST., art. I, § 4 (1865). The current version states: “The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have to prescribe the manner in which arms may be borne.” GA. CONST., art. I, § 1 ¶VIII (1983) (retaining language adopted in 1877).

<sup>159</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature.<sup>160</sup>

As the *Nunn* court acknowledged, the U.S. Supreme Court had held that Bill of Rights was only a limit on the federal government.<sup>161</sup> But many state judges considered *Barron* to be authoritative only for federal courts. State supreme courts, on this view, were still free to enforce the Bill of Rights. Significantly, under the federal Judiciary Act of 1789, the U.S. Supreme Court had jurisdiction to review cases in which a state court had found a state law to be constitutional, but not to review cases in which a state court found a state law to violate the U.S. Constitution. The Supreme Court was not granted power over the latter class of cases until the early twentieth century.<sup>162</sup> There were dozens of state cases applying parts of the federal Bill of Rights to states; *Nunn* cited the grand-daddy of them all, *People v. Goodwin*, in which New York's highest court applied the rule against Double Jeopardy to state and local action.<sup>163</sup> *Nunn* itself became a leading case in this line, although it had plenty of company.<sup>164</sup>

After the Civil War, the Fourteenth Amendment was ratified, in part for the purpose of overturning two Supreme Court decisions. One was *Barron*, with the Fourteenth Amendment's Privileges or Immunities Clause being

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<sup>160</sup> *Nunn*, 1 Ga. at 250 (emphasis in original). *Cf.* *Calder v. Bull*, 3 U.S. 386, 388 (1798) (ex post facto laws are necessarily illegal, and not true laws, regardless of whether a constitution specifically prohibits them).

As noted by Justice Thomas in his *McDonald* concurrence, two years later the Georgia Court stated that “[f]ree persons of color have never been recognized here as citizens; they are not entitled to bear arms”. 561 U.S. at 849 (Thomas, J., concurring) (quoting *Cooper v. Savannah*, 4 Ga. 68, 72 (1848)). *Cooper* freed prisoners who had been imprisoned and then hired out for not paying a \$100 tax required for free persons of color who moved to the city. Imprisonment and forced servitude for non-payment of taxes “is repugnant to the laws of the State,” the Court ruled. 4 Ga. at 74.

<sup>161</sup> *Nunn*, 1 Ga. at 250; *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>162</sup> See *McDonald* at 842–43 (Thomas, J., concurring); AKHIL REED AMAR, THE BILL OF RIGHTS 145–56 (1998) (discussing “the Barron contrarians”); Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L. REV. 1 (2007). As examples of antebellum state courts applying the Bill of Rights to the states, Justice Thomas cited, *inter alia*, *Nunn*, *State v. Buzzard*, 4 Ark. 18, 28 (1842); *State v. Jumel*, 13 La. Ann. 399, 400 (1858); and *Cockrum v. State*, 24 Tex. 394, 401–404 (1859). *McDonald* at 843 n.16. These other three cases are discussed at -----.

<sup>163</sup> *Nunn* at 250 (citing *People v. Goodwin*, 18 Johns. Rep. 187, 200, 1 Wheeler C.C. 470, 9 Am. Dec. 203 (N.Y. 1820)).

<sup>164</sup> See Mazzone at 35–54 (citing dozens of cases for the Fourth Amendment; about a dozen for Fifth Amendment takings; seven for Double Jeopardy; a half-dozen for Due Process or Self-incrimination; five for the Sixth Amendment; one for First Amendment religion; and four for the Seventh Amendment).

intended to make the Bill of Rights applicable to the states.<sup>165</sup> The other was *Dred Scott*; it had held that Blacks are not citizens of the United States, and warned that a contrary result would mean that Blacks could “keep and carry arms wherever they went.”<sup>166</sup> The citizenship clause of the Fourteenth Amendment reversed *Dred Scott*’s citizenship rule.<sup>167</sup>

## G. Louisiana

*State v. Chandler* (La. 1850).<sup>168</sup> Like Georgia, Louisiana did not have an enumerated state constitutional right to arms before the Civil War.<sup>169</sup> So like the Georgia Supreme Court, the Louisiana Supreme Court treated the Second Amendment as enforceable in state courts.

Chandler was convicted in New Orleans for manslaughter of Patrick C. Daley, on Oct. 7, 1848.<sup>170</sup> On appeal, the Louisiana Supreme Court reversed, because the trial judge had prevented the jury from hearing all the facts.<sup>171</sup> By Chandler’s account, “Daley actually attacked Chandler, and was beating his head against a brick wall so as to put his life really in danger, and Chandler then killed his assailant from absolute necessity to preserve his own life.”<sup>172</sup> The prosecution, though, had contended that “Daley was unarmed and sick, and only in consequence of a quarrel with Chandler’s wife the preceding evening, the latter was so enraged that he rushed upon and gave him four stabs with a Bowie knife, until then concealed in his bosom—Daley being a perfectly passive victim.”<sup>173</sup>

Also, the judge had instructed the jury, “I have rarely known a case in which the crime of murder was more clearly brought home to the prisoner, and I cannot think you can entertain any reasonable doubt of his guilt.”<sup>174</sup> But this was deemed harmless, since the jury only convicted for manslaughter.<sup>175</sup>

The court had no trouble upholding Louisiana’s statute against concealed carry.<sup>176</sup> Open carry “places men upon an equality. This is the right guaranteed

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<sup>165</sup> McDonald v. Chicago (Thomas, J., concurring).

<sup>166</sup> Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857).

<sup>167</sup> McDonald at 807–08 (Thomas, J., concurring).

<sup>168</sup> State v. Chandler, 5 La. Ann. 489 (1850).

<sup>169</sup> The first Louisiana right to arms provision was adopted in LA. CONST., art. 3 (1879) (copying the Second Amendment, and adding a sentence allowing punishment for carrying concealed weapons). The current provision states: “The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.” LA. CONST., art I, § 11 (amended 2012)

<sup>170</sup> Chandler, 5 La. Ann. at 489.

<sup>171</sup> Id. at 490.

<sup>172</sup> Id.

<sup>173</sup> Id.

<sup>174</sup> Id.

<sup>175</sup> Id.

<sup>176</sup> Act of Mar. 25, 1813, making it a misdemeanor to be “found with a concealed weapon, such as a dirk, dagger, knife, pistol, or any other deadly weapon concealed in his bosom, coat, or any other place about him, that does not appear in full open view.”

by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.”<sup>177</sup> The record does not indicate that Chandler was actually convicted of violating the concealed carry statute, but apparently his violation was used as evidence of his nefarious intent in the homicide case against him.

Starting with North Dakota in 1923, states would begin formalizing this approach, adopting statutes that in a prosecution for a violent crime, the defendant’s carrying of a concealed handgun without a carry permit was prima facie evidence of intent to use the handgun in the crime.<sup>178</sup> The statute was a model law, originally known as the Revolver Association Act, since it was proposed by the United States Revolver Association, as an alternative to the New York State 1911 law which required a permit to purchase or possess a handgun. Soon, the Revolver Association Act was adopted, with revisions, by the National Conference of Commissioners on Uniform State Laws, and became known as the Uniform Firearms Act.<sup>179</sup>

*Chandler* is thrice cited with approval in *Heller*, for the principle that the individual right to arms includes the right to open carry.<sup>180</sup> In opposition to Tennessee’s *Aymette*, *Chandler* holds that the Second Amendment protects the right to carry arms in public (not just during militia service), and that bowie knives are among the arms protected by the Second Amendment.<sup>181</sup>

*State v. Smith* (La. 1856).<sup>182</sup> Smith was convicted of carrying a concealed pistol.<sup>183</sup> It was undisputed that the pistol in his pocket was “partially exposed.”<sup>184</sup> The Louisiana Supreme Court reaffirmed that the concealed carry statute does not violate the Second Amendment. The court ruled that “partial concealment of the weapon” because of “want of capacity in the pocket to contain, or clothes fully to cover the weapon” violated the statute.<sup>185</sup> This was contrasted with the lawful “carrying of such weapon in full open view, and partially covered by the pocket or clothes.”<sup>186</sup>

The above standard is confusing. The issue of partial concealment continues to arise today. All but a few states today have objective licensing systems, by which law-abiding, trained adults can obtain concealed carry permits. But what if the handgun, which by law must be concealed, is momentarily exposed?

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<sup>177</sup> *Id.*

<sup>178</sup> Uniform Firearms Act (1926), § 2; David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. LEGISL. (2015, forthcoming), <http://ssrn.com/abstract=2665432>.

<sup>179</sup> Kopel, *Background Checks*, at \_\_\_\_.

<sup>180</sup> *Heller* at 586 n.9, 613, 626.

<sup>181</sup> *Chandler*, 5 La. Ann. at 490–91. Chandler’s arm was a bowie knife. *Id.* at 491.

<sup>182</sup> *State v. Smith*, 11 La. Ann. 633 (1856).

<sup>183</sup> *Id.* at 633.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*



For example, it is worn in a holster inside the waistband, on the back; when the licensee bends over, her shirt rises up, and a small portion of the handgun is momentarily revealed? Or some other extended movement makes the gun “print,” so that its outline is visible through clothing? People get prosecuted and convicted for such offenses, and legislatures sometimes refine their statutes to make it clear that transient exposure does not violate the requirement that the handgun be carried concealed.<sup>187</sup> To address the problem, some states enacted statutes specifying that carrying a gun in an exposed holster on the belt is still considered “open” carry, even though the holster will necessarily obscure a portion of the gun.<sup>188</sup>

*State v. Jumel* (La. 1858).<sup>189</sup> *Jumel* was convicted of violating the latest version of Louisiana’s concealed carry statute, which had been enacted in 1855.<sup>190</sup> The Louisiana Supreme Court speedily disposed of his appeal, citing *Chandler and Smith*: “The statute in question does not infringe the right of the people to keep or bear. It is a measure of police, prohibiting only a particular mode of bearing arms which is found dangerous to the peace of society.”<sup>191</sup>

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<sup>187</sup> Mississippi used to ban carrying a handgun concealed, “in whole or in part.” One judge noted the overbreadth of this language: “Conceivably, carrying a revolver suspended from the neck by a leather thong could be partially concealing it.” *L.M., Jr. v. State*, 600 So.2d 967, 971 (Miss. 1992) (Lee, C.J., concurring). In 2013, Mississippi added clarifying language. In the statute against carrying a concealed handgun without a license, “concealed” means hidden or obscured from common observation and shall not include...a loaded or unloaded pistol carried upon the person in a sheath, belt holster or shoulder holster that is wholly or partially visible, or carried upon the person in a scabbard or case for carrying the weapon that is wholly or partially visible.” Miss. Code § 97-37-1(4); Miss. House Bill 2 (2013).

Virginia’s regulations on “concealed” carry have been judicially interpreted to apply only when the arm is “hidden from all except those with an unusual or exceptional opportunity to view it.” *Main v. Commonwealth*, 20 Va. App. 370, 372 (Va. App. 1995) (en banc). This would include a handgun “in one’s back pocket ... if the handle of the weapon, the only part of the weapon extending outside of the pocket, is concealed by [a] duffle bag.” *Id.* 371–73. “Concealed” also encompassed a “handgun in a pocket compartment in the fabric covering the back of the passenger’s seat” of an automobile, which a police officer only saw when he peered “down into the seat’s pocket compartment from directly above.” *Clarke v. Commonwealth*, 32 Va. App. 286, 303 (Va. App. 2000). Something that was not “concealed” was a knife “sticking one-half to three-quarters of an inch out of [one’s] right back pants pocket,” even though the small amount of visible handle did not immediately indicate that the item was a knife. *Richards v. Commonwealth*, 18 Va. App. 242 (Va. App. 1994).

<sup>188</sup> For an early example, see California’s version of the Revolver Association Act/Uniform Firearms Act: An act to control and regulate the possession, sale and use of pistols, revolvers and other firearms capable of being concealed upon the person...., Ch. 339, §5, 1923 Cal. Stat. 695, 697 (June 13, 1923) (No concealed permit needed for handguns “carried openly in a belt holster” or “knives which are carried openly in sheaths suspended from the waist of the wearer.”).

<sup>189</sup> *State v. Jumel*, 13 La. Ann. 399 (1858).

<sup>190</sup> Act of March 14th, 1855, § 115, (Sess. Acts, p. 148).

<sup>191</sup> *Jumel*, 13 La. Ann. at 399.



## H. Texas

*Cockrum v. State* (Tex. 1859).<sup>192</sup> A Texas statute provided that if a person convicted of manslaughter had used a “bowie-knife or dagger,” the jury could impose the maximum non-capital sentence: solitary confinement for life.<sup>193</sup> Cockrum’s conviction was reversed because of defective jury instructions.<sup>194</sup> The Texas Supreme Court addressed other issues that Cockrum had raised on appeal, since they would be necessary for his retrial.<sup>195</sup>

The Texas Constitution right to arms included the right to carry bowie knives, said the court.<sup>196</sup> However, the sentencing enhancement did not violate the right, because of the bowie knife was “the most deadly of all weapons in common use.”<sup>197</sup>

The right to arms included the legitimate use, not the abuse, of weapons. The constitutional limit on punishing abuse was that “the legislature could not affix such a punishment to the abuse, as, in its nature, must deter the citizen from its lawful exercise; for that would be tantamount to its prohibition.”<sup>198</sup> The enhanced sentencing statute did not transgress this rule.<sup>199</sup>

The Texas enhanced sentencing statute is an example of a traditional, longstanding gun control that does not violate the right to arms. Today, enhanced sentencing for use of a firearm in a violent crime is widespread in state and federal law. The first model legislation with this rule was the Revolver Association Act from the 1920s, which subsequently became the Uniform Firearms Act.<sup>200</sup>

Other antebellum courts made the same point as Texas. The Missouri Supreme Court in *State v. Schoultz* wrote that “the right to bear does not

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<sup>192</sup> *Cockrum v. State*, 24 Tex. 394 (1859).

<sup>193</sup> *Id.* at 397.

<sup>194</sup> *Id.* at 400.

<sup>195</sup> *Id.* at 401.

<sup>196</sup> *Id.* For analysis of all the right to arms cases in Texas, see Stephen Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 BAYLOR L. REV. 629 (1989).

<sup>197</sup>

It is an exceedingly destructive weapon. It is difficult to defend against it, by any degree of bravery, or any amount of skill. The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least. The sword may be parried. With these weapons men fight for the sake of the combat, to satisfy the laws of honor, not necessarily with the intention to kill, or with a certainty of killing, when the intention exists. The bowie-knife differs from these in its device and design; it is the instrument of almost certain death. He who carries such a weapon, for lawful defence, as he may, makes himself more dangerous to the rights of others, considering the frailties of human nature, than if he carried a less dangerous weapon.

*Cockrum*, 24 Tex. at 402–03.

<sup>198</sup> *Id.* at 394.

<sup>199</sup> *Id.*

<sup>200</sup> Uniform Firearms Act § 3 (1926); Kopel, *Background Checks*, *supra*.

sanction an unlawful use of arms.”<sup>201</sup> The point was used by analogy in cases upholding libel prosecutions—which by the courts’ analysis involved a defendant who misused the First Amendment to harm someone else.<sup>202</sup>

*Heller* cited with approval the following cases, discussed above: *Bliss* (Ky. 1822), *Simpson* (Tenn. 1833), *Reid* (Ala. 1840), *Huntly* (N.C. (1843), *Nunn* (1846), *Chandler* (La. 1850), and *Schoultz* (Mo. 1857), and also cited the libel cases. The only antebellum case the Court specifically declared to be wrong was *Aymette* (Tenn. 1840).<sup>203</sup>

Collectively, the cases show the mainstream antebellum view on the right to arms: concealed carry in public may be banned, as long as open carry is allowed; bans on particular arms are impermissible (except under the disfavored jurisprudence of Tennessee); however, enhanced sentencing may be applied to violent crimes involving especially deadly arms; misuse of the right, by using arms to commit a violent crime, may be punished; the right belongs to all Americans who are entitled to the ordinary scope of civil rights.

### III. Gun Litigation during Reconstruction and Jim Crow

Things changed drastically in the South during Reconstruction. Then they changed back. As Reconstruction gave way to Jim Crow, courts became increasingly tolerant of gun control. *Heller* and *McDonald* looked to

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<sup>201</sup> *State v. Shoultz*, 25 Mo. 128, 155 (1857).

<sup>202</sup> “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.” *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 314 (1825), cited in *Heller* at 602.

As stated by the Territorial Supreme Court of Michigan:

The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose.

*United States v. Sheldon*, 1829 WL 3021 (Terr. Mich. 1829) (also in 5 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 337, 346 (W. Blume ed.1940). The block quote above is quoted in *Heller* at 612.

<sup>203</sup> The Court also cited *State v. Dempsey*, 31 N.C. 384, 385 (1849) for the fact that “keep arms” encompassed the keeping of arms by persons who were not in the militia. *Heller* at 583 n.7. *Dempsey* involved the application of the North Carolina statute, discussed above at ----, requiring that a person of color must have a licenses in order “to carry about his person or keep in his house” any arms. *Dempsey* at 385. Other than the quote from the statute, *Dempsey* has no contribution to arms rights jurisprudence; the case is entirely about whether *Dempsey* falls with the statutory definition of “persons of mixed blood,” based on a fourth generation ancestor. *Id.* at 386-88.

As discussed *infra*, the court also cited four other cases which briefly mentioned arms laws or arms rights. *See text* at notes ----. These cases were cited to illustrate for the basic point that the Second Amendment is a general individual right to possess and carry weapons. They do not tell us a great deal beyond this basic point.

Reconstruction for interpretive guidance about the Second Amendment.<sup>204</sup> They did not look for guidance from cases or statutes from the post-Reconstruction Jim Crow era.

Based on *Heller* and *McDonald*, some of these cases described in this Part III demonstrate an incorrect understanding of the right to arms; for example, some uphold bans on the majority of handguns. Many of the cases from this period may be analogized to the cases in this period upholding censorship laws, which violated the First Amendment, as detailed by David Rabban's excellent *Free Speech in its Forgotten Years, 1870-1920*.<sup>205</sup>

### A. Mississippi

After the Confederate army surrendered at Appomattox, state legislatures in the ex-Confederate states began to address the new reality. They accepted the national consensus that *de jure* slavery was finished. But many Southerners wanted to keep the freedmen in a state of *de facto* servitude. So ex-confederate states enacted Black Codes, modeled after the Slave Codes, restricting or prohibiting the freedmen from exercising many rights of citizenship. For example, Alabama forbade people of color to possess arms, while Mississippi and Florida only allowed them to do so if they received a license.<sup>206</sup> These actions outraged Congress, which in 1866 passed the Second Freedmen's Bureau Bill (applying only to states under military rule), ordering the Union commanders in the South to protect the rights of freedmen, including "the constitutional right to bear arms."<sup>207</sup>

At nearly the same time, Congress passed the Civil Rights Act of 1866 (applying nationally). Its sponsor, Senate Judiciary Chairman Lyman Trumbull also had written the Freedmen's Bureau Bill.<sup>208</sup> He explained that

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<sup>204</sup> *Heller* at 614-16; *McDonald* at 561 U.S. 742, 771–81; 827–50 (Thomas, J., concurring)

<sup>205</sup> DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920* (1999). For analysis of the poor jurisprudence and negative effects of Jim Crow gun control, see Robert J. Cottrol & Raymond T. Diamond, "Never Intended to be Applied to the White Population": *Firearms Regulation and Racial Disparity--The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995).

<sup>206</sup> See An Act prescribing additional penalties for the commission of offenses against the State and for other purposes, ch. 1,466, no. 3, § 12, 1865 Laws of Fla. 25, 27 (Dec. 18, 1865) ("[I]t shall not be lawful for any negro, mulatto, or other person of color, to own, use or keep in his possession or under his control, any Bowieknife, dirk, sword, fire-arms or ammunition of any kind." Licenses could be issued by probate judges, based on "the recommendation of two respectable citizens of the county certifying the peaceful and orderly character of the applicant." Punishment was forfeiture of the arms, along with 39 lashes or an hour in the pillory.); An Act to punish certain Offences therein named, and for other purposes, ch. 23, §1, 1865 Miss. Laws 165, 165-66 (Nov. 29, 1865) (regular session) (requiring license from the county board of police); CONG. GLOBE, 39th Cong., 1st Sess. 1838 (Apr. 7, 1866) (denouncing Alabama law forbidding arms possession by freedmen).

<sup>207</sup> 14 Stat. 173 (1866), § 14.

<sup>208</sup> He sponsored the First Bill, which was vetoed. The Second Freedmen's Bureau Bill was based on the first, and was enacted after Congress overrode President Johnson's veto.

the Civil Rights Act would eradicate the anti-gun laws of the ex-Confederacy.<sup>209</sup> But the Civil Rights Act rested on constitutionally questionable grounds. Trumbull and others argued that it could be based on Congress's enforcement power under section two of the Thirteenth Amendment; by this theory, Congress could enact any legislation "appropriate" to safeguard the full civil freedom of the freedmen.<sup>210</sup> Since Trumbull himself had written the Thirteenth Amendment,<sup>211</sup> this was not an implausible argument.

However, U.S. Rep. Jonathan Bingham, who strongly favored the objectives of the Civil Rights Act, doubted that the Thirteenth Amendment provided a basis for enacting most of it.<sup>212</sup> Shortly thereafter, Bingham introduced the Fourteenth Amendment, in part to put the Civil Rights Act on a more secure constitutional footing.<sup>213</sup> Ratification was completed in 1868, and Congress then reenacted the Civil Rights Act. But the first cases involving the Civil Rights Act arose before the Fourteenth Amendment had been ratified.

In November 1866, the Mississippi High Court of Errors and Appeals ruled the Civil Rights Act of 1866 unconstitutional, in a case involving the state's arms restrictions on freedmen. James Lewis, a former slave, had been convicted of carrying a firearm without a license from the county board of police—in violation of the 1865 gun control law for blacks.<sup>214</sup> Pursuant to the statute, he was fined one dollar, and ordered to pay court costs. Being unable to afford to do so, he was jailed for five days, and would then be hired out as a servant to whomever would pay the fine and costs for him.<sup>215</sup>

He appealed, and no brief was filed by the prosecutor. Nevertheless, the opinion by Chief Justice Handy upheld the conviction.<sup>216</sup> Lewis had argued that, now being free, he was a citizen of Mississippi, and entitled to the right to bear arms guaranteed by the Mississippi Constitution.<sup>217</sup> Chief Justice

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<sup>209</sup> CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (Jan. 29, 1866).

<sup>210</sup> *Id.* at 475.

<sup>211</sup> MARK K. KRUG, LYMAN TRUMBULL: CONSERVATIVE RADICAL 218 (1965); RALPH J. ROSKE, HIS OWN COUNSEL: THE LIFE AND TIMES OF LYMAN TRUMBULL 106–07 (1979); HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 227 (Boston: Houghton Mifflin, 1913).

<sup>212</sup> CONG. GLOBE 1866, 1293.

<sup>213</sup> For details on the repeatedly-expressed intent of Congress to use the Freedmen's Bureau, the Civil Rights Act, and the Fourteenth Amendment to protect the Second Amendment rights of the freedmen, *see, e.g.*, *McDonald v. Chicago* at 771–78; *id.* at 846–50 (Thomas, J., concurring); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998) (cited in *Heller* at 614–15, and in *McDonald* at 771 n.18, 776, 780).

<sup>214</sup> An Act to punish certain Offences therein named, and for other purposes, ch. 23, §1, 1865 Miss. Laws 165, 165-66 (Nov. 29, 1865) (regular session).

<sup>215</sup> *Decision of Chief Justice Handy, Declaring the Civil Rights Bill Unconstitutional*, N.Y. TIMES, Oct. 26, 1866, at 2, col. 3.

<sup>216</sup> Even by Mississippi standards, Alexander H. Handy (1809–71) was an ardent and adamant secessionist. *See* JOHN RAY SKATES, A HISTORY OF THE MISSISSIPPI SUPREME COURT: 1817-1948 (1972).

<sup>217</sup> "Every citizen has a right to bear arms in defence of himself and the State." MISS.

Handy said that section one of the Thirteenth Amendment,<sup>218</sup> which had liberated Lewis from slavery, did not change the practice which had existed in many non-slave states that “the African race, even when free, are essentially a degraded caste, of inferior rank and condition in society.”<sup>219</sup>

Section two of the Thirteenth Amendment gave Congress “the power to enforce this article by appropriate legislation.”<sup>220</sup> According to the Chief Justice, this gave Congress the power to act against the holding of people in slavery, but not to pass legislation regarding how ex-slaves were treated by the states. The Civil Rights Act had mandated that blacks must have “full and equal benefit of all laws and proceedings for the security of person and property as are enjoyed by white citizens.”<sup>221</sup> This would make Mississippi’s gun licensing law illegal. But the Civil Rights Act was unconstitutional, because Congress had no power to enact it, the Mississippi Court ruled.<sup>222</sup>

The 1866 case was not the only time the Mississippi Court would take a hard line on gun control. In a later case, a Sheriff gave his pistol to a gunsmith, Strahan, for repair. After the repair was completed, Strahan put the pistol in his pocket, and delivered it to the Sheriff. The Mississippi Supreme Court upheld the conviction for violation of the concealed carry ban.<sup>223</sup>

In 1883, in the *Civil Rights Cases*, the U.S. Supreme Court would rule that Section two of the Thirteenth Amendment authorizes Congress to abolish “all badges and incidents of slavery.”<sup>224</sup> Since disarmament was an “incident” of slavery,<sup>225</sup> this would allow Congress to act against disarmament laws. But by 1883, Congress had lost any appetite for interfering with white supremacy in the ex-Confederacy.

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CONST. art. I, § 23 (1817). The current version of the right is “The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the Legislature may regulate or forbid carrying concealed weapons.” MISS. CONST. art. III, § 12.

<sup>218</sup> “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

<sup>219</sup> Quoting JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 258n (1826).

<sup>220</sup> “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII, § 2.

<sup>221</sup> Civil Rights Act of April 9, 1866, 14 Stat. 2; CONG. GLOBE, 39th Cong., 1st Sess., 129 (1866)

<sup>222</sup> *Decision by Chief Justice Handy, supra.*

<sup>223</sup> *Strahan v. State*, 68 Miss. 347, 8 So. 344 (1891)

<sup>224</sup> *Civil Rights Cases*, 109 U.S. 3, 4 (1883).

<sup>225</sup> *McDonald* at 843–46 (Thomas, J., concurring); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 335-38 (1991); Kopel, *Background Checks* at \_\_\_\_ (compiling statutes from colonial era through 1860).

## B. United States v. Cruikshank

After the Fourteenth Amendment was ratified in 1868, Congress re-enacted the Civil Rights Act. Congress also passed the Enforcement Act, providing criminal penalties for persons who attempted to deprive persons of their civil rights.<sup>226</sup> As a result, there were federal criminal prosecutions of persons who had deprived freedmen of their Second Amendment rights.<sup>227</sup>

But that came to an end in the 1876 Supreme Court case *United States v. Cruikshank*.<sup>228</sup> William Cruikshank was among the leaders of a group of whites who attacked and slaughtered scores of blacks at the county courthouse in Colfax, Louisiana.<sup>229</sup> The massacre resulted from a dispute about whether the white supremacist Democrats allied with Cruikshank, or the black and white Republicans who barricaded themselves in the courthouse would control the county government. The white Republicans were allowed to flee before the massacre began. The barricaded blacks were armed, but mostly with low-quality short-range shotguns. Cruikshank and his followers attacked with high-quality, longer-range rifles.<sup>230</sup>

When the criminal prosecution of Cruikshank and others for violations of the constitutional rights of the victims reached the Supreme Court, the Court stated that right recognized in the Second Amendment, as well as the First Amendment right of peaceable assembly, had pre-existed the Constitution.<sup>231</sup> Ergo, First and Second Amendment rights had not been created by the Constitution; they were simply protected by the Constitution against federal infringement. The Privileges or Immunities protected by section one of the Fourteenth Amendment were only those which had been actually created by the formation of a national government under the Constitution. (E.g., the right to U.S. consular protection when traveling in a foreign nation, the right to travel to Washington, D.C., to do business with the federal government.)

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<sup>226</sup> “An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes,” 16 Stat. 140 (May 31, 1870).

<sup>227</sup> See *McDonald* at 837 (Thomas, J., concurring) (citing Proceedings in the Ku Klux Trials at Columbia, S. C., in the United States Circuit Court, November Term, 1871, p. 147 (1872)); Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921 (1984).

<sup>228</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876).

<sup>229</sup> CHARLES LANE, *THE DAY FREEDOM DIED* (2008). Cited in *McDonald* at 757 n.6.

<sup>230</sup> LANE, at \_\_\_\_\_. Among the stellar defense team for Cruikshank were former U.S. Supreme Court Justice John Campbell, and U.S. Senator Reverdy Johnson (D-Md.), an ardent opponent of Reconstruction and the 14th Amendment. *Id.* at \_\_\_\_.

<sup>231</sup> *Id.* at 551–53.

Some but not all of the defendants had been convicted at trial. They moved in arrest of judgment. The two-judge panel on the Circuit Court split, and certified the case to the Supreme Court. Justice Bradley was circuit-riding, and he voted to arrest the judgment. In a tie vote, the Supreme Court Justice won, so in the Supreme Court case, the United States was the moving party. *United States v. Cruikshank*, 1 Woods 308, no 14,897, 13 Am. Law Reg. (N.S.) 630 (Cir. Ct., D. La. 1874). Woods would be appointed to the Supreme Court in 1881, and serve until 1887.

Hence, Congress's enforcement power under section five of the Fourteenth Amendment could not be used to protect First and Second Amendment rights.

Justice Thomas explained the consequences:

*Cruikshank's* holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens.<sup>232</sup>

Although *Cruikshank* is not as famous as the *Slaughter-House Cases* or the *Civil Rights Cases*, James Gray Pope argues that it is really the case which accomplished what the other cases are given credit (or blame) for. The idea that the Privilege or Immunities Clause does not protect the Bill of Rights was dicta in *Slaughter-House*, but was applied to the Bill of Rights in *Cruikshank*. The idea that the Fourteenth Amendment only applies to state action is attributed to the *Civil Rights Cases*, but it was announced years before in *Cruikshank*, as part of the holding.<sup>233</sup> In terms of how *Slaughter-House* and *Cruikshank* have been understood by the last several generations of lawyers, Pope is correct.

However, Gerald Magliocca argues that in the nineteenth century, neither the Supreme Court nor the bar understood *Slaughter-House* and *Cruikshank* as rejecting Privileges or Immunities incorporation of any and every item from the Bill of Rights. Rather, the broadly restrictive interpretation was created by the Supreme Court around 1900, in retrospective declarations about what *Slaughter-House* and *Cruikshank* had really meant.<sup>234</sup> This helps explain why, notwithstanding *Slaughter-House* and *Cruikshank*, one of the greatest Supreme Court litigators of the century, Lyman Trumbull, would bring a Second Amendment case to the Supreme Court in 1886, as will be detailed *infra*.

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<sup>232</sup> McDonald at 855–56.

<sup>233</sup> See James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385 (2014).

<sup>234</sup> Gerald Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?* 94 MINN. L. REV. 102 (2009).



### C. Tennessee

Tennessee, a border state, had acted speedily upon the April 1865 surrender of the Confederate States of America, and its representatives were soon back in the United States Congress. As a result, Tennessee escaped the military rule which was imposed on the other ex-confederate states. A new constitutional convention was held, and it declared all acts of the confederate state legislature null and void ab initio.<sup>235</sup>

This led to *Smith v. Ishenhour* (Tenn. 1866).<sup>236</sup> In 1861, Tennessee's Confederate government had enacted a statute authorizing the seizure of citizen arms for use by the Confederate army.<sup>237</sup> Acting under authority delegated by the state's Confederate Governor, Smith had seized Ishenhour's firearm in 1862.<sup>238</sup>

After the war, Ishenhour sued Smith for trespass, for taking his gun. He won the case before a Justice of the Peace. The Tennessee Supreme Court had no trouble disposing of Smith's appeal.<sup>239</sup> Smith was personally liable, for although he had purported statutory authority, the statute was void. Besides that, the confiscation statute "utterly disregarded" the state constitution, and was "the first attempt, in the history of the Anglo-Saxon race, of which we are apprised, to disarm the people by legislation."<sup>240</sup>

But soon, the Tennessee legislature would resume its traditional role as the leading arms control legislature in the nation. Like other Southern state legislatures after 1868, Tennessee steered away from gun control laws which explicitly discriminated based on race. Provoking Congress would not be a good idea, and expressly racial gun control might run afoul of the Equal Protection Clause of the Fourteenth Amendment. So arms control laws were always racially neutral on paper, although in practice this was not always so. A Florida Supreme Court Justice, describing a gun control law enacted during Jim Crow, wrote that "The statute was never intended to be applied to the white population and in practice has never been so applied."<sup>241</sup>

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<sup>235</sup> *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214, 217–18 (1866).

<sup>236</sup> *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214 (1866).

<sup>237</sup> *Id.* at 216–17.

<sup>238</sup> *Id.* at 215.

<sup>239</sup> *Id.* at 215.

<sup>240</sup> *Id.* at 217. The Court also could have cited the England's 1671 Game Act, which was applied by Kings Charles II and James II with the purpose of disarming the population, thus preventing forcible resistance to their arbitrary rule, but eventually helping to cause the downfall of the Stuart line in the Glorious Revolution. MALCOLM; *Heller* at 612–13 (quoting *Nunn* at 251); text at note --- *supra*.

<sup>241</sup>

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and



*Andrews v. State* (Tenn. 1871).<sup>242</sup> In 1870, the Tennessee Legislature prohibited the carrying of “a dirk,<sup>243</sup> sword-cane, Spanish stiletto,<sup>244</sup> belt or pocket pistol or revolver,” either openly or concealed.<sup>245</sup> The language about “belt or pocket pistol or revolver” covered many but not all handguns.

The case known as *Andrews v. State* was a consolidated appeal of cases involving four defendants: Andrews, O’Toole, Custer, and Page. Andrews was convicted and appealed. O’Toole had been successful in quashing his indictment on the grounds that the statute was unconstitutional, so the prosecutor appealed. Custer was convicted, but the trial court refused to order him to post bond for good behavior (“surety for the peace”) and so the prosecutor appealed. Page was on one occasion “seen coming from his home along the big road, about a mile distant from his house, carrying in his hand, swinging by his side, a pistol called a revolver, about eight inches long,” and had threatened to perpetrate an assault, and was convicted.<sup>246</sup>

All of the defendants had moved that their indictments be quashed on the grounds that the indictments had not specified what type of pistol was carried. None of these motions had prevailed. Andrews had wanted to introduce evidence “that there was a set of men in the neighborhood of defendant during the time he had carried his pistol, and before, seeking the life of defendant.”<sup>247</sup>

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to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess that more than 80% of the white men living rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

*Watson v. Stone*, 4 So.2d 700, 703 (Fla. 1941) (Buford, J., concurring) (the case held that a handgun in an automobile glove compartment did not violate the statutory restriction on “carrying”).

<sup>242</sup> *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

<sup>243</sup> A knife with one cutting edge, originally created in Scotland; prohibited by Great Britain’s “Disarming Acts” of 1716 and 1725, in response to Scottish uprisings. HAROLD L. PETERSON, *DAGGERS & FIGHTING KNIVES OF THE WESTERN WORLD* 60 (1968); American Knife & Tool Institute, *ATKI Approved Knife Definitions*, <http://www.akti.org/resources/akti-approved-knife-definitions/#dirk>

<sup>244</sup> This apparently refers to thin-bladed Spanish knives which open automatically when a lever or button releases a spring. [http://www.autoknife.info/Spanish\\_1.html](http://www.autoknife.info/Spanish_1.html). The American Tool and Knife Institute argues that the terms “dirk” and “stiletto” are unconstitutionally vague. *ATKI Approved Knife Definitions*, *supra*.

<sup>245</sup> *Andrews* at 171.

<sup>246</sup> *Id.* at 201.

<sup>247</sup> *Id.* at 188.

This evidence had been properly refused, said the state Supreme Court, given the proof “that he had been in the habit of carrying a pistol since the war.”<sup>248</sup>

The Tennessee Supreme Court ruled that all the first three indictments must be quashed, whereas Page’s conviction was affirmed.

The ban on open public carry could not be applied to militia-suitable arms: “the rifle, of all descriptions, the shot gun, the musket and repeater.”<sup>249</sup> The “repeater” was a “pistol” that “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...”<sup>250</sup> Further, the carry ban had the effect of prohibiting the carrying of a gun to places for target practice or for repair, both of which were constitutionally protected:

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.... But farther than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.<sup>251</sup>

In the twenty-first century, *Andrews* is one of the few post-war cases to stand as an important authority. *Heller* quoted the above language about “all the ordinary purposes” and “all the ordinary modes usual in the country,” subject to “the duties of a good citizen in times of peace.”<sup>252</sup> *Heller* also cited *Andrews* for the principle that the Second Amendment is not only for militiamen.<sup>253</sup> Finally, *Heller* pointed to the carry restriction in *Andrews* as one of the “[f]ew laws in our history” that approached the severity of the D.C. handgun ban, and noted with approval that the handgun carry ban in *Andrews* had been “struck down.”<sup>254</sup>

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<sup>248</sup> *Id.* at 188.

<sup>249</sup> *Id.* at 171.

<sup>250</sup> *Id.* at 171.

<sup>251</sup> *Id.* at 178-79.

<sup>252</sup> *Heller* at 614.

<sup>253</sup> *Heller* at 609.

<sup>254</sup> *Heller* at 629. Justice Stevens also quoted language from *Andrews* stating that some arms (those that are not of the type for militia service) can be banned. *McDonald v. Chicago* at 937 (Stevens, J., dissenting). Justice Stevens said that *Andrews* “summarized the Reconstruction understanding of the states’ police power to regulate firearms.” *Id.* If that is true, the understanding is contrary to Justice Stevens’ view that Chicago can constitutionally ban all handguns, even in the home.

Post-*Heller*, *Andrews* has been cited by the Sixth Circuit in upholding a sentence enhancement of using a gun in a crime,<sup>255</sup> by the Ninth Circuit in striking down a near-total prohibition on defensive handgun carrying,<sup>256</sup> and by the U.S. District Court for the Eastern District of California in striking down unreasonable delays on the purchase of firearms.<sup>257</sup> It has been miscited by some courts as purported authority for statutes making it nearly impossible for citizens to carry handguns for lawful protection.<sup>258</sup> The Second Circuit put *Andrews* in a list of cases where severe restrictions on the right to carry “withstood constitutional challenges.”<sup>259</sup> The passage does not create confidence that the author read *Andrews* or *Heller* carefully.

*State v. Wilburn* (Tenn. 1872).<sup>260</sup> The Tennessee legislature responded promptly to *Andrews*. A new statute banned carrying any handgun “other than an army pistol, or such as are commonly carried and used in the United States army.”<sup>261</sup> This was the narrowest reading possible of the *Aymette-Andrews* “civilized warfare” rule that only militia-suitable arms were constitutionally protected. The obvious effect was that the military handguns owned by ex-confederate officers and ex-cavalrymen (likely to be wealthier, since cavalrymen typically had to supply their own horse) were protected, whereas the smaller, less expensive handguns which might be owned by freedmen were not.

However, the statute also did its best to constrain all carry: “in no case shall it be lawful for any person to carry such army pistol publicly or privately about his person in any other manner than openly in his hands...”<sup>262</sup>

To say the least, requiring that gun carriers must carry in the hand is extremely dangerous. Especially in a period when many handguns did not have safeties or trigger guards, the potential to cause accidents was enormous. The inconvenience of this mode of carry was obviously designed to discourage carrying.

There is a pattern in some post-bellum Southern Supreme Courts of attempting to enforce constitutional rights, and then giving up under incessant pressure of the legislature. One good example is the Alabama Supreme Court, which three times relied on the federal Civil Rights Act (protecting the right to contract) to strike down state statutes against inter-racial marriage. But after

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<sup>255</sup> *United States v. Greeno*, 679 F.3d 510, 520 (6th Cir. 2012) (quoting the concurring opinion that (“Neither the old [1796] nor the new [1870 state] Constitution confers the right to keep, or to bear, or to wear arms, for the purpose of aggression.”) (brackets added).

<sup>256</sup> *Peruta v. County of San Diego*, 742 F.3d 1144, 1157 (9th Cir. 2014), *reh’g en banc granted*, 781 F.3d 1106 (9th Cir. 2015). Because en banc review was granted, the *Peruta* decision has been vacated. *Id.* *Peruta* and *Greeno* both examine many of the nineteenth century cases carefully.

<sup>257</sup> *Silvester v. Harris*, 41 F.Supp.3d 927, 962 (E.D. Calif. 2014).

<sup>258</sup> *See In re Wheeler*, 81 A.3d 728, 758 (N.J. Super. A.D. 2013).

<sup>259</sup> *Kachalsky v. County of Westchester*, 701 F.3d 81, 90–91 (2d Cir. 2012).

<sup>260</sup> *State v. Wilburn*, 66 Tenn. (7 Baxt.) 57 (1872).

<sup>261</sup> *Id.* at 61.

<sup>262</sup> *Id.* at 61.

the Indiana Supreme Court upheld an Indiana law on the same subject (on the theory that marriage is “status,” not “contract”), the Alabama Supreme Court gave up, and its fourth case finally allowed Alabama’s statute against inter-racial marriage to stand.<sup>263</sup>

The Tennessee Supreme Court was less resilient, giving up after only one time. The *Wilburn* decision unanimously upheld the abrogation for almost all practical purposes of the right to carry a handgun.<sup>264</sup>

It had only taken a few decades for Tennessee to go all the way down the slippery slope. The 1837 statute merely forbade carrying a concealed bowie knife, but by 1872 it was illegal to carry any handgun, except that a person could carry an expensive and large handgun in a manner that no prudent person would want to. The results would not have surprised the Kentucky Supreme Court which had decided *Bliss v. Commonwealth* in 1822; an allowed infringement of part of the right may eventually lead to the destruction of the right.

A few years later, in *State v. Callicutt*, the Tennessee Court upheld an 1856 statute making it illegal to sell or loan pistols or other dangerous weapons to minors.<sup>265</sup> The statute had an exception for hunting and for self-defense when traveling.<sup>266</sup> The Court opined that there was no right to carry arms for self-defense; rather, defensive carry was “justly branded as a crime that ought to be suppressed.”<sup>267</sup> That aspect of the *Callicutt* opinion is not followed today, but courts have cited *Callicutt* as an example of “longstanding” restrictions on minors acquiring arms.<sup>268</sup>

*State v. Burgoyne* (Tenn. 1881).<sup>269</sup> Having previously disposed of handgun carry, the Tennessee legislature in 1879 outlawed the sale of all handguns “except army or navy pistols.”<sup>270</sup>

Burgoyne was the first firearms businessmen to be a party in a right to arms case. He was a licensed merchant in Memphis. Burgoyne had an active merchant’s license when the sales ban went into effect on March 17, 1879. He continued to sell pistols, some of them not “army or navy,” afterwards. Later, his merchant’s license expired, and he acquired a second license. He continued to sell the inventory of arms which he had acquired before March 17.<sup>271</sup>

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<sup>263</sup> PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2010).

<sup>264</sup> *Wilburn* at 62–63.

<sup>265</sup> *State v. Callicutt*, 69 Tenn. 714 (1878).

<sup>266</sup> 1855–56 Tenn. Acts 92 (Feb. 26, 1856).

<sup>267</sup> *Callicutt* at 716.

<sup>268</sup> *National Rifle Ass’n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 203 (5th Cir. 2012); *United States v. Rene E.*, 583 F.3d 8, 14–15 (1st Cir. 2009).

<sup>269</sup> *State v. Burgoyne*, 75 Tenn. (7 Lea) 173 (Tenn. 1881).

<sup>270</sup> *Id.* at 173–74.

<sup>271</sup> *Id.* at 174.

The Tennessee Supreme Court ruled that the gun ban was constitutional, since it would help reduce the carrying of concealed handguns, which had been recognized as a constitutional purpose.<sup>272</sup>

However, there was a separate constitutional problem: the unreasonable interference with Burgoyne's sale of goods which he had lawfully acquired. The court ruled that the exception provided by the legislature was sufficient: merchants with handguns could continue to sell handgun inventory acquired before the ban, until their current license expired. So Burgoyne's handgun sales under the first license were legal, but his sales under the second license were illegal. His fine was affirmed.<sup>273</sup>

As *Burgoyne* demonstrates, not everything which is historic is constitutional.<sup>274</sup> This is particularly so for Jim Crow precedents restricting enumerated rights.

#### D. Arkansas

*Fife v. State* (1876).<sup>275</sup> Tennessee's greatest competitor as gun control exemplar was Arkansas. There too, the state supreme court eventually acceded to the state legislature's efforts to extirpate lawful handgun carry.

The 1874 election was the first in which former Arkansas Confederates were allowed to vote. They elected huge Democratic majorities, and ended Reconstruction in the state.<sup>276</sup> In February 1875, the new state legislature enacted a statute against carrying concealed arms.<sup>277</sup> On September 17, 1875, a witness saw Alfred Fife on a street in Pine Bluff, "in company with one Terry, near Trulock's bank."<sup>278</sup> Fife "had a banjo under his left arm, and a pistol in his hand."<sup>279</sup>

The witness spoke to Fife's companion, Terry.<sup>280</sup> Whereupon Fife "raised his pistol" and asked Terry what the witness had said to Terry.<sup>281</sup> The

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<sup>272</sup> *Id.* at 175–76.

<sup>273</sup> *Id.* at 176–79.

<sup>274</sup> *Burgoyne* was cited by the Illinois Supreme Court in 1917 for the proposition that "the sale of deadly weapons may be absolutely prohibited," and that prohibition in no way conflicts with the constitutional right to arms. *Biffer v. City of Chicago*, 278 Ill. 562, 569, 116 N.E. 182, 185 (1917).

<sup>275</sup> *Fife v. State*, 31 Ark. 455 (1876).

<sup>276</sup> *Civil War through Reconstruction, 1861 through 1874*, THE ENCYCLOPEDIA OF ARKANSAS HISTORY & CULTURE (Butler Center for Arkansas Studies, Central Arkansas Library System), <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=388>.

<sup>277</sup> Act of 16th Feb., 1875

<sup>278</sup> *Fife*, 31 Ark. at 455.

<sup>279</sup> *Id.* at 455–56.

<sup>280</sup> *Id.* at 456.

<sup>281</sup> *Id.*

[w]itness replied that he was talking to Terry. [Fife]<sup>282</sup> laid the guard of his pistol, which he held in his hand, against the face of witness, and said that, meaning the pistol, ruled the world, to which witness replied: ‘Yes, it did.’ Witness saw the pistol, and thought it was a revolver.

On the same day, perhaps, another witness saw plaintiff in a drug store, with a pistol in his hand. He did not notice it particularly, but thought it was a revolver.

On the evening of the same day, [Fife] was playing cards in a saloon, when an intoxicated man came in, and [Fife] undertook to put him out. They clenched and fell behind a screen. After the difficulty was over, the saloon keeper found on the floor the cylinder of a pistol, but he saw [Fife] with no pistol.<sup>283</sup>

The Supreme Court reasonably concluded “It is probable, from all the evidence, that [Fife] was carrying a pocket revolver.”<sup>284</sup> The state statute banned “carrying, as a weapon, ‘any pistol of any kind whatever,’ with provisions for exceptional cases.”<sup>285</sup>

Fife was convicted by a jury, and the Arkansas Supreme Court rejected his argument that the concealed carry statute was unconstitutional. The Arkansas court hewed closely to and quoted extensively from Tennessee’s *Andrews v. State*.<sup>286</sup> Reading the Arkansas statute narrowly, the Court found that it applied to “the pistol intended to be proscribed is such as is usually carried in the pocket, or of a size to be concealed about the person, and used in private quarrels and brawls, and not such as is in ordinary use, and effective as a weapon of war, and useful and necessary for ‘the common defense.’”<sup>287</sup>

After quoting *Andrews*’ listing of constitutionally protected arms, *Fife* explained that the “repeater” pistol meant “the army and navy repeaters, which, in recent warfare, have very generally superseded the old-fashioned holster, used as a weapon in the battles of our forefathers.”<sup>288</sup> The “pocket revolver” that Fife had been carrying was not a military handgun, so Fife’s conviction was upheld.

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<sup>282</sup> In the block quote here, the court refers to Fife as “Plaintiff.” Fife was, in the terminology of the day, the “plaintiff-in-error,” because he was bringing a case in which he alleged a lower court had made an error. BLACK’S LAW DICTIONARY 1035 (5th ed. 1979).

<sup>283</sup> *Fife*, 31 Ark. at 456.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 461.

<sup>288</sup> *Id.* at 460–61. The *Fife* court suggested that *Andrews*’ examples of some of the arms which are constitutionally protected should have included “the sword, though not such as are concealed in a cane.” *Id.*

As was typical in states with carry restrictions, Arkansas had exceptions for persons on their own premises or on a journey.<sup>289</sup>

*Wilson v. State* (Ark. 1878)<sup>290</sup> straightforwardly followed *Fife* and *Andrews*. The trial court had excluded evidence that Chancy Wilson borrowed “a large army size six shooter, a revolving pistol, 44 caliber, eight inches in the barrel, such as is commonly used in warfare.”<sup>291</sup> He said that

he was going over to Pearman’s to shoot wild hogs. On the next day he went to Pearman’s, stated to him the purpose of his visit, and while conversing with him, before going into dinner, pulled the pistol out of his boot, cocked it a few times to see if it would revolve, and then put it around under his coat, and went in to dinner.<sup>292</sup>

The Supreme Court held that individuals had a right to openly carry army-quality handguns in public. Wilson had the right to a jury instruction, which had been refused at trial, “that if they believed from the evidence, that the pistol carried by him was an army size pistol, such as are commonly used in warfare, they should acquit.”<sup>293</sup> “[T]o prohibit the citizen from wearing or carrying a war arm....is an unwarranted restriction upon his constitutional

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<sup>289</sup> *State v. Wardlaw*, 43 Ark. 73, 74 (1884). *Wardlaw* found a derringer to be within the scope of the carry ban. *Id.* at 74. The statute should not be implied to require that the gun must be loaded, for this is “a fact which can hardly ever be ascertained beyond peradventure.” *Id.* at 74–75. This was true for old-fashioned muzzle-loading guns which were still common in 1884. It is not true for modern breech-loading firearms; for them, it is easy to open the gun and examine the firing chamber.

For more on the journey exception, see John Thomas Shepherd, Comment, *Who is the Arkansas Traveler?: Analyzing Arkansas’s “Journey” Exception to the Offense of Carrying a Weapon*, 66 Ark. L. Rev. 463 (2013) (also examining similar exemptions in Mississippi, Missouri, and Texas). The Arkansas nineteenth century courts applied the “journey” exception liberally, whenever a person traveled beyond his “circle of neighbors.” Shepherd, at 468–71. Texas did not adopt the “circle of neighbors” test, and its jurisprudence on the meaning of “a person who is traveling” has long been confusing. See Jack Skaggs, Comment, *Have Gun, Will Travel? The Hopelessly Confusing Journey of the Traveling Exception to the Unlawful Carrying Weapons Statute*, 57 BAYLOR L. REV. 507 (2005). The Texas problem was mostly solved in 2007 by legislation specifying that a carry permit is not necessary for carrying a handgun in an automobile. TEX. PENAL CODE §46.02; Motorist Protection Act, HB1815 (2007).

<sup>290</sup> *Wilson v. State*, 33 Ark. 557 (1878). Along with *Andrews* and *Fife*, *Wilson* was cited by the dissent in *Drake v. Filko*, 724 F.3d 426, 451 (3d Cir. 2013) (Hardiman, J., dissenting) (arguing that New Jersey’s refusal to issue carry permits except in rare circumstances violates the Second Amendment).

<sup>291</sup> *Wilson*, 33 Ark. at 559.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

right to keep and bear arms.”<sup>294</sup> The conviction was reversed and the case remanded for a new trial.<sup>295</sup>

*Holland v. State* (Ark. 1878).<sup>296</sup> Also in 1878, the Arkansas Supreme Court reversed and remanded the conviction of James Holland. On October 1, 1875, a witness saw Holland riding a horse, with two guns in the saddlebags—a navy size Remington, and “a Colt’s army pistol.”<sup>297</sup> Holland said he was from Texas.<sup>298</sup> The trial court erred by refusing to give Holland’s requested instruction “that if they found from the evidence that the pistols, proven to have been carried, were army sized pistols, and were such as are commonly used in the United States military and naval service, they must acquit defendant.”<sup>299</sup> So the case was remanded for a new trial.<sup>300</sup>

In *Fife, Wilson, and Holland*, the Arkansas Supreme Court had protected the right to carry, at least for large handguns openly carried. But the judicial will to resist would soon wane.

*Haile v. State* (Ark. 1882).<sup>301</sup> In 1881 the Arkansas legislature copied the 1872 Tennessee statute which outlawed “the carrying of army pistols except uncovered and in the hand.”<sup>302</sup> In the trial court, the parties agreed on all the facts: On Sept. 26, 1881, Haile had carried openly “and buckled around his waist...a large revolving pistol, known as the Colts army pistol.”<sup>303</sup> He was not within the scope of any of the statutory exemptions, since he was not an army officer or carrying under the direction thereof; “he was not upon a journey, nor upon his own premises.”<sup>304</sup>

He appealed after being fined 50 dollars.<sup>305</sup> Yet he did not submit a brief on appeal.<sup>306</sup> The court reached out to address the constitutional issue, for “we suppose his exceptions refer to the validity of the act as unconstitutional.”<sup>307</sup> Citing Tennessee’s *Wilburn* decision upholding a similar statute, the Arkansas court affirmed Haile’s conviction, while insisting “The constitutional right is a very valuable one. We would not disparage it.”<sup>308</sup>

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<sup>294</sup> *Id.* at 560. “If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.” *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Holland v. State*, 33 Ark. 560 (1878).

<sup>297</sup> *Id.* at 561.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Haile v. State*, 38 Ark. 564 (1882).

<sup>302</sup> Act of April 1, 1881.

<sup>303</sup> *Haile* at 564.

<sup>304</sup> *Id.* at 564.

<sup>305</sup> *Id.* at 564.

<sup>306</sup> *Id.* at 565.

<sup>307</sup> *Id.* at 564.

<sup>308</sup> *Haile* at 566-67.



*Dabbs v. State* (Ark. 1885).<sup>309</sup> Arkansas in 1881 also enacted a copy of the 1879 Tennessee ban on the sale of all handguns, except those “used in the army or navy of the United States and known as the navy pistol.”<sup>310</sup> Dabbs pleaded guilty to selling a pocket pistol, and the court assessed a fine. Dabbs then “moved in arrest of judgment.”<sup>311</sup>

On appeal, the Attorney General took a hard line: “The right to ‘keep and bear arms’ may be absolutely prohibited.”<sup>312</sup> The Arkansas Supreme Court did not go that far, but it did uphold Dabbs’s conviction and the statute, since it did not ban arms which are “useful in warfare.”<sup>313</sup> Neither *Haile* nor *Dabbs* have been cited by any post-*Heller* court.

## E. Texas

*English v. State* (Tex. 1872).<sup>314</sup> An 1871 statute forbade the open or concealed carrying of handguns and a variety of edged weapons under most circumstances.<sup>315</sup> The Texas Supreme Court analyzed the law in the context of three combined appeals.

English was intoxicated when a witness saw him with a pistol. The pistol was unloaded and inoperable. He was taking “it along with him to have it mended.”<sup>316</sup> Daniels had gone “into a religious assembly.”<sup>317</sup> There, witnesses had seen “the handle of a butcher knife was sticking out above the waistband of his breeches, and between the skirts of his frock coat.”<sup>318</sup> There was “[n]o transcript in Carter’s case.”<sup>319</sup> Neither Daniels nor Carter filed a brief.

The court upheld the convictions of English, Daniels, and Carter. The court said that the right to arms was only for weapons of war, and that laws against concealed carry were constitutional. The court did not inquire as to whether English’s pistol was or was not the type that was constitutionally protected.

The Court thought that Texans had bad habits with guns, and explained the cause: Texas’s unusual and unfortunate legal and cultural heritage from

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<sup>309</sup> *Dabbs v. State*, 39 Ark. 353 (1882).

<sup>310</sup> General Pistol Act of 1881.

<sup>311</sup> *Dabbs* at 355.

<sup>312</sup> *Id.*

<sup>313</sup>

The law was enacted as a measure of precaution for the prevention of crimes and calamities. It is leveled at the pernicious habit of wearing such dangerous or deadly weapons as are easily concealed about the person. It does not abridge the constitutional right of citizens to keep and bear arms for the common defense; for it in no wise restrains the use or sale of such arms as are useful in warfare.

*Id.* at 356–57.

<sup>314</sup> *English v. State*, 35 Tex. 473 (1872).

<sup>315</sup> Act to regulate the keeping and bearing of deadly weapons (Apr. 11, 1871).

<sup>316</sup> *English*, at 473.

<sup>317</sup> *Id.* at 473–74.

<sup>318</sup> *Id.* at 474.

<sup>319</sup> *Id.*

Spain.<sup>320</sup> Spain, in turn, was said by the court to have a mixture of Carthaginian, Visigoth, Arab, and other influences.<sup>321</sup> The court looked to the new gun control statute as a salutary example of the Spanish influence being displaced by “the sound philosophy and pure morality of the common law.”<sup>322</sup> The state’s founding traditions of liberty were rejected: “We will not say to what extent the early customs and habits of the people of this state should be respected and accommodated, where they may come in conflict with the ideas of intelligent and well-meaning legislators.”<sup>323</sup>

As to what the right to arms protected, *English* said it was those “as are used for purposes of war,” such as “musket and bayonet...the sabre, holster pistols and carbine...the field piece, siege gun, and mortar, with side arms.”<sup>324</sup> These were contrasted with “dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives,” which were “employed in quarrels and broils, and fights between maddened individuals.”<sup>325</sup> In support of the distinction, *English* pointed out that “Blackstone says, the offense of riding or going around with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land.”<sup>326</sup>

*English* is cited in *Heller* as an illustration of what Heller calls “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>327</sup> Heller also cited three other cases which had the “dangerous and unusual” language, although these were terse, fact-bound cases which just contained the quote about the common law crime, and did not analyze or mention the right to arms.<sup>328</sup>

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<sup>320</sup> *Id.* at 480.

<sup>321</sup> *Id.*

<sup>322</sup> *English*, at 480.

<sup>323</sup> *Id.*

<sup>324</sup> *English* at 475.

<sup>325</sup> *English* at 475. A “slungshot” is not the same as a “slingshot.” The former is a cord with a loop in the middle, and weighted balls at each end; it is a maritime tool, used for casting lines. See GEORGE CAMERON STONE, A GLOSSARY OF THE CONSTRUCTION, DECORATION AND USE OF ARMS AND ARMOR 568 (Dover Mil. Hist. 1999) (1934).

<sup>326</sup> *Id.*

<sup>327</sup> *Heller* at 627.

*English* is also cited by Justice Stevens’ dissent in *McDonald*, as “observing that ‘almost, if not every one of the States of this Union have [a prohibition on the carrying of deadly weapons] upon their statute books,” and lambasting claims of a right to carry such weapons as “little short of ridiculous.” *McDonald* at 888 (Stevens, J., dissenting) (citing *English* at 478–79). This overlooks the fact that except in some ex-Confederate states, the carry laws were non-prohibitive, applying only to carrying in a concealed or terrifying manner.

<sup>328</sup> *Heller* at 627, citing *State v. Langford*, 10 N.C. 381, 383–84 (1824); *O’Neill v. State*, 16 Ala. 65, 67 (1849); *English v. State*, 35 Tex. 473, 476 (1871); *State v. Lanier*, 71 N.C. 288, 289 (1874).

In *Langford*, there had clearly been a breach of the peace because “These 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.” 10 N.C. at 383. However, the court also discussed the general meaning of “affray”: “it seems certain 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

While *Heller* adopted *English*'s "dangerous and unusual" general rule, *Heller* did not adopt *English*'s warfare-based test of which arms were protected or excluded by the rule. *Heller* makes no distinction between concealable pistols (unprotected under *English*) versus larger "holster pistols" (protected under *English*).

*State v. Duke* (Tex. 1875).<sup>329</sup> George Duke was indicted under the charge that on Dec. 23, 1871 he did "unlawfully carry on his person one pistol, known as a six-shooter."<sup>330</sup>

The court said that citizens had a right to own "such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State."<sup>331</sup> This included "the double-barreled shot-gun, the huntsman's rifle, and such pistols at least as are not adapted to being carried concealed," and "beyond question, the dragoon or holster pistol."<sup>332</sup>

As for carrying in public, *Duke* found that near-prohibition was "a legitimate and highly proper regulation of their use."<sup>333</sup> The carry law merely served to "regulate the place where, and the circumstances under which, a pistol may be carried."<sup>334</sup> The statute had exceptions for "certain officers in actual service, and any one having reasonable grounds to fear an attack."<sup>335</sup>

The district court had ruled that indictment was defective because it failed to allege that *English* was not protected by either of the statutory exemptions (military service or reasonable grounds to fear an attack). The State had appealed, and *English* had filed no brief on appeal. Even so, the Supreme Court affirmed the district court's ruling against the form of the indictment. The Supreme Court emphasized that based on the particular form of the "loosely drawn statute," a lawful indictment must negate the exceptions.<sup>336</sup>

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manner as will naturally cause a terror to the people." *Id.*

*O'Neill* held that "mere words" of "vulgar or low abuse" did not constitute an affray. 16 Ala. at 67. The court contrasted this with the rule 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." *Id.*

*Lanier* relied on *Huntley*, *supra* text at notes ---, to state that "the offence of going armed with dangerous or unusual weapons is a crime against the public peace by terrifying the good people of the land." *Id.* at 289. While unarmed and laughing, *Lanier* had cantered his horse through the courthouse, well after the court had adjourned for the day. The *Lanier* court said that whether this constituted the aforesaid crime, "within the spirit of this offence," should be left to the jury. *Id.*

<sup>329</sup> *State v. Duke*, 42 Tex. 455 (1875).

<sup>330</sup> *Id.* at 456.

<sup>331</sup> *Id.* at 459.

<sup>332</sup> *Id.* A "dragoon" is a cavalry revolver.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 460.

<sup>336</sup> *Id.* at 459–62. Although the indictment must negative the exceptions, the prosecutor was not required to prove the negatives at trial. *Leatherwood v. State*, 6 Tex. App. 244, 247 (1879). *Cf.* *Woodward v. State*, 5 Tex. App. 296 (1878) (indictment had not negated the traveler

*Jennings v. State*, (Tex. 1878).<sup>337</sup> Jennings was convicted of concealed carry, a misdemeanor. He did not appeal the conviction, but he did appeal the county court's order, pursuant to state statute, that his gun be forfeited. The intermediate court of appeals agreed:

While [the legislature] has the power to regulate the wearing of arms, it has not the power by legislation to take a citizen's arms away from him. One of his most sacred rights is that of having arms for his own defence and that of the State. This right is one of the surest safeguards of liberty and self-preservation.<sup>338</sup>

The forfeiture was reversed.<sup>339</sup>

## F. Georgia

*State v. Hill* (Ga. 1874).<sup>340</sup> Miles Hill was indicted for violating a statute against going to a court of justice while carrying weapons. The Georgia Supreme Court grudgingly acknowledged that the *Nunn* precedent protected the general right to carry handguns. However, there was another right which was equally important:

the right to go into a court-house and peacefully and safely seek its privileges, is just as sacred as the right to carry arms, and if the temple of justice is turned into a barracks, and a visitor to it is compelled to mingle in a crowd of men loaded down with pistols and Bowie-knives, or bristling with guns and bayonets, his right of free access to the courts is just as much restricted as is the right to bear arms infringed by prohibiting the practice before courts of justice.<sup>341</sup>

In 2012, the Eleventh Circuit used similar reasoning in rejecting a lawsuit claiming that plaintiffs had a right to carry firearms in churches, regardless of whether a particular church wanted them to.<sup>342</sup> Churches' right to control their own property was just as fundamental and traditional as plaintiffs' right to bear arms.<sup>343</sup>

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exception, but this was harmless, because Woodward carried the gun in his hand, rather than in baggage, as travelers would do).

Arkansas held that the exceptions need not be negated in the indictment. *See Walker v. State*, 35 Ark. 386, 388 (1880).

<sup>337</sup> *Jennings v. State*, 5 Tex. App. 298 (1878).

<sup>338</sup> *Id.* at 300–01.

<sup>339</sup> *Id.* at 301.

<sup>340</sup> *State v. Hill*, 53 Ga. 472 (1874).

<sup>341</sup> *Id.* at 477–78. The *Hill* court did not cite the Statute of Northampton, but that statute was created in large part because of armed interference with the courts. *See text at ---- supra.*

<sup>342</sup> *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244 (11th Cir. 2012).

<sup>343</sup> *Id.* at 1264–65.

The U.S. Supreme Court in *Heller* stated that among the “longstanding” gun controls which were “presumptively lawful” were bans on carrying guns in “sensitive places, such as schools and government buildings.”<sup>344</sup> *Hill* and the statute it upheld are early examples of the sensitive places doctrine.

## G. Pennsylvania

North of the Mason-Dixon Line, gun control was less popular, so there were consequently few non-Southern cases interpreting whether a particular law infringed the right to arms.<sup>345</sup> One exception was the 1874 *Wright v.*

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<sup>344</sup> *Heller* at 626–27.

<sup>345</sup> A recent article exaggerates the scope of gun control in the nineteenth-century North. See Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. FORUM 121 (2015). For example, the authors point to an 1836 Massachusetts statute that authors call a “broad regulation of public carry.” The Massachusetts model was copied by several non-Southern states. *Id.*

Actually, the Massachusetts statute required that if a gun carrier gave someone “reasonable cause to fear an injury, or breach of the peace” *and* the gun carrier himself did not have “reasonable cause to fear an assault,” then the gun carrier could be required to post a bond for good behavior. 1836 Mass. Acts 750 (“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 . . .”). The Massachusetts statute imposed a reasonable requirement on persons whose conduct has already given “reasonable cause” for concern that they would misuse the gun. It is a not a restriction on peaceable behavior.

Ruben and Cornell analogize the Massachusetts law to the Texas anti-carry law, discussed *infra*. Ruben & Cornell at 133. But they overlook the difference between permissive regulation and prohibition. Both statutes used similar language, in that they applied to a person who carried in public and who did not have reasonable cause to fear an assault. In Texas, that was the end of the matter; the person who carried would be criminally punished. In Massachusetts, nothing would happen; the carrying could take place in the plain view of a law enforcement officer, and no arrest could be made.

Instead, Massachusetts provided a system to rein in gun carriers whose individual behavior made them appear threatening. *If* a private citizen could prove in court that the behavior of the gun carrier created “reasonable cause to fear an injury, or breach of the peace,” *then* the gun carrier could be required to post a bond for that he would cause unlawful injury or breach of the peace. Having posted the bond, he could go on carrying. The Massachusetts system demonstrated one way to leave the citizenry at liberty to carry, while imposing a reasonable regulation on individuals whose behavior was proven to be worrisome. As Chancellor Kent explained, “the personal security of every citizen is protected from lawless violence” not only by the penal code, but also by “the preventive arm of the magistrate, as a further protection from threatened or impending danger; and on reasonable cause being shown, he may require his adversary to be bound to keep the peace.” JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW \*15–16 (8th ed., N.Y., William Kent 1854).

Ruben and Cornell follow Patrick Charles in asserting that the Statute of Northampton, by its own force, prohibited peaceable carry in early America. As explained above, this interpretation is implausible for the Statute of Northampton itself (especially following *Sir John Knight’s Case*), and lacks any support in American statutes or case law related to the Statute of Northampton. See text at notes ----- *infra*. Ruben and Cornell cite various early American sources for prohibitions on going armed offensively, although these citations do nothing to support the notion that peaceable carry was illegal. Ruben & Cornell at 129–30.

*Commonwealth*.<sup>346</sup> Pennsylvania had not banned the peaceful carry of concealed arms but had made it a crime to carry concealed with intent “unlawfully and maliciously, to do bodily harm to some other person.”<sup>347</sup>

Jonathan Wright was tried for this offense, and the jury acquitted him. But the jury ruled he still had to pay the costs of the case. He appealed the costs, and also argued that the statute was unconstitutional.

The Pennsylvania Supreme Court rejected the constitutionality argument: carrying a gun with intent to unlawfully and maliciously injure someone was obviously not part of the right to arms.<sup>348</sup> As for the costs, “[w]e must presume the jury had a good reason for doing so, arising in the conduct of the defendant.”<sup>349</sup>

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Indeed, the notion that early Americans would have considered the sight of someone peaceably carrying a firearm to be inherent terrifying is contradicted by the many early American statutes which *required* firearms carrying in many non-militia situations, such as while going to or from church, or traveling more than a short distance from one’s home. *See, e.g.*, WILLIAM WALLER HENING, 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 198 (1823) (1632 statute that ‘All men that are fittinge to beare arms, shall bring their pieces to the church.’); *id.* at 127, 198 (while working the ground; or whenever one shall “go or send abroad”; enacted 1632); 1 PUBLIC RECORDS OF CONNECTICUT 95–96 (enacted 1643) (going to or from church); NATHANIEL B. SHURTLEFF, 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 85 (1853) (when traveling more than one mile from dwelling houses); 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 94 (John Russell Bartlett ed., 1856) (traveling more than two miles from town, or attending any public meeting); 3 ARCHIVES OF MARYLAND 103 (J. Hall Pleasants ed., 1935) (enacted 1642) (church meetings, travel); DAVID J. MCCORD, 7 STATUTES AT LARGE OF SOUTH CAROLINA 417–19 (1840) (churches or other public religious meetings); 19 (part 1) THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137–40 (Allen D. Candler ed., 1904) (enacted 1770) (same as South Carolina).

Thus, it is not surprising that criminal justice offer manuals from early America contain no instruction to arrest people for peaceably carrying arms. *See* ISAAC GOODWIN, NEW ENGLAND SHERIFF (Worcester, Dorr & Howland 1830); CHARLES W. HARTSHORN, NEW ENGLAND SHERIFF (Worcester, Warren Lazell 1844); JOHN MILTON NILES, THE CONNECTICUT CIVIL OFFICER tford, Huntington & Hopkins 1823); JOHN H.B. LATROBE, THE JUSTICES’ PRACTICE UNDER THE LAWS OF MARYLAND: INCLUDING THE DUTIES OF A CONSTABLE 22 (Baltimore, Fielding Lucas, Jr. 1826); HENRY POTTER, THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE...ACCORDING TO THE LAWS OF NORTH CAROLINA 243–44 (Raleigh, Joseph Gales 1816).

For a general critique of historian Cornell’s claims about legal doctrine, see Brief Amicus Curiae of Professors of Law, History, Politics, and Government In Support of Plaintiffs-Appellees and in Support of Affirmance, 2012 WL 3164535, in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

<sup>346</sup> *Wright v. Commonwealth*, 77 Pa. St. 470 (1875).

<sup>347</sup> *Id.* at 470.

<sup>348</sup> *Id.* at 471.

<sup>349</sup> *Id.* at 471.

## H. Missouri

*State v. Wilforth* (Mo. 1881).<sup>350</sup> Like several state constitutions, Missouri's right to arms had an express exception for carrying concealed weapons.<sup>351</sup> Wilforth had gone to a church house which was hosting a school exhibition "for literary purposes."<sup>352</sup> At the event, Wilforth carried "about his person fire-arms."<sup>353</sup> This violated the state statute carrying any deadly weapon into "any school room, or place where people are assembled for educational, literary, or social purposes, or to any election precinct on election day..." Wilforth appealed his conviction for illegal carry but did not file a brief on appeal.

Below, he had asked for jury instructions that they should acquit "if they believed defendant carried the pistol for the purpose of trade, or went into the house where the exhibition was going on having reasonable cause to believe that he would be in danger of bodily harm."<sup>354</sup> The Supreme Court ruled that the proposed jury instructions were properly refused because "there was not a scintilla of evidence upon which to base them."<sup>355</sup>

*Wilforth* is another early ancestor of the Supreme Court *Heller* rule allowing carry prohibition "in sensitive places, such as schools and government buildings."<sup>356</sup>

*State v. Shelby* (Mo. 1886).<sup>357</sup> Shelby was staying at the Palace Hotel in the city of Gallatin when he "took a pistol from his coat pocket, where it was concealed, and laid it upon his lap while seated at the table in the dining-room, and that at the time the defendant was under the influence of intoxicating

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<sup>350</sup> *State v. Wilforth*, 74 Mo. 528 (1881).

<sup>351</sup> Under the 1875 Constitution: "That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons. MO. CONST. art. II, § 17.

The current provision is:

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those duly adjudged mentally infirm by a court of competent jurisdiction.

MO. CONST. art. I, § 23 (1945 Const., 2014 amend.).

<sup>352</sup> *Id.* at 529.

<sup>353</sup> *Id.*

<sup>354</sup> *Wilforth* at 529–30.

<sup>355</sup> *Id.* at 530.

<sup>356</sup> *Heller* at 626-27.

<sup>357</sup> *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886).



drink.”<sup>358</sup> He was convicted for carrying his revolver in violation of 1. The statute against concealed carry, and 2. The statute against carrying a deadly weapon while intoxicated (with an exception for self-defense).

On appeal, the Missouri Supreme Court ruled that “a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution.”<sup>359</sup> However, the concealed carry ban was expressly permitted by the state constitution. The ban on intoxicated carry was valid under the precedent of the school carry ban which had been upheld in *Wilforth*.

The convictions of two separate offenses were nevertheless void. Both crimes were based on “but one carrying...[t]he fact that defendant took the pistol out and laid it upon his lap but furnished the proof of his guilt, and in no just sense can it be said the defendant was guilty of two distinct offenses.”<sup>360</sup> Because the state “could take a verdict of guilty for one offense, but not for both,” the convictions were reversed and remanded.<sup>361</sup>

Bans on using firearms while intoxicated are now common.<sup>362</sup> *Wilforth* may be the first case upholding such a ban.

## I. North Carolina

*State v. Speller* (N.C. 1882).<sup>363</sup> The 1876 constitution’s right to arms section explicitly excluded “the practice of carrying concealed weapons” and expressly authorized the legislature to enact penal laws against them.<sup>364</sup> The legislature did so in 1879.<sup>365</sup>

One Saturday night, L.R. Speller and Jenkins argued. According to Speller, Jenkins attempted to cut Speller with a razor and threatened that he would kill Speller very soon. Jenkins lived a half-mile from Speller. The nearest peace officer lived a mile and half away; the nearest justice, four miles. On Monday, Speller and Jenkins each went to court and swore out warrants against each other. When the officer came to arrest Speller, a search revealed the Speller was carrying a concealed handgun.<sup>366</sup>

At trial, the judge refused to allow Speller to present his side of the story. The North Carolina Supreme Court ruled that the trial court had acted properly. Presuming that Speller’s self-defense story was correct, he could have carried the gun openly. “The right to wear secret weapons is no more essential

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<sup>358</sup> *Id.* at 2 S.W. 469.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 469–70.

<sup>361</sup> *Id.* at 470.

<sup>362</sup> For the modern Missouri law, *see*, MO. STATS. § 571.030.1(5); *Missouri v. Richard*, 298 S.W.3d 529 (Mo. 2009) (upholding statute); *cf.* *People v. Garcia*, 197 Colo. 550, 595 P.2d 228 (1979) (applying a narrowing construction so that the statute only covers “actual or physical control”; it is not illegal to be drunk in the same room where one stores a firearm).

<sup>363</sup> *State v. Speller*, 86 N.C. 697 (1882).

<sup>364</sup> N.C. CONST. art. I, § 24 (1876).

<sup>365</sup> *Speller* at 697.

<sup>366</sup> *Id.* at 697.



to the protection of one man than another, and surely it cannot be supposed that the law intends that an unwary advantage should be taken even of an enemy.”<sup>367</sup>

## J. West Virginia

*State v. Workman* (W.V. 1891).<sup>368</sup> A state statute banned the carrying of handguns, bowie knives, and some other weapons (but not long guns). The statute had several exceptions, including that if

the defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time...he had good cause to believe, and did believe, that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapon for self-defense and for no other purpose, the jury shall find him not guilty.<sup>369</sup>

Erastus Workman, of Boone County, was convicted in a bench trial of violating the carry statute. On appeal, he argued that he was entitled as a matter of law to an acquittal, based upon the statutory language.

At trial, Erastus Workman had presented the testimony of Elsworth Workman, who said that he had heard George Ball threaten to murder Erastus Workman. The witness also said that he had warned Erastus of Ball’s threats. The witness said that George Ball has a well-deserved reputation as “a dangerous man.”<sup>370</sup>

This testimony was buttressed Ester A. Ball, the sister of George Ball, and also his ex-wife. She testified that from the winter of 1888 through the spring of 1889, she had heard George Ball threaten to kill Erastus Workman, and had warned the defendant about the threats. She too considered that “George Ball was a very dangerous man.”<sup>371</sup> Erastus Workman testified that he had been informed about the threats in the Spring of 1889, and had begun carrying a pistol thereafter, “for no other purpose than to defend himself against the said George Ball.”<sup>372</sup>

The November 1891 Supreme Court decision does not specify on what date Erastus Workman had carried the handgun. Whenever it was, it was too long for the Supreme Court to consider the self-defense exception applicable. He

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<sup>367</sup> *Id.* at 700.

<sup>368</sup> *State v. Workman*, 35 W.Va. 367, 14 S.E. 9 (1891). For a history of the arms right in West Virginia, see Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W.V. L. REV. 1 (1993).

<sup>369</sup> *Workman*, 14 S.E. at 9.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 10.

<sup>372</sup> *Id.*

had not gone to the authorities for help, and this negated his claim to be carrying “in good faith...for self-defense and for no other purpose.”<sup>373</sup>

*Workman* used the civilized warfare test, stating it with unusual narrowness—the first court to include no handguns on the protected side. The right was for “swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty” and not for “pistols, bowie-knife, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes.”<sup>374</sup>

The civilized warfare test for which arms are protected by the Second Amendment, which was invented by *Aymette*, and later employed by *Andrews*, *Hill*, *English*, and *Workman*, is obviously no longer valid; *Heller* is very clear that the individual right to keep and bear arms does not require any militia or military nexus for either the individual or the arm. Nevertheless, two courts, in defiance of *Heller*, have upheld arms bans partly on the basis that the arm in question is not a militia arm. The Massachusetts Supreme Judicial Court did so in *Commonwealth v. Caetano* for electric stun guns, citing the aforesaid state cases.<sup>375</sup>

Judge Easterbrook of the Seventh Circuit ignored *Heller* and Seventh Circuit precedent to uphold a ban on “assault weapons” and “large” magazines (over ten rounds).<sup>376</sup> The case involved a municipal ban, and during oral argument, the plaintiffs agreed that the ban would be equally unconstitutional if it had been passed by the state.<sup>377</sup> According to Chief Judge Easterbrook, “states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty.”<sup>378</sup> Thus, state gun prohibitions are fine, because states are in charge of what arms the militia will have.

This contradicts the constitutional text. The Constitution grants Congress, not the States, the power “To provide for organizing, *arming*, and disciplining the Militia,” while “reserving to the States” the appointment of officers and training.<sup>379</sup> Accordingly, Congress, and not state legislatures or city councils, is the source for what constitute militia arms. If the *Highland Park* militia test were to be applied by its own terms, then because Congress has not banned “assault weapons” or magazines, they are necessarily militia arms.

*Caetano* and *Highland Park* fit well with several of the post-war cases, in that they remind us that some judges wish that there were no right to arms, and they will do what they can to make their wish a reality.

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<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Commonwealth v. Caetano*, 470 Mass. 774, 779, 26 N.E.3d 688, 693 (2015).

<sup>376</sup> *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015).

<sup>377</sup> *Id.* at 410–11.

<sup>378</sup> *Id.* at 410.

<sup>379</sup> U.S. CONST. art. I, §8 cl. 16 (emphasis added).

## K. Illinois and Lyman Trumbull

Before becoming a U.S. Senator from Illinois, Lyman Trumbull had been the state's leading anti-slavery lawyer.<sup>380</sup> In 1873 he returned to Illinois, practicing and teaching law in Chicago. While in the Senate, he had also often appeared as a lawyer before the Supreme Court, and he continued to build a Supreme Court practice after he returned to Illinois.

According to his friend Clarence Darrow, Trumbull's lifelong cause was "a fair chance" for "the poor who toil for a living in this world."<sup>381</sup> In Chicago, that would include immigrant laborers, whose right to assemble, protest, and strike was sometimes violently suppressed.

Workingmen's organizations such as German immigrant *Lehr und Wehr Verein* organized community sporting activities—and also trained with arms, for the expressed goal of protecting workers from violence.<sup>382</sup> The training, drilling, and parading of such groups were outlawed by the 1879 Militia Act; the activities were only allowed if the Governor granted a special permit, and he had complete discretion to refuse.<sup>383</sup>

### 1. *Illinois v. Bielfeld*

Because the new law was so controversial, the Governor agreed that there should be a test case. In *Illinois v. Bielfeld*, the Cook County Circuit Court declared that the new law violated the Second Amendment. The Circuit Court's panel opinion was the longest exposition of the Second Amendment yet written by an American court. The *Chicago Tribune* reprinted the entire decision.<sup>384</sup> The Circuit Court analyzed the issue along of the lines of the antebellum Georgia and Louisiana courts: concealed carry could be banned, but not the open parade and drill of *Lehr und Wehr Verein*. The right to practice with arms included the right to practice in a group.

But unfortunately for the challengers, *Bielfeld* had procedural problems which made it impossible for Illinois (the losing party in the trial court) to appeal to the Illinois Supreme Court, for a definitive ruling. For the next case, Lyman Trumbull would be the lead attorney.

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<sup>380</sup> See David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOYOLA U. CHI. L.J. (issue 4, forthcoming 2016), <http://ssrn.com/abstract=2564819>.

<sup>381</sup> CHI. TIMES, June 26, 1896, HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 425–26 (Boston: Houghton Mifflin, 1913).

<sup>382</sup> Stephen P. Halbrook, *The Right Of Workers To Assemble And To Bear Arms: Presser v. Illinois, One of the Last Holdouts against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943 (1999). This article is the best history of Illinois cases.

<sup>383</sup> An act to provide for the organization of the State militia, BRADWELL, LAWS OF ILLINOIS (1879), 149 (May 28, 1879) [hereinafter Militia Act].

<sup>384</sup> *Militia Law*, CHI. TRIB., Sept. 2, 1879, at 6.

## 2. *Dunne v. Illinois*

The formal basis of the second case was that the new law exempted Illinois National Guard officers from jury duty. Dunne, an Illinois officer, claimed the exemption when summoned for a jury; he refused to serve, so the trial judge held him in contempt, and fined Dunne \$50. The Illinois Supreme Court agreed that on appeal it would consider all aspects of the Militia Act.<sup>385</sup>

By a 6-1 vote, the Court upheld the Militia Act.<sup>386</sup> Most of the Court's opinion was devoted to whether it was preempted by federal militia law. This raised the complicated question of whether Congress's enumerated powers over the militia (in Article I, § 8, clauses 15–16) were exclusive of state power, or whether concurrent state power could exist. The leading Supreme Court case on the subject was *Houston v. Moore* (1814), and it was not a model of clarity.<sup>387</sup> The Illinois Court decided that federal law still left room for Illinois to re-organize its militia.

Illinois at the time had no express right to arms guarantee. Like *Bielfield*, the *Dunne* Court took it for granted that the right to arms was a limitation on all American governments, and that it included personal defense. But the Court scoffed at the idea that *Lehr und Wehr Verein's* mass activities had anything to do with the right. "The right of the citizen to 'bear arms' for the defence of his person and property is not involved, even remotely, in this discussion."<sup>388</sup>

## 3. *Presser v. Illinois*

In apparent abundance of caution, Trumbull had brought another test case.<sup>389</sup> This one involved *Lehr und Wehr Verein* officer Hermann Presser. Carrying a sword, he had led a Labor Day parade of men carrying unloaded rifles.<sup>390</sup> After being convicted of having led an armed parade without a permit, he was fined ten dollars, and appealed to the Illinois Supreme Court. For procedural reasons, the case lingered there for years.<sup>391</sup> Finally, it was affirmed by an unpublished and terse *per curiam* opinion which just cited *Dunne*.<sup>392</sup> But *Presser* was the case that the U.S. Supreme Court decided to hear.

The Court refused to consider the federal militia law preemption issues, since they were irrelevant to the charge on which Presser had been convicted, "even if the other sections of the act were invalid."<sup>393</sup>

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<sup>385</sup> *Dunne v. Illinois*, 94 Ill. 120 (1879).

<sup>386</sup> *Dunne* at 140–41.

<sup>387</sup> *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820)

<sup>388</sup> *Dunne*, 94 Ill. at 140.

<sup>389</sup> *Presser v. Illinois*, 116 U.S. 252 (1886).

<sup>390</sup> Halbrook at .

<sup>391</sup> *Id.* at.

<sup>392</sup> *Id.* at.

<sup>393</sup> *Presser*, 116 U.S. at 261–63.

On the Second Amendment, Trumbull's brief argued that the Amendment was collective as well as individual. Requiring the Governor's consent for "drilling, officering, organizing" was absurd, for this was "the consent, of the very man, against whose usurpation of powers, their organization and arming may, perhaps be directed, and lawfully so."<sup>394</sup>

The Illinois Attorney General answered: "the right to keep and bear arms by no means includes the right to assemble and publicly parade in the manner forbidden by the law under which the conviction in this case was had."<sup>395</sup>

The Supreme Court agreed with the Attorney General: the Illinois provisions "which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms."<sup>396</sup> Besides that, the "conclusive answer" was Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the state."<sup>397</sup> As for the Privileges or Immunities claim, "The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of congress or law of the state authorizing the same, is not an attribute of national citizenship."<sup>398</sup>

Whatever *Cruikshank* had meant, outside the South it apparently had not been uniformly construed by the public as shielding states from having to obey the Second Amendment. As a leading member of the Supreme Court bar, Trumbull would be unlikely spend his time on hopeless cases. *Presser* got the message across. An article summarizing *Presser* in the *Central Law Journal* concluded that "It will no doubt be news to most people, not members of the legal profession, and to many who are," that the Second Amendment offered no protection from state anti-gun laws.<sup>399</sup>

In an era fraught with urban riots and immigrant labor unrest, the Supreme Court was disinclined to protect large assemblies which might have revolutionary ideas.<sup>400</sup> *Heller* does acknowledge that one purpose of the Second

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<sup>394</sup> Petitioner's Brief at 18, quoted in Halbrook, *Right of Workers*.

<sup>395</sup> Respondent's Brief at 8, in Halbrook.

<sup>396</sup> *Presser* at 264–65.

<sup>397</sup> *Id.* at 265. The Court cited *Cruikshank*, *Barron v. Baltimore*, *Newsom*, *Andews*, and *Fife*, as well as some cases not involving the Second Amendment. *Id.*

<sup>398</sup> *Id.* at 267

<sup>399</sup> *Constitutional Law--Militia--Right to Bear Arms*, 22 CENT. L.J. 411, 412–13 (1886). The *Central Law Journal* was a weekly legal newspaper, first published in 1874, and continuing until 1827. It concentrated on the U.S. Supreme Court and the Mississippi Valley. 1 CENT. L.J. 1 (Jan. 1, 1874). The publishers were John F. Dillon and Seymour D. Thompson. Dillon was a former Justice of the Iowa Supreme Court and (as of 1874), a Judge of the Eighth Circuit. Both were authors of influential treatises.

<sup>400</sup> Although the parade at issue, and *Lehr und Wehr Verein* in general had been peaceful, the Court warned that a ruling in favor of *Presser* would "deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine." *Presser* at 267.

Amendment is that “when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”<sup>401</sup> Yet *Heller* is more about personal defense than anything else. “[T]he right of law-abiding, responsible citizens to use arms in defense of hearth and home” is the core of the core of the *Heller* right.<sup>402</sup>

## Conclusion

As right to arms jurisprudence develops in the post-*Heller* era, the nineteenth century cases have attracted newfound interest. A look at the Westlaw “Citing References” finds that most of them have been cited several times, sometimes often, in judicial opinions and in appellate briefs. With a few exceptions such as *Nunn*, *Aymette*, and *Andrews*, most of them were obscure in the century before *Heller*. In the first century of Second Amendment cases, we can see some of the emerging contours of the Second Amendment as it is understood today: a right to own and carry handguns and other firearms for self-defense and other legitimate purposes—but not an unlimited right. There may be regulation of the manner of carry (open vs. concealed); carrying may be prohibited in sensitive places, such as courthouses and schools. Restrictions on giving handguns to unsupervised minors are not novel. Intoxicated use may be forbidden.

The jurisprudence of the nineteenth century, especially in the latter cases from Tennessee and Arkansas, also offers a negative example, which resulted in the evisceration of Second Amendment rights. By 1891, citizens of those states were greatly restricted in the choice of handguns they could purchase, and were disabled from carrying those handguns, in any reasonable manner, for self-defense outside their premises (except when on a journey). The first of the judicial sequence of errors was defining the right to arms narrowly, as only encompassing a few of the right’s purposes (militia, or resistance to tyranny). The next error was reliance on incorrect judicial intuition rather than fact-finding to assert that certain arms (such as bowie knives) were not useful for the narrow purposes.

Some courts, such as Georgia’s, were able to uphold bans on concealed carry without that ban leading to a slippery slope of arms prohibition. Yet in other states, the ban on concealed carry led to ban on the sale of concealable handguns—thus depriving citizens of the handguns which might be the best choice (ergonomically or economically) for those citizens when defending hearth and home. The sensible notion that the manner of carrying may be regulated (open vs. concealed) was perverted by a purported “manner” regulation (“in the hand”) which amounted to “destruction of the right.” Eventually, prohibition becomes a categorical imperative, detached from common sense, common law, and constitutional right—so a gunsmith was

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<sup>401</sup> *Heller* at 598.

<sup>402</sup> *Id.* at 635.

criminally convicted for having delivered a repaired handgun to a sheriff. In retrospect, the Kentucky Supreme Court's decision not to start going down the slippery slope (*Bliss*, 1822, rejecting a ban on sword canes) helped prevent Kentucky from falling to the anti-constitutional depths of some other southern states.

Another lesson we can draw from the nineteenth century is that restrictive rules from the era may be abandoned if they no longer make sense. While the overwhelming majority of states in the nineteenth century did not prohibit any type of firearm, the states which did impose bans used the "civilized warfare" test. Although the test may not be clear at the margins, it was reasonably clear at the core, protecting the types of long guns and handguns typically carried by ordinary soldiers and their officers. But by the time *Heller* was decided, that test would have protected rifles that the public overwhelmingly did not want (such as the M-16 rifle) and would have greatly constricted the variety of handguns that the public did want. ("Civilized warfare" would protect the current military handgun, the Beretta 92, predecessors such as the Colt 1911, and similar guns from other manufacturers.) So the *Heller* Court wisely chose a broader reading of the Second Amendment right, not founded exclusively on whether a firearm is used by the military.

A similar reconsideration is due for concealed carry. While "civilized warfare" was the model only in a minority of especially restrictive states, concealed carry bans were widespread, and by 1891, they could be found in many states. Yet while the nineteenth century extolled open carry and feared concealed carry, social norms in the twenty-first century are different. All but a handful of states have fair, objective laws for issuing concealed carry licenses. Overwhelmingly, the manner in which Americans exercise their right to bear arms for lawful defense in public places today is by concealed carry, not open carry. While *Heller's* description of the nineteenth century concealed carry cases was accurate, modern jurisprudence can recognize that on this subject, modern Americans have developed a more expansive vision of the right than the vision that their ancestors held in 1891. Indeed, the modern view of the legitimacy of concealed carry is closer to the original vision of 1791 than is the anti-concealment theory of the nineteenth century.

The nineteenth century cases on concealed carry can still play a modern role, by demonstrating the legitimacy of regulations for concealed carry licenses that many persons would consider inappropriate for mere possession of a firearm on one's own property. These include biometric fingerprint-based background checks, an application process that can take weeks or months, mandatory safety training, and bounded discretion for a Sheriff or similar official to veto or revoke a concealed carry permit, based on particular facts about the individual.

Some people today think that the political battles over gun control have always been drawn on the same sectional lines. Yet during the latter nineteenth century, it was the Southern legislatures which were the most

ardent for gun control, while New York, Connecticut, and most of the rest of the country were not. Now, the roles are reversed, with New York City as the epicenter of gun prohibition advocacy, while Tennessee, Arkansas, and most Southern states have “F” ratings from the Brady Campaign.<sup>403</sup> The historical variability of local enthusiasm for infringement on Second Amendment rights is one reason to reject special pleading to exempt various localities from compliance with the ordinary Second Amendment.<sup>404</sup>

The South eventually redeemed itself from Jim Crow gun control.<sup>405</sup> Today, citizens of those states can, like Americans in most other states, choose from among the full range of handguns, not just the Army/Navy models. They can carry handguns, after going through a fair licensing system which respects the right of defensive carry.

As in the nineteenth century, judicial willingness to enforce the right to arms varies. The Jim Crow period offers precedents for modern judges who favor infringement or even elimination of Second Amendment rights. The better precedents from the nineteenth century are those favored by *Heller* and *McDonald*. They are consistent with the American tradition of ordered liberty, and of recognition that the Second Amendment is just as fundamental and deserving of judicial protection as the rest of the Bill of Rights.<sup>406</sup>

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<sup>403</sup> Brady Campaign, 2013 State Scorecard, <http://www.bradiycampaign.org/sites/default/files/SCGLM-Final10-spreads-points.pdf>.

Twenty-seven states received a Brady “F.” *Id.*

<sup>404</sup> See Ruben & Cornell, *supra* (asserting that urban areas should be allowed to prohibit exercise of the right to bear arms).

<sup>405</sup> When ex-Confederate states threw off Reconstruction, and imposed white supremacy via Jim Crow laws, the phrase at the time was that the state had been “redeemed.” Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to be Applied to the White Population*”: *Firearms Regulation and Racial Disparity--The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995). Today, the better understanding is the Jim Crow laws were un-American, and that true redemption involved the South’s rejection of the racist past.

<sup>406</sup> The Second Amendment is not “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees...” *McDonald* at 780.