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## THE COMMON LAW AND THE RIGHT OF THE PEOPLE TO BEAR ARMS: CARRYING FIREARMS AT THE FOUNDING AND IN THE EARLY REPUBLIC

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I. INTRODUCTION

To what extent does “the right of the people to . . . bear Arms, shall not be infringed” as guaranteed by the Second Amendment protect the liberty to carry firearms outside the home for self-defense or other lawful purposes?<sup>1</sup> While most states recognize a right to do so, either with or without a license and subject to place restrictions, some states grant discretion to a law enforcement agency to decide whether a specific person “needs” or has “good cause” to carry a firearm and restricts licenses to such persons. These discretionary licensing schemes have become a major issue in Second Amendment litigation, with some circuits upholding such laws<sup>2</sup> and others invalidating them.<sup>3</sup>

The Supreme Court has not decided the specific issue, but essential to its interpretation of the Amendment in *District of Columbia v. Heller* is the following: “At the time of the

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<sup>1</sup> “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

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

<sup>3</sup> *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933 (7<sup>th</sup> Cir. 2012); *Young v. Hawaii*, 896 F.3d 1044 (9<sup>th</sup> Cir. 2018), *reh. en banc granted*, 915 F.3d 681 (9<sup>th</sup> Cir. 2019).

founding, as now, to ‘bear’ meant to ‘carry.’”<sup>4</sup> More specifically, to bear arms means to “‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’”<sup>5</sup> Preservation of the militia was the Amendment’s stated purpose, but most Americans valued the ancient right more for self-defense and hunting.<sup>6</sup>

While the Amendment guarantees “the individual right to possess and carry weapons in case of confrontation,”<sup>7</sup> history and tradition do not support “a right to keep and carry any weapon whatsoever in any manner whatsoever,” and longstanding prohibitions such as carrying firearms in sensitive places like schools are not in question.<sup>8</sup> Nor may the right be exercised in a manner as to terrify others.<sup>9</sup>

*Heller* declared the District of Columbia’s ban on the possession of handguns violative of the Second Amendment. Recalling nineteenth century state court decisions that declared bans on the open carrying of handguns unconstitutional, the Court noted: “Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”<sup>10</sup>

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

<sup>5</sup> *Id.* (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

<sup>6</sup> *Id.* at 598-99.

<sup>7</sup> *Id.* at 592.

<sup>8</sup> *Id.* at 625-26.

<sup>9</sup> *Id.* at 588 n.10.

<sup>10</sup> *Id.* at 629 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. 165, 187 (1871); *State v. Reid*, 1 Ala. 612, 616-17 (1840)).

*Heller* was followed by *McDonald v. City of Chicago*, which reiterated that “individual self-defense is ‘the central component’ of the Second Amendment right.”<sup>11</sup> *McDonald* held that the Second Amendment applies to the States through the Fourteenth Amendment and invalidated Chicago’s handgun ban.<sup>12</sup> In *Caetano v. Massachusetts*, the Supreme Court reversed a Massachusetts decision upholding that state’s stun gun ban.<sup>13</sup> Since the defendant had been caught with the stun gun in a parking lot,<sup>14</sup> the Court assumed that the Second Amendment protects the right to bear arms in non-sensitive, public places.

The Court has granted a petition for a writ of certiorari in a Second Amendment challenge to a New York City rule providing that a person with a license to keep a handgun at one’s dwelling may not take it out of the premises other than to a licensed shooting range within the City.<sup>15</sup> The plaintiffs wish to transport their handguns outside the City to second homes or to shooting ranges and competitions.<sup>16</sup> In upholding the rule, the lower court relied on a declaration by a police official that allowing licensees to transport handguns to second homes or to competitions was “a potential threat to public safety.”<sup>17</sup>

However, to date the Court has not granted certiorari in any of the circuit decisions upholding discretionary carry license laws. Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari in a Ninth Circuit decision that the Second Amendment fails to protect the right of a member of the general public to carry a concealed weapon in public, but declining to decide whether open carry is protected.<sup>18</sup> Justice Thomas wrote that the Court “has already suggested that the Second Amendment protects the right to carry firearms in public in some fashion,” and that the denial

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<sup>11</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

<sup>12</sup> *Id.* at 791.

<sup>13</sup> *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*).

<sup>14</sup> *Id.* at 1029 (Alito, J., concurring).

<sup>15</sup> *New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45 (2nd Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

<sup>16</sup> *Id.* at 52.

<sup>17</sup> *Id.* at 63.

<sup>18</sup> *Peruta v. County of San Diego*, 824 F.3d 919, 924, 927 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017).

of certiorari “reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”<sup>19</sup>

While the lower court cases involve various issues about the text of the Amendment, judicial precedents, standards of review, and criminal statistics, a major bone of contention has involved the legacy of the common law at the American Founding and the early Republic. A virtual cottage industry has arisen in which certain historians argue that current restrictions are consistent with the common law history, attorneys supporting the restrictions on behalf of defendants and their amici rely on such historical writings in their briefs, and courts sift through and use or reject the arguments in either upholding or invalidating the restrictions.<sup>20</sup>

Opponents of recognizing that the Second Amendment protects the right of “the people” to “bear arms” seem obsessed with Edward III’s Statute of Northampton of 1328, which provided that no person shall “come before the King’s Justices . . . with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere . . . .”<sup>21</sup>

From some of the current literature, one would think that this monarchical decree, written three-quarters of a century before Chaucer’s *Canterbury Tales*, supersedes the explicit language of the Second Amendment recognizing “the right to bear arms.”<sup>22</sup> Moreover, as William Hawkins clarified, “no

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<sup>19</sup> *Peruta*, 137 S. Ct. at 1198-99 (Thomas, J., dissenting from denial of cert.).

<sup>20</sup> See, e.g., *Peruta*, 824 F.3d at 939 (citing Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 7-36 (2012)); *Young*, 896 F.3d at 1077 (Clifton, J., dissenting) (citing Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry*, 125 YALE L.J. F. 121, 125 (2015)). But see *Wrenn v. District of Columbia*, 864 F.3d 650, 660-61 (D.C. Cir. 2017) (“we can sidestep the historical debate on how the first Northampton law might have hindered Londoners in the Middle Ages. Common-law rights developed over time . . .”).

<sup>21</sup> 2 Edw. III, c. 3 (1328).

<sup>22</sup> “What does the Statute of Northampton provide us in terms of evaluating the protective scope of the Second Amendment outside the home? The answer is armed individual self-defense outside the

wearing of arms is within the meaning of the statute unless it be accompanied with such circumstances as are apt to terrify the people . . . .”<sup>23</sup> Yet the beating of the dead horse continues unabated.

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

The following seeks to conduct a reality check regarding this history and how it is being read and used. The American experience combines bills of rights declaring the right to bear arms together with common law restrictions against being armed to terrorize others, requirements to find sureties to keep the peace if armed and threatening to others, prohibitions on carrying concealed weapons, and—as applied only to slaves and persons of color—bans on keeping or bearing firearms at all, or in some cases the discretionary issuance of limited licenses. Other than that, the peaceable bearing of arms was not a crime at the Founding or in the early Republic.

#### A. THE COLONIAL PERIOD

Most of the American colonies required able-bodied males to provide their own arms and participate in the militia, and at times required persons to carry arms to church. Carrying arms openly or concealed in a peaceable manner was not, generally speaking, prohibited. The main exception was that some colonies prohibited slaves from keeping or carrying firearms.<sup>24</sup>

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home deserves only minimalist protection or categorical exclusion.” Charles, *supra* note 20, at 43.

<sup>23</sup> 1 HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 28, § 9 (8<sup>th</sup> ed. 1824).

<sup>24</sup> See generally S. Halbrook, A RIGHT TO BEAR ARMS (1989).

A New Jersey colonial law stands out as being one of a kind that was not found anywhere else. In 1686, the colony enacted a law providing that no person “shall presume privately to wear any pocket pistol . . . or other unusual or unlawful weapons” – which did not affect open carry – and that “no planter shall ride or go armed with sword, pistol, or dagger . . . excepting . . . all strangers, traveling upon their lawful occasions thro’ this Province, behaving themselves peaceably.”<sup>25</sup> It is unclear why the latter provision was limited to planters.

It was also unclear whether to ride or go armed implied an element of doing so offensively,<sup>26</sup> as was explicit in the laws of other colonies. A 1694 Massachusetts law punished “such as shall ride or go armed Offensively . . . in Fear or Affray of Their Majesties Liege People,”<sup>27</sup> and a 1699 New Hampshire law instructed justices of the peace to arrest “affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed offensively . . . .”<sup>28</sup>

The Glorious Revolution of 1689 overthrew James II, who had disarmed the Protestants, and resulted in the enactment of the Declaration of Rights, which provided: “That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law.”<sup>29</sup> That led to overthrow or reform of the royal governments in some of the American colonies.<sup>30</sup> It is unclear

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<sup>25</sup> N.J. LAWS 289, ch. 9 (1686). Patrick Charles calls this “the earliest American statute prohibiting ‘going armed,’” but it was unlike any other statute. Charles, *supra* note 20, at 32.

<sup>26</sup> In a 1682 directive, New Jersey constables pledged “to arrest all such persons, as in [their] presence, shall ride or go arm’d offensively.” A BILL FOR THE OFFICE OF CORONER AND CONSTABLE, ch. 18 (Mar. 1, 1682), quoted in Ruben & Cornell, *supra* note 20, at 130 n.50.

<sup>27</sup> MASS. ACTS 10, no. 6 (1694).

<sup>28</sup> N.H. LAWS 1 (1699).

<sup>29</sup> AN ACT DECLARING THE RIGHTS AND LIBERTIES OF THE SUBJECT, 1 W. & M., Sess. 2, c.2, (1689).

<sup>30</sup> “The rule of James II hung as heavy over colonists in America as it did the people of England in 1688. . . . His arbitrary government, the colonists believed, was reflected everywhere; in Andros’ regime over all of New England, New York, and New Jersey . . . .” DAVID S. LOVEJOY, *THE GLORIOUS REVOLUTION IN AMERICA* 235 (1972).

how long New Jersey's 1686 law remained on the books, but it passed into oblivion.

Whatever restrictive firearm law found its way into the books hardly amounts to a long-standing regulation with relevance to the Second Amendment. Another New Jersey law, which passed in 1694, recited that "complaint is made by the inhabitants of this Province, that they are greatly injured by slaves having liberty to carry guns and dogs, into the woods and plantations, under pretence of guning, to kill swine." It thus provided that "no slave or slaves . . . be permitted to carry any gun or pistol, or take any dog with him or them into the woods, or plantations, upon any pretence whatsoever; unless his or their owner or owners, or a white man, by the order of his or their owner or owners, be with the said slave or slaves . . ." <sup>31</sup>

Further, a 1722 New Jersey law provided that any "Indian, Negro or Mullato Slave . . . carrying or Hunting with any Gun, without License from his Master, shall, at the Publick Whipping post, on the bare Back, be Whipt, not exceeding twenty Lashes . . ." <sup>32</sup> That restriction may have been loosened later, as a 1798 law mandated whipping only for "any Negro [who] . . . shall be seen to hunt or carry a gun on the first day of the week . . ." <sup>33</sup>

New Jersey had no restrictions on the peaceable carrying of arms by whites in the eighteenth century. New Jersey's code with statutes passed between 1702-1776 reflected only a prohibition on shooting matches for gambling.<sup>34</sup> A 1776 law defined the militia as "all effective Men between the Ages

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<sup>31</sup> An Act concerning Slaves, &c., § 1, East New Jersey Laws, October 1694, ch.II, L&S 340-342, available at <http://njlegallib.rutgers.edu/slavery/acts/A8.html>.

<sup>32</sup> An Act to prevent the Killing of Deer out of Season, and against Carrying of Guns and Hunting by Persons not qualified, § 6, 2 Bush 293, 295 (May 5, 1722), available at <http://njlegallib.rutgers.edu/slavery/acts/A15.html>.

<sup>33</sup> An Act respecting Slaves. March 14, 1798, Acts 22nd G.A. 2nd sitting, ch. DCCXXVII, p. 364-373, available at <http://njlegallib.rutgers.edu/slavery/acts/A75.html#s9>.

<sup>34</sup> *Acts of the General Assembly of the Province of New Jersey* 235 (Burlington 1776). The code published in 1800 contained certain hunting regulations and a prohibition on setting a loaded gun. *Laws of the State of New Jersey* 19-21 (1800).



of sixteen and fifty Years,” and required each member to “constantly keep himself furnished with a good Musket . . . [or] a good Rifle-Gun,” or if a horseman, “a Pair of Pistols and Holsters.”<sup>35</sup>

In fact, New Jersey did not require a permit to carry a concealed firearm until 1905.<sup>36</sup> Open carry was perfectly legal until 1966, when a permit requirement was imposed.<sup>37</sup> Thus, in its entire history as a state until 1966, New Jersey allowed law-abiding citizens to carry firearms in some manner without being authorized to do so by the state.<sup>38</sup> This exemplifies that, in America’s history and tradition, the right to bear arms has been the norm.

#### B. CONSTITUTIONAL DECLARATIONS OF THE RIGHT TO BEAR ARMS AND COMMENTARIES ON CARRYING ARMS PEACEABLY

When the colonies declared themselves independent states, they adopted their own constitutions, several of which included declarations of rights. Of those, Pennsylvania and Vermont declared: “That the people have a right to bear arms for the defense of themselves, and the state . . . .”<sup>39</sup> North Carolina declared: “That the People have a right to bear Arms for the Defense of the State . . . .”<sup>40</sup> And Massachusetts declared: “The people have a right to keep and bear arms for the common defence.”<sup>41</sup>

When the federal Constitution was proposed in 1787 without a bill of rights, demands were made for a declaration. In the Massachusetts ratification convention, Samuel Adams proposed “that the said Constitution be never construed to authorize Congress, . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own

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<sup>35</sup> *Acts of the Council and General Assembly of the State of New Jersey* 168-69, 180 (Burlington 1776).

<sup>36</sup> *Compiled Statutes of New Jersey*, Vol. II. 1759 (Soney & Sage 1911).

<sup>37</sup> N.J. STAT. ANN. § 2A:151-41 (1966).

<sup>38</sup> See *Drake v. Filko*, 724 F.3d 426, 447-49 (3rd Cir. 2013) (Hardiman, J., dissenting), *cert. denied*, 572 U.S. 1100 (2014).

<sup>39</sup> PA. DEC. OF RIGHTS, art. XIII (1776); VT. CONST., art. I, § 15 (1777).

<sup>40</sup> N.C. DEC. OF RIGHTS, art. XVII (1776).

<sup>41</sup> MASS. DEC. OF RIGHTS, art. XVII (1780).

arms . . . .”<sup>42</sup> In the Pennsylvania convention, the Dissent of the Minority proposed a bill of rights, including: “That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .”<sup>43</sup> The New Hampshire convention resolved: “Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.”<sup>44</sup>

In the Virginia convention, George Mason recalled that “when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised . . . to disarm the people; that it was the best and most effectual way to enslave them.”<sup>45</sup> And Patrick Henry implored: “The great object is, that every man be armed.”<sup>46</sup> The ensuing debate concerned defense against tyranny and invasion.

The Virginia convention proposed a bill of rights asserting “the essential and unalienable rights of the people,” including: “That the people have a right to keep and bear arms . . . .”<sup>47</sup> In identical language, New York,<sup>48</sup> North Carolina,<sup>49</sup> and Rhode Island<sup>50</sup> joined in the demand for what became the

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<sup>42</sup> *Documentary History of the Ratification of the Constitution*, John P. Kaminski and Gaspare J. Saladino eds. (Madison: State Historical Society of Wisconsin, 2000), vol. 6, at 1453.

<sup>43</sup> *Documentary History of the Ratification of the Constitution*, vol. 2 at 623-24 (Merrill Jensen ed.) (1976) (Madison: State Historical Society of Wisconsin, 1976).

<sup>44</sup> *Documentary History of the Ratification of the Constitution*, vol. 18 at 188 (John P. Kaminski and Gaspare J. Saladino eds.) (1995) (Madison: State Historical Society of Wisconsin, 1995).

<sup>45</sup> *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 3 at 380 (Jonathon Elliot ed.) (1836) (Philadelphia: J.B. Lippincott, 1836).

<sup>46</sup> *Id.* at 386.

<sup>47</sup> *Id.* at 658-59.

<sup>48</sup> *The Documentary History of the Ratification of the Constitution*, *supra* note 44, at 298.

<sup>49</sup> *Id.* at 316.

<sup>50</sup> *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, *supra* note 45, at 335.

Second Amendment. The right to bear arms had universal support.

An argument has been made that the Second Amendment was adopted to protect slavery.<sup>51</sup> Not only is there no direct evidence of this, but as indicated above, the Northern states led the effort to guarantee the right to bear arms, and the recent attempt by the British to disarm the Americans was the focus in the critical debates in the Virginia convention. The defect in the early American polity was that, because of slavery, the liberties in the Bill of Rights did not extend to all Americans.

James Madison drafted what became the Bill of Rights. In notes he prepared for introducing the amendments to the House of Representatives in 1789, Madison averred that “[t]hey relate 1<sup>st</sup> to private rights,” and observed a fallacy “as to English Decl[aratio]n. of Rights - 1. mere act of parl[iamen]t. 2. no freedom of press - . . . arms to protest[an]ts.”<sup>52</sup> By contrast, in America, rights would be protected by the Constitution and not be subject to repeal by the legislature, and these rights would be expanded to recognize the press and not to limit the right to arms to Protestants.

Madison introduced his draft to the House on June 8, 1789. It included the provision: “The right of the people to keep and bear arms shall not be infringed . . . .”<sup>53</sup> While several states had proposed simply “that the people have a right to keep and bear arms,” Madison inserted the stronger guard that this right “shall not be infringed.”

Similarly, in 1790, the Pennsylvania Declaration of Rights was revised to provide: “That the right of the citizens to bear arms in defense of themselves and the state shall not be questioned.”<sup>54</sup> James Wilson, a Justice on the U.S. Supreme

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<sup>51</sup> Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

<sup>52</sup> 12 THE PAPERS OF JAMES MADISON (Charles F. Hobson *et al.* eds., The Univ. Press of Virginia 1979).

<sup>53</sup> 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, at 10 (Charlene Bangs Bickford ed., John Hopkins Univ. Press 1986).

<sup>54</sup> Pa. Dec. of Rights, art. XXI (1790); THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790 305 (Harrisburg, Pa., John S. Wiestling, 1825).

Court, presided over the convention and was a member of the committee that drafted it.<sup>55</sup>

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

This law, however, is expressly recognised in the constitution of Pennsylvania. “The right of the citizens to bear arms in the defence of themselves shall not be questioned.” This is one of our many renewals of the Saxon regulations. “They were bound,” says Mr. Selden, “to keep arms for the preservation of the kingdom, and of their own persons.”<sup>56</sup>

Just before the above passage, Wilson copied the following from William Hawkins: “In some cases, there may be affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.”<sup>57</sup> Ignoring the phrase “in such manner,” Patrick Charles asserts that passages like this show that “the carrying of dangerous weapons in the public concourse – without the license of government – is what placed the people in great fear or terror . . . .”<sup>58</sup> That further disregards the Pennsylvania’s explicit declaration of “the right of the citizens to bear arms in defense of themselves . . . .”

St. George Tucker’s 1801 edition of Blackstone’s *Commentaries* contrasted the Second Amendment from the English Declaration of Rights as follows: “The right of the

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<sup>55</sup> THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790 153-54 (Harrisburg, Pa., John S. Wiestling, 1825).

<sup>56</sup> 2 THE WORKS OF JAMES WILSON 657 (Harvard Univ. Press 1967) (quoting Nathaniel Bacon, AN HISTORICAL AND POLITICAL DISCOURSE OF THE LAWS AND GOVERNMENT OF ENGLAND. 1 COLLECTED FROM SOME MANUSCRIPT NOTES OF JOHN SELDEN, ESQ. 40 (London: D. Browne & A. Millar) (1760)).

<sup>57</sup> *Id.* at 654 (citing 1 Hawkins, *A Treatise of the Pleas of the Crown*, 135).

<sup>58</sup> Patrick J. Charles, *The Statute of Northampton by the Late Eighteenth Century: Clarifying the Intellectual Legacy*, 41 *FORDHAM URB. L.J.* 10, 21 (2013).

people to keep and bear arms shall not be infringed . . . and this without any qualification as to their condition or degree, as is the case in the British government . . . .”<sup>59</sup> Tucker called this right “the true palladium of liberty,” adding that “[t]he right of self defence is the first law of nature” and that wherever the right to bear arms is prohibited, “liberty, if not already annihilated, is on the brink of destruction.”<sup>60</sup>

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

But ought that circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.<sup>61</sup>

In support of his argument that the Second Amendment guarantees no right of a citizen to carry firearms for self-defense, Saul Cornell argues that Tucker was referring only to militiamen carrying military arms, excluding pistols, and that the practice was limited to Virginia.<sup>62</sup> But Tucker referred simply to a man leaving his house “on any occasion” with a firearm, contrasting him with a European gentleman carrying a sword, neither without any military context. Nor did Tucker’s statement conflict with the views of any other American jurist.

Kentucky’s Constitution of 1792 declared “that the right of the citizens to bear arms in defence of themselves and

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<sup>59</sup> 1 St. George Tucker, BLACKSTONE’S COMMENTARIES, at \*143 n.40 (Philadelphia: William Young Birch & Abraham Small) (1803).

<sup>60</sup> *Id.*, app., at 300.

<sup>61</sup> *Id.*, vol. 5, at 19.

<sup>62</sup> Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1710-11 (2012).

the state shall not be questioned.”<sup>63</sup> A treatise by Charles Humphreys entitled *Compendium of the Common Law in Force in Kentucky* analyzed Blackstone and sought to determine what in English law was still valid and what had become obsolete in America. On the subject at hand he wrote:

Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land, which is punishable by forfeiture of the arms, and fine and imprisonment. But here it should be remembered, that in this country the constitution guaranties 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.

We have a statute on the subject, related to concealed weapons.<sup>64</sup>

Again denying a Second Amendment right of individuals to bear arms, Saul Cornell asserts that the above deviates from the common law and was unique to the South.<sup>65</sup> To the contrary, Humphreys stated the traditional rule that going armed was a crime only when done in a manner to terrify the people, and the Second Amendment’s confirmation of that rule would discourage deviation therefrom.

Kentucky’s 1813 prohibition on wearing a pocket pistol and certain edged weapons concealed was declared unconstitutional in *Bliss v. Commonwealth*, which held: “Whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.”<sup>66</sup> In 1849, the

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<sup>63</sup> Ky. Const., art. XII, § 22 (1792).

<sup>64</sup> Charles Humphreys, *COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY* 482 (Lexington, Ky.: William Gibbes Hunt) (1822).

<sup>65</sup> Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 *LAW & CONTEMP. PROBS.* 11, 35 (2017).

<sup>66</sup> *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91-92 (1822).

guarantee was revised to authorize the legislature to “pass laws to prevent persons from carrying concealed arms.”<sup>67</sup>

The federal and state constitutional declarations of the right to “bear arms” preclude any argument that somehow the common law in America prohibited peaceably going armed. Further, the passage of restrictions on concealed weapons indicate that going armed, without more, was not already unlawful under the common law. Meanwhile the courts would uphold such laws as long as open carry was allowed.

### C. GOING ARMED IN THE EARLY REPUBLIC: STATUTORY MODELS

#### 1. VIRGINIA’S ACT ON AFFRAYS, 1786

In Virginia, a Committee of Revisors—of which Thomas Jefferson played the leading role—drafted a restatement of the statutory law which included the common law and elements of such English statutes as were deemed applicable.<sup>68</sup> One of the provisions reported by the Committee, presented to the General Assembly by James Madison, would be passed as an Act Forbidding and Punishing Affrays (1786).<sup>69</sup> It reformulated the Statute of Northampton to provide that no man shall “come before the Justices of any court, or other of their ministers of justice doing their office, with force and arms, . . . nor go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the country . . . .”<sup>70</sup> This offense had three pertinent elements: (1) going or riding armed; (2) in fairs, markets or

<sup>67</sup> Ky. Const., art. XIII, § 25 (1849).

<sup>68</sup> Edward Dumbauld, THOMAS JEFFERSON AND THE LAW 134-36 (1978).

<sup>69</sup> 2 Jefferson, PAPERS OF THOMAS JEFFERSON 519-20 (Julian P. Boyd ed., 1951). “This Bill is a good example of TJ’s retention of the language of early English statutes, with its archaic provision for the forfeiture of ‘armour,’ &c. It is also a good example of TJ’s ability to condense the involved language of the earlier English statutes that he thought worthy of retaining in the revision . . . .” *Id.* at 520 (note by editor).

<sup>70</sup> A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE, ch. 21, at 30 (1803).

“other places,” which according to the canon of *noscitur a sociis* (associated words) meant other places like fairs and markets; and (3) in terror of the country.

A sufficient indictment of the above could not simply allege the first element but would have been required to allege all three. As Virginia courts held, it was “an established rule, that in general, if an Indictment pursues the words of a Statute in describing an offence, . . . it is sufficient . . .”<sup>71</sup> A demurrer (motion to dismiss) would be sustained for an insufficient indictment.<sup>72</sup>

It is unclear how long the Virginia law remained on the books, and no judicial decision exists reciting its language. Had it been read to ban the mere carrying of firearms, its draftsman Thomas Jefferson would have been one of its biggest violators, as he regularly went armed and defended the right to do so.<sup>73</sup> As he advised his 15-year old nephew: “Let your gun therefore be the constant companion of your walks.”<sup>74</sup>

If it was still law in 1838, the enactment was not interpreted to prohibit the habitual carrying of concealed weapons, as in that year the legislature for the first time provided: “If a free person, habitually, carry about his person hid from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, he shall be fined fifty dollars.”<sup>75</sup> This provision would have been unnecessary if going armed was already an offense, not to mention that this provision only restricted going armed habitually and hiding the arms. Law enforcement officers were not exempt – the Virginia high court affirmed the conviction of a constable who “drew out a pistol and dirk” against a person to levy an execution.<sup>76</sup>

In 1847, Virginia enacted the following: “If any person shall go armed with any offensive or dangerous weapon,

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<sup>71</sup> *Rasnick v. Commonwealth*, 4 Va. (2 Va. Cas.) 356, 357 (1823).

<sup>72</sup> *Commonwealth v. Lodge*, 43 Va. (2 Gratt.) 579, 580-81 (1845).

<sup>73</sup> See S. Halbrook, *THE FOUNDERS' SECOND AMENDMENT* 131, 260, 316-18 (2008). In 1803, Jefferson wrote an innkeeper that “I left at your house . . . a pistol in a locked case,” and asked that a friend pick it up. See original letter at <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=210>.

<sup>74</sup> Jefferson, *WRITINGS* 816-17 (Merril D. Peterson ed., 1984).

<sup>75</sup> VA CODE tit. 54, ch. 196, § 7 (1849).

<sup>76</sup> *Hicks v. Commonwealth*, 48 Va. (7 Gratt.) 597, 598 (1850).



without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may be required to find sureties for keeping the peace."<sup>77</sup> Any person engaging in the subject conduct, if anyone complained, could continue doing if the court did not find that keeping the peace required sureties. If sureties were required, he could simply obtain them. There are no published judicial decisions on the provision.

At a more general level, courts could require a person to enter into a recognizance with sureties to keep the peace, particularly in regard to a specified person who was threatened, for a given period.<sup>78</sup> If a person violated the recognizance, a writ of *scire facias* could be issued alleging the violation with specificity and requiring the person to answer in court.<sup>79</sup> Specific threats or harm were required for a finding that sureties were needed to ensure that the person kept the peace.

Virginia's only prohibition on carrying a firearm *per se* applied to African Americans. As discussed below, slaves could not keep or carry a gun, and free persons of color were required to obtain a license to do so, which the court had discretion to issue or not issue.

## 2. THE MASSACHUSETTS MODEL, 1795

The Massachusetts Declaration of Rights of 1780 provided: "The people have a right to keep and bear arms for the common defence."<sup>80</sup> A Massachusetts Act of 1795 incorporated a version of the Statute of Northampton in the following words:

That every Justice of the Peace, within the county for which he may be commissioned, may cause to be staid and arrested, all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth,

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<sup>77</sup> 1847 Va. Laws 127, 129, § 16.

<sup>78</sup> Welling's Case, 47 Va. (6 Gratt.) 670 (1849).

<sup>79</sup> Randolph v. Brown, 4 Va. (2 Va. Cas.) 351 (1823).

<sup>80</sup> Mass. Dec. of Rights, art. XVII (1780).

or such others as may utter any menaces or threatening speeches, and upon view of such Justice, confession of the delinquent, or other legal conviction of any such offence, shall require of the offender to find sureties for his keeping the Peace, and being of the good behaviour; and in want thereof, to commit him to prison until he shall comply with such requisition . . . .<sup>81</sup>

Elements of the offense included (1) riding or going armed, (2) offensively, i.e., not peaceably, and (3) to the fear or terror of the good citizens. Just peaceably riding or going armed alone was not an offense. As the Massachusetts Supreme Judicial Court stated the rule, every word defining a crime must be given meaning and charged in an indictment:

The general principle applicable to criminal pleading requires that an indictment shall set forth, with technical particularity, every allegation necessary to constitute the offence charged; and the constitution, adopting and sanctioning this principle, provides, "that no subject shall be held to answer for any crime or offence, until the same is fully, substantially and formally described to him."<sup>82</sup>

The explicit definition of the crime as riding or going armed "offensively, to the fear or terror of the good citizens" is given further meaning and context by the above associated crimes referring to "affrayers, rioters, disturbers, or breakers of the

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<sup>81</sup> 1795 Mass. Acts 436, ch. 2; 2 PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 259 (1801) (emphasis added).

<sup>82</sup> Commonwealth v. Eastman, 55 Mass. (1 Cush.) 189, 223 (1848). The court added: "If an indictment for murder, should allege merely that the accused had committed the crime of murder upon the person of one A. B., or, if an indictment for larceny should simply set forth, that the defendant had stolen from C. D., in neither case would the offence be set forth with the particularity and precision required by law."

peace,” and those who “utter any menaces or threatening speeches.”

There are no judicial opinions on the 1795 enactment. However, an 1825 decision did differentiate being armed from misuse of arms: “The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.”<sup>83</sup>

### 3. THE REFINED MASSACHUSETTS MODEL, 1836

The 1795 Act was superseded by the Act of 1836, entitled “Of Proceedings to Prevent the Commission of Crimes,” which provided:

If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.<sup>84</sup>

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

*Reasonable cause to fear an injury.* What would be required of a complainant to show “reasonable cause to fear

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<sup>83</sup> Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 314 (1825).

<sup>84</sup> 1836 Mass. Laws 748, 750, ch.134, § 16.

an injury"? By analogy, a magistrate had to have "reasonable cause" to believe certain things to get a search warrant. "The oath to the complainant's belief, and not to his suspicion, is one of 'the formalities prescribed by the laws,' without which 'no warrant ought to be issued.'"<sup>85</sup> Here, reasonable cause to fear an injury, not speculation or suspicion, was required.

Similar language was used in a decision regarding an indictment for a forcible entry, which "must be accompanied with circumstances tending to excite terror": "There must at least be some apparent violence; or *some unusual weapons*; or the parties attended with an unusual number of people; some menaces, or other acts giving *reasonable cause to fear*, that the party making the forcible entry will do some bodily hurt to those in possession, if they do not give up the same."<sup>86</sup> The mere presence of ordinary weapons, without more, would not suffice.

*Reasonable cause to fear a breach of the peace.* A breach of the peace was not considered a minor manner—one case referred to "breaches of the peace or other great disorder and violence, being what are usually considered *mala in se* or criminal in themselves . . ."<sup>87</sup> Reasonable cause to fear such would entail anticipated violence or related unlawful conduct: "Breaches of the peace comprise not only cases of actual violence to the person of another, but any unlawful acts, tending to produce an actual breach of the peace . . ."<sup>88</sup> Under a 1783 enactment, "justices of the peace had power to bind over to keep the peace those who are complained of as having a present intent to commit a breach of the peace, as

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<sup>85</sup> Commonwealth v. Lottery Tickets, 59 Mass. 369, 372 (1850) (citation omitted).

<sup>86</sup> Commonwealth v. Shattuck, 58 Mass. 141, 145 (1849) (emphasis added); see also Commonwealth v. Dudley, 10 Mass. 403, 409 (1813) ("There must be some apparent violence offered, in deed or in word, to the person of another; or the party must be furnished with unusual offensive weapons, or attended by an unusual multitude of people; all which circumstances would tend to excite terror in the owner").

<sup>87</sup> Commonwealth v. Willard, 39 Mass. 476, 478 (1839); see Fifty Associates v. Howland, 59 Mass. 214, 218 (1849) (reference to "such a degree of force, as would tend to a breach of the peace").

<sup>88</sup> Pearce v. Atwood, 13 Mass. 324, 332 (1816) (citing 4 Bl. Com. 255).

well as those who are charged with having committed such an offence . . . .”<sup>89</sup>

*On complaint of any person.* When a complaint was made that “any person has threatened to commit an offence against the person or property of another,” the magistrate was required to examine the complainant and any witnesses under oath and to prepare a written complaint.<sup>90</sup> If the magistrate determined that “there is just cause to fear that any such offence may be committed,” he issued a warrant reciting the substance of the complaint and directed an officer to apprehend the person.<sup>91</sup>

*Finding sureties.* The Act reflected general remedies available to a person who was injured or feared injury or breach of the peace by another. “When the person complained of is brought before the magistrate, he shall be heard in his defense, and he may be required to enter into a recognizance, with sufficient sureties, in such sum as the magistrate shall direct, to keep the peace” towards all persons but “especially towards the person requiring such security,” for no more than six months.<sup>92</sup> As applied in a similar scenario, a threatened person “may apply to a magistrate, and ask that sureties to keep the peace may be required of one from whom he may apprehend any serious personal injury.”<sup>93</sup>

*Appeal.* The defendant could appeal to the court of common pleas, which would hear the witnesses and could either discharge him or require him to enter into a new recognizance in a sum determined to be proper.<sup>94</sup>

*Insufficient cause.* Alternatively, if on examination the magistrate determined that it did “not appear that there is just cause to fear that any such offence will be committed,” the person was to be discharged. If the magistrate deemed the

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<sup>89</sup> Commonwealth v. M’Neill, 36 Mass. 127, 141 (1837).

<sup>90</sup> Act of Feb. 1836, ch. 134 § 2, 1836 Mass. Laws 748; see Commonwealth v. Wallace, 80 Mass. 382 (1860) (a complaint would have one’s full name, a sworn statement of the complaint, and a signature. It would be certified by the appropriate authority, which was “an averment by him that the signature and oath were those of the complainant . . .”).

<sup>91</sup> *Id.* § 3.

<sup>92</sup> *Id.* § 4.

<sup>93</sup> Mason v. Mason, 36 Mass. (19 Pick.) 506, 508 (1837).

<sup>94</sup> Act of Feb. 1836, ch. 134 §§ 9-11, 1836 Mass. Laws 748.

complaint “unfounded, frivolous or malicious,” he could order the complainant to pay the costs of the prosecution.<sup>95</sup> As held in a prior decision, a groundless complaint could have further consequences: “A false complaint, made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel; and the question of malice is to be determined by the jury.”<sup>96</sup>

The above procedures were not required for certain offenses committed in the presence of a magistrate. Any person who would “make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property,” or would “contend with hot and angry words, to the disturbance of the peace,” could be ordered to keep the peace or be of good behavior.<sup>97</sup> No further process or other proof was required.<sup>98</sup> This provision identifies the types of analogous behavior included in the next section about going armed in a manner causing a person to have “reasonable cause to fear an injury, or breach of the peace.”<sup>99</sup>

*Failing to keep the peace.* Generally, if a person who violated his recognizance to keep the peace such as by assaulting the complainant, the Commonwealth could prosecute an action of debt upon this forfeited recognizance, or bring a writ of *scire facias*.<sup>100</sup> It was decided in one case: “Where one, being under a recognizance to keep the peace, committed a breach of the peace, for which he was indicted and fined, it was *held* that he was nevertheless liable to an action for the penalty of the recognizance.”<sup>101</sup>

In sum, as exemplified by Virginia and Massachusetts, the statutory offense of going armed to the terror of the people required proof that the defendant did so in an offensive manner that terrified actual persons. Further, provisions requiring persons who went armed to find sureties to keep the peace required findings of offensive behavior that threatened

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<sup>95</sup> *Id.* § 7.

<sup>96</sup> *Bodwell v. Osgood*, 20 Mass. 379 (1825).

<sup>97</sup> *Allen v. State*, 183 Wis. 323, 331 (1924).

<sup>98</sup> Act of Feb 1836, ch. 134 § 15, 1836 Mass. Laws 748.

<sup>99</sup> *Id.* § 16.

<sup>100</sup> *Commonwealth v. Green*, 12 Mass. 1 (1815).

<sup>101</sup> *Commonwealth v. Braynard*, 23 Mass. (6 Pick.) 113 (1828).

the peace. Peaceably carrying arms was not subject to any sanction.

#### D. GOING ARMED IN THE EARLY REPUBLIC: JUDICIAL PRECEDENTS

To what extent was the prohibition of the Statute of Northampton recognized as a common law offense in America? The courts of Tennessee and North Carolina grappled with the issue, with the former questioning its applicability and the latter holding that it was. The latter also provided significant detail regarding how both going armed and doing so to the terror of the people were separate elements of the offense, both of which must be alleged in the indictment and proven to the jury.

##### 1. TENNESSEE: SIMPSON V. STATE

In *Simpson v. State*, the Supreme Court of Errors and Appeals of Tennessee dismissed an indictment alleging that “William Simpson, laborer, with force and arms being arrayed in a warlike manner, in a certain public street or highway situate, unlawfully, and to the great terror and disturbance of divers good citizens, did make an affray . . . .”<sup>102</sup> The court held that the indictment was insufficient as it failed to allege the elements of an affray of fighting between two or more persons.

The Attorney General sought to rely on Hawkins’ claim that “there may be an affray . . . where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes.”<sup>103</sup> That doctrine, averred the court, relied “upon ancient English statutes, enacted in favor of the king, his ministers and other servants, especially upon the statute of the 2d Edward III,” which

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<sup>102</sup> *Simpson v. State*, 13 Tenn. Reports (5 Yerg.) 356, 361 (1833).

<sup>103</sup> *Id.* at 357-58 (citing WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN OR A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT: DIGESTED UNDER THEIR PROPER HEADS 70 (1716)).

provided that no man “shall go or ride armed by night or by day, etc.”<sup>104</sup>

The *Simpson* court repeated Hawkins’ comment about the Statute of Northampton “that persons of quality are in no danger of offending against this statute by wearing their common weapons” in places and on occasions where common.<sup>105</sup> The court held the English statute, at least as construed by the Attorney General, not to be incorporated into American common law:

It may be remarked here, that ancient English statutes, from their antiquity and from long usage, were cited as common law; and though our ancestors, upon their emigration, brought with them such parts of the common law of England, and the English statutes, as were applicable and suitable to their exchanged and new situation and circumstances, yet most assuredly the common law and statutes, the subject-matter of this fourth section,<sup>106</sup> formed no part of their selection.<sup>107</sup>

The *Simpson* court held in the alternative that if the Statute of Northampton had been brought to America, it was abrogated by Tennessee’s constitutional guarantee “that the freemen of this state have a right to keep and to bear arms for their common defence.”<sup>108</sup> That guarantee precluded recognition of “a man’s arming himself with dangerous and unusual weapons” as part of the crime of an affray. “By this clause of the constitution, an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature . . .” The constitution having thus said that “the people may carry arms,” doing so in itself could not

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<sup>104</sup> *Id.* at 358.

<sup>105</sup> *Id.* at 358-59.

<sup>106</sup> i.e., Hawkins, *supra* note, at 103.

<sup>107</sup> *Id.* at 359.

<sup>108</sup> *Id.* at 360 (quoting TENN. CONST., art. 11, § 26).



be the basis of the element of “terror to the people” necessary for an affray.<sup>109</sup>

Recall the flimsy allegations of the bare-bones indictment that the laborer Simpson with no detail other than that “with force and arms being arrayed in a warlike manner” – who knows what specific act that legalese applied to – “to the great terror” of unidentified citizens, he made an “affray” with no one.<sup>110</sup>

## 2. NORTH CAROLINA: STATE V. HUNTLEY

By contrast to the above case, the Supreme Court of North Carolina upheld indictments with language and under reasoning reflecting the legacy of the Statute of Northampton as including both going armed and doing so in a concrete manner to terrorize specific people. In *State v. Langford*, the indictment alleged that the defendants “with force and arms, at the house of one Sarah Roffle, an aged widow woman, . . . did then and there wickedly, mischievously and maliciously, and to the terror and dismay of the said Sarah Roffle, fire several guns . . . .”<sup>111</sup> As the court stated, “men were armed with guns, which they fired at the house of an unprotected female, thus exciting her alarm for the safety of her person and her property. This is the *corpus delicti* . . . .”<sup>112</sup> The court recalled the words of Hawkins that “there may be an affray when there is no actual violence: as when a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people . . . .”<sup>113</sup>

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

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

<sup>110</sup> *Id.* at 361.

<sup>111</sup> *State v. Langford*, 10 N.C. (3 Hawks) 381 (1824).

<sup>112</sup> *Id.* at 383.

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

terror of the people . . . .”<sup>114</sup> The court quoted Blackstone’s references to “the offence of riding or going armed with dangerous or unusual weapons, . . . by terrifying the good people of the land,” and to the Statute of Northampton.<sup>115</sup> It further quoted Hawkins’ reference to an affray as including “where a man arms himself with dangerous and unusual weapons in such a manner, as will naturally cause a terror to the people . . . .”<sup>116</sup>

The *Huntley* court next turned to the guarantee of the North Carolina bill of rights securing to every man the right to “bear arms for the defence of the State.” While this “secures to him a right of which he cannot be deprived,” he has no right to “employ those arms . . . to the annoyance and terror and danger of its citizens . . . .”<sup>117</sup> That said, “the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun.”<sup>118</sup> However, he may not carry a weapon “to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.”<sup>119</sup>

#### E. PROHIBITIONS ON CARRYING CONCEALED WEAPONS

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

Given that a ban on concealed carry was unprecedented, it was no small wonder that the first judicial decision thereon by a state court declared it unconstitutional. In *Bliss v. Commonwealth*, the Kentucky Supreme Court reasoned that “in principle, there is no difference between a

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<sup>114</sup> State v. Huntley, 25 N.C. (3 Ired.) 418, 419 (1843).

<sup>115</sup> *Id.* at 420-21 (quoting 4 Bl. Com. 149).

<sup>116</sup> *Id.* at 421 (quoting Haw. P. C. B. 1, ch. 28, sect. 1).

<sup>117</sup> *Id.* at 422.

<sup>118</sup> *Id.* at 422-23.

<sup>119</sup> *Id.* at 423.

law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.”<sup>120</sup> What if the legislature banned open carry, the court asked? It reasoned that the rule could not be that whichever mode of carry was banned first was thereby constitutional.<sup>121</sup>

The sister courts of other states rejected that view and upheld the bans on concealed carry because open carry was allowed. The Alabama Supreme Court said it this way in upholding the conviction of a sheriff for carrying a concealed pistol: “A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”<sup>122</sup>

The Georgia Supreme Court overturned the conviction of a defendant “for having and keeping about his person, and elsewhere, a pistol, the same not being such a pistol as is known and used as a horseman’s pistol,” but where it was not alleged that he carried it concealed.<sup>123</sup> While Georgia had no state constitutional guarantee to bear arms, the court reasoned: “The language of the *second* amendment is broad enough to embrace both Federal and state governments . . . . Is it not an unalienable right, which lies at the bottom of every free government?”<sup>124</sup>

By contrast, the Supreme Court of Indiana, in a one-sentence opinion, stated: “It was *held* in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional.”<sup>125</sup>

While holding that a statute prohibiting the carrying of concealed weapons was not in violation of the Second Amendment, the Louisiana Supreme Court reasoned that the right to carry arms openly “placed men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and

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<sup>120</sup> *Bliss v. Commonwealth*, 2 Litt. 90, 92 (Ky. 1822).

<sup>121</sup> *Id.* at 93.

<sup>122</sup> *State v. Reid*, 1 Ala. 612, 616-17 (1840).

<sup>123</sup> *Nunn v. State*, 1 Ga. 243, 247 (1846).

<sup>124</sup> *Id.* at 250.

<sup>125</sup> *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833) (emphasis in original).

noble defense of themselves, if necessary, and of their country . . . .”<sup>126</sup> As this suggests, the open carry rule was tied into the social norms of the day.

Eric Ruben and Saul Cornell argue that the *Nunn* and the other above decisions, except for the Indiana case, are tainted because they were from “the slaveholding South” and that no right peaceably to carry firearms was recognized in the North.<sup>127</sup> But there were no decisions on the right to bear arms from courts in the North because the Northern states did not restrict the peaceable carrying of arms, concealed or openly. Ruben and Cornell point to such laws as the 1836 Massachusetts enactment analyzed extensively above, seeing no significance in the provision requiring a person to file a complaint that he or she had “reasonable cause to fear an injury, or breach of the peace” by the person going armed.<sup>128</sup>

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

## F. PROHIBITIONS AND LICENSING REQUIREMENTS FOR AFRICAN AMERICANS

### 1. THE SLAVE CODES

From colonial times until adoption of the Thirteenth Amendment, slaves were prohibited from keeping and bearing arms in most circumstances or altogether. Additionally, free blacks were prohibited from possessing

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<sup>126</sup> *State v. Chandler*, 5 La. Ann 489, 490 (1850); see also *State v. Jumel*, 13 La Ann. 399 (1858).

<sup>127</sup> Eric M. Ruben and Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. FORUM 121, 123 (2015).

<sup>128</sup> *Id.* at 130.

arms unless they obtained a license, which was subject to an official's discretion. Such laws reflected that African Americans were not trusted or recognized to be among "the people" with the rights of citizens.

Virginia law provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive," punishable by no more than thirty-nine lashes, except those living at a frontier plantation could be licensed to "keep and use" such weapons by a justice of the peace.<sup>129</sup> Further, "[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court" where he resided, "which license may, at any time, be withdrawn by an order of such court."<sup>130</sup>

As a Virginia court held, among the "numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States," were "the restriction upon the migration of free blacks into this State, and upon their right to bear arms."<sup>131</sup>

In Georgia, it was unlawful "for any slave, unless in the presence of some white person, to carry and make use of fire arms," unless the slave had a license from his master to hunt.<sup>132</sup> It was also unlawful "for any free person of colour in this state, to own, use, or carry fire arms of any description whatever . . ."<sup>133</sup> Georgia's high court held: "Free persons of color have never been recognized here as citizens; they are not

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<sup>129</sup> VIRGINIA, REVISED CODE OF THE LAWS OF VIRGINIA: BEING A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE; WITH A GENERAL INDEX 111 § 7 (1819).

<sup>130</sup> *Id.* § 8.

<sup>131</sup> *Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

<sup>132</sup> HORATIO; CRAWFORD MARBURY, WILLIAM H. DIGEST OF THE LAWS OF THE STATE OF GEORGIA, FROM ITS SETTLEMENT AT BRITISH PROVINCE, IN 1755, TO THE SESSION OF THE GENERAL ASSEMBLY IN 1800, INCLUSIVE 424 (1802).

<sup>133</sup> Ga. Laws § 7 226, 228 (1833).

entitled to bear arms, vote for members of the legislature, or to hold any civil office."<sup>134</sup>

Maryland made it unlawful "for any negro or mulatto . . . to keep any . . . gun, except he be a free negro or mulatto . . ." <sup>135</sup> It was unlawful "for any free negro or mulatto to go at large with any gun . . ." <sup>136</sup> However, this did not "prevent any free negro or mulatto from carrying a gun . . . who shall . . . have a certificate from a justice of the peace, that he is an orderly and peaceable person . . ." <sup>137</sup> This requirement was based on such person's status as less than a citizen. As one court stated: "Free negroes were and are now 'those who were emancipated from slavery, or born free, but subjected to various disabilities and penal enactments.'" <sup>138</sup>

Later, the above was made stricter to require a license not just to bear, but merely to keep a firearm: "No free negro shall be suffered to keep or carry a firelock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court of the county or corporation in which he resides . . ." <sup>139</sup>

Delaware forbade "free negroes and free mulattoes to have, own, keep, or possess any gun [or] pistol," except that such persons could apply to a justice of the peace for a permit to possess a gun or fowling piece, which could be granted with a finding "that the circumstances of his case justify his keeping and using a gun . . ." <sup>140</sup> The police power was said to justify restrictions such as "the prohibition of free negroes to own or have in possession fire arms or warlike instruments." <sup>141</sup>

Alabama provided that "no slave shall keep or carry any gun," but added that "any justice of the peace may grant . . . permission in writing to any slave, on application of his

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<sup>134</sup> *Cooper v. Savannah*, 4 Ga. 72 (1848).

<sup>135</sup> VIRGIL MAXCY, *LAWS OF MARYLAND. WITH THE CENTER, THE BILL OF RIGHTS, THE CONSTITUTION OF THE STATE, AND ITS ALTERATIONS, THE DECLARATION OF INDEPENDENCE, AND THE CONSTITUTION OF THE UNITED STATES, AND ITS AMENDMENTS* 297 (1811).

<sup>136</sup> *Id.* at 298.

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

<sup>138</sup> *Brown v. State*, 23 Md. 503, 508 (1865).

<sup>139</sup> *Otho, et al. Scott. Maryland Code*, 464 (1860).

<sup>140</sup> *Laws of the State of Delaware ch. 176 § 1, 8, at 208* (1841).

<sup>141</sup> *State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856).

master or overseer, to carry or use a gun and ammunition within the limits of said master's or owner's plantation . . . ."<sup>142</sup> In short, a slave had to have a license to possess a gun, but it could not be removed from the plantation.

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

## 2. NORTH CAROLINA'S DISCRETIONARY LICENSING FOR FREE PERSONS OF COLOR

North Carolina typically provided that "no slave shall go armed with Gun," unless he had a certificate to carry a gun to hunt, issued with the owner's permission.<sup>143</sup> Its discretionary license-issuance system applicable to free persons of color was explained in more detail by judicial decisions in that state than in others, and merits further analysis.

North Carolina made it unlawful "if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence therefor from the Court of Pleas and Quarter Sessions of his or her county . . . ."<sup>144</sup> The provision was upheld in *State v. Newsom* as constitutional partly on the ground that "the free people of color cannot be considered as citizens . . . ."<sup>145</sup> The court also opined that the

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<sup>142</sup> JOHN G. AIKIN. DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY 391-92 (1833).

<sup>143</sup> Statutes of the State of North Carolina 93 (1791).

<sup>144</sup> *State v. Newsom*, 27 N.C. 250, 250 (1844) (quoting Act of 1840, ch. 30).

<sup>145</sup> *Id.* at 254. Despite that, a defendant being tried "as a free negro, for carrying arms," had a right not to exhibit himself to the jury to determine his status as a free negro, as that would violate his privilege against self-incrimination. *State v. Jacobs*, 50 N.C. 259 (1858).

Second Amendment only applied to the federal government, not to the states.<sup>146</sup>

Somewhat bizarrely, the court further stated: "It does not deprive the free man of color of the right to carry arms about his person, but subjects it to the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of persons, shall have a right to the licence, or whether any shall."<sup>147</sup> This is reminiscent of today's judicial jargon that the right of the people to bear arms is not infringed by laws granting officials discretion to deny them that right.

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

Degraded as are these individuals, as a class, by their social position, it is certain, that among them are many, worthy of all confidence, and into whose hands these weapons can be safely trusted, either for their own protection, or for the protection of the property of others confided to them. The County Court is, therefore, authorised to grant a licence to any individual they think proper, to possess and use these weapons.<sup>148</sup>

The court could not only deny a license outright, but also to limit a license to carry only in certain places. In *State v. Harris*, a free person of color had a license to carry a gun on his own land, but he was hunting with a shotgun elsewhere with white companions.<sup>149</sup> The court held that "the county court might think it a very prudent precaution to limit the carrying of arms to the lands of the free negro" and that the act did not "prevent the restriction from being imposed."<sup>150</sup>

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<sup>146</sup> *Id.* at 251.

<sup>147</sup> *Id.* at 253.

<sup>148</sup> *State v. Lane*, 30 N.C. 256, 257 (1848).

<sup>149</sup> *State v. Harris*, 51 N.C. 448 (1859)

<sup>150</sup> *Id.* at 449.



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

### 3. CITIZENSHIP: "TO KEEP AND CARRY ARMS WHEREVER THEY WENT"

As analyzed above, slaves and persons of color were not considered citizens, and thus having arms, if allowed at all, was subject to discretionary licensing by state authorities. Of course, the deprivation of arms was one of a bundle of disabilities bolstering the peculiar institution of slavery. As St. George Tucker wrote: "To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offences punishable by whipping."<sup>151</sup>

The Supreme Court, in *Dred Scott v. Sanford*, notoriously held that African Americans were not citizens and had no rights that must be respected.<sup>152</sup> Chief Justice Taney noted that "the laws of the present slaveholding States . . . are full of provisions in relation to this class," and such laws "have continued to treat them as an inferior class, and to subject them to strict police regulations . . ."<sup>153</sup> But if blacks were "entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they [whites] considered to be necessary for their own safety."<sup>154</sup>

To avoid that result, Taney listed some of the prominent rights that African Americans would have, but of

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<sup>151</sup> ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA 65 (1796).

<sup>152</sup> *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>153</sup> *Id.* at 412.

<sup>154</sup> *Id.* at 416-17.

which they were currently deprived in numerous states, should their citizenship be recognized:

It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and *to keep and carry arms wherever they went.*<sup>155</sup>

Overturing *Dred Scott* would be a primary objective of the Fourteenth Amendment, which overruled that decision.<sup>156</sup> Senator George F. Edmunds explained shortly after the Amendment was ratified: "What was the fourteenth article designed to secure? . . . [T]hat the privileges and immunities of citizens of the United States shall not be abridged or denied by the United States or by any State; defining also, what it was possible was open to some question after the *Dred Scott* decision, who were citizens of the United States."<sup>157</sup>

In sum, having no arms right was an incident of slavery. Even free blacks were required to obtain a license to possess or carry a firearm, which license could be denied or limited subject to the discretion of the issuing authority. Such laws were based on the denial of the rights of citizenship to African Americans.

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<sup>155</sup> *Id.* at 417 (emphasis added).

<sup>156</sup> See *McDonald*, 561 U.S. at 307-08 (Scalia, J., concurring).

<sup>157</sup> Congressional Globe, 40th Cong., 3d Sess. 1000 (1869).

## II. CONCLUSION

The story does not end with the end of the early Republic. Following the War of 1861-65, a new chapter in the history of the Second Amendment began. While it is beyond the scope of this study, this new chapter involved the reenactment of the Slave Codes as the Black Codes that sought to keep African Americans unarmed, the enactment of the Civil Rights Act and Freedmen's Bureau Act of 1866 that sought to protect the Second Amendment rights and other rights of the freed slaves, and the adoption of the Fourteenth Amendment that sought in part to constitutionalize that protection.<sup>158</sup>

The Freedmen's Bureau Act symbolized this era with its declaration that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery."<sup>159</sup>

Without delving further into that history here, it would be appropriate to mention in this law review that the Freedmen's Bureau, which was charged with implementing the above mandate, was headed by General Oliver O. Howard. In his autobiography, Howard chronicles the daunting task of assisting African Americans in their transition from slaves to freedmen in all spheres, from civil rights and work conditions to education and voting. He was instrumental in the founding of Howard University,<sup>160</sup> which was established as a college for freedmen and is today the largest historically-black university nationwide, as well as Lincoln Memorial University, which was founded as a college for the Cumberland Gap region and whose law school

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<sup>158</sup> See generally STEPHEN P. HALBROOK, *SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS* (2010).

<sup>159</sup> Freedmen's Bureau, 14 Stat. 176-177 (1866) (quoted in *McDonald*, 561 U.S. at 773).

<sup>160</sup> See 2 O. O. HOWARD, *AUTOBIOGRAPHY OF OLIVER OTIS HOWARD* 340-401, 452-55 (1908).

provides attorneys for the often under-served region of Appalachia and beyond.<sup>161</sup> Having taught in the philosophy department at Howard University decades ago, this author was pleasantly surprised to learn of this connection when invited to present at the Second Amendment Symposium sponsored by the Lincoln Memorial University Law Review.

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While it would be a delusional reach to claim that the Second Amendment implicitly incorporated the Statute of Northampton of 1328, no question exists that the right to bear arms does not include the carrying of dangerous and unusual weapons to the terror of one's fellow citizens. Peaceably carrying arms was not an offense at the Founding or in the early Republic, and instead was enshrined as a constitutional right at both state and federal levels. Some states restricted carrying arms concealed, but allowed open carry. Prohibitions on the keeping and bearing of arms by African Americans, or the requirement that they obtain licenses to do so subject to the discretion of the authorities, were based on their condition as slaves or non-citizens.

To what extent may a State prohibit the peaceable bearing of arms, or limit the right to select persons determined by law enforcement officials to have a "need" to do so? To date, the Supreme Court has not decided the validity of such a prohibition under the Second Amendment, but should do so.

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<sup>161</sup> See *id.* at 568-69, 586-87; Lincoln Memorial University, Heritage and Mission, <https://www.lmunet.edu/about-lmu/heritage-mission.php> (lasted visited Sept. 18, 2019).