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## Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context

*Eric M. Ruben & Saul Cornell*

### INTRODUCTION

During recent oral arguments in *Peruta v. County of San Diego*, a case being reconsidered en banc in the U.S. Court of Appeals for the Ninth Circuit, former Solicitor General Paul Clement turned to what may appear an unusual guide for interpreting the scope of the Second Amendment in the twenty-first century. His clients had been denied permits to carry concealed handguns in San Diego because they could not demonstrate a heightened need for self-defense, and Clement was trying to convince the Ninth Circuit that the Second Amendment precluded those denials. Two of the strongest sources of authority—decisions by other federal appellate courts and evidence from the period of the Second Amendment’s adoption—provided scant support for his position. In fact, several courts recently upheld “good cause” policies similar to San Diego’s,<sup>1</sup> and firearm regulations, including those prohibiting discharge in populated areas, were common in the Founding era.<sup>2</sup> Instead, Clement looked to antebellum state court case law, and referred the Ninth Circuit to the interpretation of the Second Amendment from an 1846 opinion by the Georgia Supreme Court, *Nunn v. State*.<sup>3</sup> The Georgia high court held that the Second

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1. See *Drake v. Filko*, 724 F.3d 426, 434 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 881 (4th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012). *But see* *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (striking down a total ban on public carry without ruling on the constitutionality of less restrictive “good cause” policies like San Diego’s).
  2. Among other things, laws restricted the way gunpowder could be stored, and several cities—including Boston, Philadelphia, New York City, and Newport—restricted the use of firearms in public. See *District of Columbia v. Heller*, 554 U.S. 570, 683-84 (2008) (Breyer, J., dissenting) (compiling laws).
  3. See Oral Argument at 11:50, *Peruta v. Cty. of San Diego*, No. 10-56971 (June 16, 2015), [http://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000007886](http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007886) [<http://perma.cc/DMK2-JDQA>] (invoking *Nunn v. State*, 1 Ga. 243 (1846)). By interpreting the Second

Amendment protected the right “to keep and bear arms of every description” and was violated by a law prohibiting the open carrying of certain weapons.<sup>4</sup> Clement argued that the Ninth Circuit should adopt *Nunn*’s view of the Second Amendment to strike down San Diego’s “good cause” policy.<sup>5</sup>

*Nunn*, of course, is not binding precedent in the Ninth Circuit. But ever since the Supreme Court’s landmark decision in *District of Columbia v. Heller* used an originalist approach to establish the individual right to keep and bear arms,<sup>6</sup> courts have incorporated historical evidence into their Second Amendment jurisprudence.<sup>7</sup> This historical evidence includes *Nunn* and other antebellum state court opinions.<sup>8</sup> As Justice Scalia put it in his majority opinion in *Heller*, “interpret[at]ions] of the Second Amendment in the century after its enactment,” including in state court opinions, are “a critical tool of constitutional interpretation,” since they can point to “the scope [constitutional rights] were understood to have when the people adopted them.”<sup>9</sup> Indeed, as

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Amendment as applicable to a Georgia state law, *Nunn* rejected the United States Supreme Court’s prior conclusion that the Bill of Rights did *not* constrain state governments. See *Barron v. Baltimore*, 32 U.S. 243 (1833). This was an early signal that *Nunn* was out of sync with the national consensus at the time about an elemental aspect of constitutional law. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 153-56 (1998) (describing *Nunn* as one of several “contrarian” opinions in conflict with *Barron*).

4. *Nunn*, 1 Ga. at 251 (emphasis omitted). In particular, *Nunn* held that Georgia was precluded from prohibiting the *open* carrying of weapons, but could prohibit the *concealed* carrying of weapons. *Id.* The argument advanced by the plaintiff in *Peruta* is similar: that San Diego cannot prohibit the concealed carrying of firearms, given that the open carrying of firearms is prohibited in much of the county.
5. See CAL. PENAL CODE §§ 26150(a)(2), 26155(a)(2) (2012) (requiring concealed carry applicants to prove “good cause”); *id.* § 26160 (maintaining that licensing authorities shall publish written policies regarding “good cause” and other requirements); *Peruta v. Cty. of San Diego*, 758 F. Supp. 2d 1106, 1110 (S.D. Cal. 2010) (describing the defendant’s argument that in San Diego “good cause” is a “set of circumstances that distinguishes the applicant from other members of the general public and causes him or her to be placed in harm’s way”).
6. 554 U.S. 570 (2008).
7. See, e.g., *Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013) (holding that to determine whether a law impinges on the Second Amendment the court must ask “whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee”); *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (same); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context.”).
8. See, e.g., *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1155-60 (9th Cir. 2014), *reh’g en banc granted*, 781 F.3d 1106 (9th Cir. 2015); *id.* at 1185-89 (Thomas, J., dissenting); *Drake*, 724 F.3d at 449-50 (Hardiman, J., dissenting); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 90-91 (2d Cir. 2012).
9. *Heller*, 554 U.S. at 605, 634-35.

Clement noted, the *Heller* majority itself favorably cited *Nunn*'s interpretation of the Second Amendment.<sup>10</sup>

But when courts invoke *Nunn* and other antebellum opinions about the right to carry guns in public, they glance over a striking fact about the case law: it is drawn almost exclusively from the slaveholding South. This regional link raises two related questions. First, why did this case law arise in the antebellum South, but not in other areas of the country? And second, did this regional jurisprudence really reflect a national understanding of the Second Amendment's scope? If *Nunn* and similar cases were the product of a unique regional culture during a unique period in the nation's development, quite removed from the Founding era (and the Reconstruction era),<sup>11</sup> they do not provide a solid foundation for a contemporary interpretation of the Second Amendment.<sup>12</sup>

This Essay begins to address these questions.<sup>13</sup> First, it draws on the broad body of historical research into the distinctive culture of slavery and honor in

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10. See *Heller*, 554 U.S. at 612 (quoting *Nunn*, 1 Ga. at 251); Oral Argument, *supra* note 3, at 11:50. The holding in *Heller* was limited to the scope of the Second Amendment right *within* the home, which is why *Heller*'s invocation of *Nunn* is not dispositive in cases like *Peruta*, concerning the scope of the right *outside* the home.
  11. Some scholars, most prominently Akhil Reed Amar, argue that the understanding of the Second Amendment at the time of the adoption of the Fourteenth Amendment should inform today's interpretation of the right to bear arms. See AMAR, *supra* note 3, at 257-66. More recently, Amar has pointed to the existence of distinctive regional constitutional subcultures. See AKHIL REED AMAR, *THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC* at xii (2015) (“[O]ur common Constitution looks slightly different from state to state and across the various regions of this great land.”). Our analysis builds on Amar's important observation regarding regionalism, as well as the exposition of differing urban and rural firearm regulatory regimes in Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013). Several other notable papers addressing historical firearms regulations that have been published recently by the *Yale Law Journal* include Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013); Michael P. O'Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J. ONLINE 359 (2014), <http://yalelawjournal.org/forum/why-firearm-federalism-beats-firearm-localism> [<http://perma.cc/XFX6-2B9R>]; and Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2014).
  12. Cf. *McDonald v. City of Chicago*, 561 U.S. 742, 871 (2010) (Stevens, J., dissenting) (“Liberty claims that are inseparable from the customs that prevail in a certain region, the idiosyncratic expectations of a certain group, or the personal preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature.”).
  13. We take no position in this Essay regarding whether courts *should* use originalism as the sole means of constitutional interpretation, or which of several competing theories of originalism ought to be the preferred method. On the current state of the debate regarding originalism, see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

the antebellum South that contributed to both arms carrying and violence.<sup>14</sup> This culture also influenced jurisprudence throughout the region, including the opinions of Chief Justice Joseph Henry Lumpkin, the author of *Nunn*. Second, we contrast *Nunn*'s view of the right to bear arms outside the home with a separate historical tradition, dominant outside the South, which was less enthusiastic about public carry and more tolerant of broad regulation of the public bearing of arms.<sup>15</sup> In fact, the vast majority of Americans lived under this alternative tradition, rather than under the *Nunn* regime. This analysis suggests that *Nunn* and similar cases did not represent a national consensus about the meaning of the right to bear arms, and should not be relied upon to strike down public carry regulations today.

### I. THE ANTEBELLUM SOUTH AND THE ORIGINS OF PERMISSIVE CARRY JURISPRUDENCE

Last year, when a split panel in *Peruta* declared San Diego's concealed carry policy unconstitutional—prompting the Ninth Circuit to rehear the case en banc—the majority rested its conclusion on an analysis of nineteenth-century cases, including *Nunn*, from courts in nine states, all but one of them Southern: Alabama, Arkansas, Georgia, Indiana, Kentucky, Louisiana, North Carolina, Tennessee, and Texas.<sup>16</sup> After reviewing these cases, the opinion for

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14. For two notable studies relating to honor culture, slavery, and violence in the antebellum South, see RANDOLPH ROTH, *AMERICAN HOMICIDE 180-249* (2009), which discusses how slavery, honor, and other regional differences contributed to higher homicide rates in the slave South than the North; and BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 362-401* (2007), which describes how violence was used to preserve personal status in Southern honor culture.
  15. In the era of Reconstruction, moreover, this alternative model grew stronger and included large sections of the South. See *infra* notes 63–69 and accompanying text.
  16. In particular, the *Peruta* majority relied upon *State v. Reid*, 1 Ala. 612, 616–17 (1840); *Wilson v. State*, 33 Ark. 557, 560 (1878); *Stockdale v. State*, 32 Ga. 225, 227 (1861); *Nunn v. State*, 1 Ga. 243 (1846); *Walls v. State*, 7 Blackf. 572, 573 (Ind. 1845); *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822); *State v. Junel*, 13 La. Ann. 399, 400 (1858); *State v. Chandler*, 5 La. Ann. 489 (1850); *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843); *Andrews v. State*, 50 Tenn. 165, 187 (1871); *Aymette v. State*, 21 Tenn. 154 (1840); *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833); and *Cockrum v. State*, 24 Tex. 394, 403 (1859). See *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1156–60 (9th Cir. 2014). The one non-Southern state in this list is Indiana, whose early history was largely shaped by migrants from the South. As historian Nicole Etcheson observes, “forty-four percent of Hoosiers” in 1850 were immigrants from the South. Nicole Etcheson, *Manliness and the Political Culture of the Old Northwest, 1790-1860*, 15 J. EARLY REP. 59, 60 & n.2 (Spring 1995). The *Peruta* majority acknowledged, but rejected, the following nineteenth century cases that did not support its conclusion: *Haile v. State*, 38 Ark. 564 (1882); *Fifé v. State*, 31 Ark. 455 (1876); *Carroll v. State*, 28 Ark. 99 (1872); *State v. Buzzard*, 4 Ark. 18 (1842); *Hill v. State*, 53 Ga. 472 (1874); *State v. Duke*, 42 Tex. 455, 459 (1875); *English v. State*, 35 Tex. 473 (1872). See *Peruta*, 742 F.3d at 1156–60.

the divided court concluded that “the majority of nineteenth century courts agreed that the Second Amendment right extended outside the home and included, at minimum, the right to carry an operable weapon in public for the purpose of lawful self-defense.”<sup>17</sup>

But the majority’s presumption that this regional selection of case law reflected a national jurisprudential consensus in the nineteenth century is deeply problematic. The selective use of Southern case law in *Peruta* represents just the type of analysis that Justice Scalia has warned against, in which courts “look over the heads of the crowd and pick out [their] friends.”<sup>18</sup> Understanding this jurisprudence, to borrow again from Justice Scalia, “requires immersing oneself in the political and intellectual atmosphere of the time . . . and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.”<sup>19</sup> These cases did not emerge in a vacuum and do not reflect the full range of American legal history. Rather, they come from a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined.<sup>20</sup>

Violence was a central element of slave and honor culture in the South. Richard Hildreth, an antebellum lawyer, journalist, and historian, wrote in 1840 that violence was frequently employed both to subordinate slaves and to intimidate abolitionists.<sup>21</sup> That violence, in turn, resulted in “a complete paroxysm [sic] of fear” and “extreme degree of terror . . . of slave vengeance” amongst the slaveholding class.<sup>22</sup> Meanwhile, violence between white men “to preserve white manhood and personal status” was encouraged in Southern honor culture.<sup>23</sup> According to Hildreth, duels “appear but once an age” in the

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17. *Peruta*, 742 F.3d at 1160.

18. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997) (paraphrasing Judge Harold Leventhal’s criticism of the use of legislative history); see also *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

19. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989).

20. 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, 1314 (1995) (observing that, unlike in the North, “the South’s large population of slaves constituted a potential danger to the free white population, a danger that had to be controlled”); *id.* at 1318-19 (“Almost from the beginning, the unique need to maintain white domination in the nation’s first truly multi-racial society led the South to a greater vigor [than other regions] with respect to the private possession of arms and to the universal depu[t]ization of the white population as a means of insuring racial control.”) (footnote omitted).

21. RICHARD HILDRETH, *DESPOTISM IN AMERICA: AN INQUIRY INTO THE NATURE, RESULTS, AND LEGAL BASIS OF THE SLAVE-HOLDING SYSTEM* 88 (1854).

22. *Id.* at 89-90.

23. See WYATT-BROWN, *supra* note 14, at 368-69.

North, but “are of frequent and almost daily occurrence at the [S]outh.”<sup>24</sup> As a result of the distinct cultural phenomena of slavery and honor, Southern men carried weapons both “as a protection against the slaves” and also to be prepared for “quarrels between freemen.”<sup>25</sup>

Hildreth was not the only contemporary commentator to observe the prevalence of public carry in Southern society or to compare it with the norm in other parts of the country. In 1845, one year before *Nunn*, New York jurist William Jay contrasted “those portions of our country where it is supposed essential to personal safety to go armed with pistols and bowie-knives” with the “north and east, where we are unprovided with such facilities for taking life.”<sup>26</sup> Frederick Law Olmstead, writing in 1857, observed that “among young men a bowie-knife was a universal, and a pistol a not at all unusual, companion in Kentucky.”<sup>27</sup> Similarly, an 1874 *New York Times* editorial commented that “[i]n most of the Southern States, the keeping and bearing of arms is considered an indispensable adjunct to the freedom of an American citizen.”<sup>28</sup> The editorial continued: “When a mob assembles in a Southern State, it is certain to be an ‘armed mob.’ The gun stores are among the largest and most prosperous establishments in small Southern towns.”<sup>29</sup> In 1880, journalist H.V. Redfield published one of the earliest studies exploring Southern violence and concluded that the South’s murder rate was connected to the prevalence of public carrying of weapons, particularly concealable ones.<sup>30</sup> In much of the South, “[s]o fixedly has this deadly custom been engrafted upon society . . . that a very earnest and prolonged effort will be required to efface it.”<sup>31</sup> He noted that in New England, however, carrying concealed weapons was uncommon because “[t]he laws forbid it, and public sentiment condemns it so

24. See HILDRETH, *supra* note 21, at 145.

25. *Id.* at 90; see also ROTH, *supra* note 14, at 218 (“Few whites had carried pistols or fighting knives in the eighteenth century, but the practice became popular in the plantation South in the nineteenth century as fears of black violence grew and whites became more anxious and belligerent.”).

26. WILLIAM JAY, ADDRESS BEFORE THE AMERICAN PEACE SOCIETY AT ITS ANNUAL MEETING 23-24 (1845).

27. FREDERICK LAW OLMSTEAD, A JOURNEY THROUGH TEXAS, OR, A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER 20 (1857).

28. Editorial, *A Question for Arkansas*, N.Y. TIMES, May 11, 1874, at 4.

29. *Id.*

30. H.V. REDFIELD, HOMICIDE, NORTH AND SOUTH: BEING A COMPARATIVE VIEW OF CRIME AGAINST THE PERSON IN SEVERAL PARTS OF THE UNITED STATES 197-98 (1880) (“If the habit of carrying deadly weapons could be suppressed in the Southern States it would diminish the number of homicides very largely.”). By the time of Redfield’s study, the Southern homicide rates had been significantly higher than the Northern rates for at least sixty years. By the 1820s, Southern homicide rates were at least double that of the two “most homicidal” Northern cities – New York and Philadelphia. See ROTH, *supra* note 14, at 200.

31. REDFIELD, *supra* note 30, at 195.

strongly that were the laws silent the habit could not be engrafted upon society.”<sup>32</sup>

Public carry thus was popular in Southern society, but cultural norms were not silent regarding what *manner* of carrying was honorable. In particular, concealed carry was perceived to give men “secret advantages” and lead to “unmanly assassinations,” while open carry “place[d] men upon an equality” and “incite[d] men to a manly and noble defence of themselves.”<sup>33</sup> Some Southern legislatures, accordingly, passed laws penalizing concealed carry, while permitting open carry. Kentucky and Louisiana passed the first such laws in 1813, and other states followed suit.<sup>34</sup>

The challenges to these laws gave rise to the *Nunn* family of case law. Following the norms of the time, Southern judges wrote opinions supporting open carry as constitutionally protected, while criticizing concealed carry and noting that it was constitutionally unprotected.<sup>35</sup> No similar judicial record exists in the North, meanwhile, where public carry was much less prevalent and public carry restrictions appear to have gone unchallenged.<sup>36</sup>

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32. *Id.* at 194.

33. *See* *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (stating that open carry “is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country,” but concealed carry tends “to secret advantages and unmanly assassinations”).

34. *See* Act of Feb. 3, 1813, ch. 89, 1812 Ky. Acts 100; Act of Mar. 25, 1813, 1812 La. Acts 172; Act of Feb. 1, 1839, No. 77, 1838 Ala. Laws 67; Act of Dec. 25, 1837, 1837 Ga. Laws 90; Act of Feb. 10, 1831, ch. 26, § 58, 1831 Ind. Acts 180, 192; Act of Jan. 14, 1820, ch. 23, 1819 Ind. Acts 39; Act of Feb. 2, 1838, ch. 101, 1838 Va. Acts 76; REVISED STATUTES OF THE STATE OF ARKANSAS, ADOPTED AT THE OCTOBER SESSION OF THE GENERAL ASSEMBLY OF SAID STATE, A.D. 1837, at 280 (William MoK. Ball & Sam C. Roane eds., 1838) (including “[w]earing concealed weapons” in its list of “offences against the public peace, and affecting the security of persons and property” in ch. 44, div. VIII, art. I, § 13).

35. *See, e.g., Chandler*, 5 La. Ann. at 489-90. *Nunn* based its holding on the Second Amendment, while other Southern courts relied upon provisions in their state constitutions. To be sure, the broad view of the right to bear arms was not universally held in the South. But supporters of expansive public carry rights generally reject any contrary cases as not surviving *Heller*. *See, e.g., Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1159 (rejecting analysis in *State v. Buzzard*, 4 Ark. 18 (1842)); *id.* at 1160 (rejecting analysis in *State v. Duke*, 42 Tex. 455 (1874)); *see also* Darrell A.H. Miller, *Peruta, the Home-Bound Second Amendment, and Fractal Originalism*, 127 HARV. L. REV. F. 238, 239 (2014) (describing how “some . . . precedent did not fit” with *Heller*’s view of the right to bear arms and “[t]rimming was therefore in order”). Today, concealed carrying is more popular than open carrying, and accordingly gun rights advocates do not limit their arguments about the scope of the Second Amendment to one preferred form of carrying.

36. *See infra* Part II. We do not intend to suggest that violence or firearms carrying did not exist in the north. They did exist, but to a much lesser extent. *See* SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 139 (2006) (discussing northern concerns about concealed carry).



The judges deciding the Southern right-to-carry cases were thus immersed in a social and legal atmosphere unique to the South.<sup>37</sup> The distinctive nature of Southern society, including its embrace of slavery and honor, contributed to an aggressive gun culture.<sup>38</sup> That culture, in turn, influenced jurists such as Chief Justice Lumpkin, who had considerable success “translating his personal views into law.”<sup>39</sup> At minimum, the historical origins of *Nunn* and similar cases ought to give modern judges serious pause as they consider public carry cases, like *Peruta*, in the post-*Heller* era.

## II. AN ALTERNATIVE REGULATORY TRADITION

*Nunn*’s permissive view of public carry was not universally held in the United States—indeed, it was not universally held in the South.<sup>40</sup> Another prevalent view accepted robust regulation of the right to carry. The roots of this alternative framework can be traced to the regulatory regime of medieval England. In 1328, the English Statute of Northampton began a tradition of prohibiting armed travel through fairs, markets, and other populated areas.<sup>41</sup>

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37. Some gun rights advocates have acknowledged as much. See, e.g., Cottrol & Diamond, *supra* note 20, at 1318-23.

38. See *supra* notes 20-33 and accompanying text.

39. Mason W. Stephenson & D. Grier Stephenson, Jr., “To Protect and Defend”: Joseph Henry Lumpkin, the Supreme Court of Georgia, and Slavery, 25 EMORY L.J. 579, 579-80 (1976). Indeed, one of Chief Justice Lumpkin’s primary objectives was to preserve the hegemony of the planter class and maintain the hierarchy that defined slave society. In an opinion just two years after *Nunn*, he expressed his fear that freed slaves would endanger slaveholders: “Neither humanity, nor religion, nor common justice, requires of us to sanction or favor domestic emancipation; to give our slaves their liberty at the risk of losing our own.” *Vance v. Crawford*, 4 Ga. 445, 459 (1848). In another, he upheld the use of trained dogs to pursue a runaway slave. Before quoting extensively from the New Testament regarding the coming apocalypse, Chief Justice Lumpkin opined that such measures were necessary “to tighten the chords that bind the negro to his condition of servitude—a condition which is to last . . . until the end of time.” *Moran v. Davis*, 18 Ga. 722, 724 (1855). *Nunn*, which struck down a Georgia law that prohibited white citizens from openly carrying guns, is an especially weak foundation for our modern, national jurisprudence, given Chief Justice Lumpkin’s professed interest in preserving the “peculiar institution,” even if through the use of violence and intimidation.

40. See, e.g., *infra* note 44 and accompanying text (discussing the ability of justices of the peace to arrest those who “shall go or ride armed with unusual and offensive weapons . . . among any great Concourse of the People” in North Carolina (quoting J. DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 13 (Newbern, James Davis 1774))).

41. 2 Edw. 3, c. 3 (1328), reprinted in 1 THE STATUTES OF THE REALM 258 (mandating that individuals “bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in [f]airs, [m]arkets, nor in the presence of the [j]ustices or other [m]inisters, nor in no part elsewhere, upon pain to forfeit their [a]rmour to the King, and their [b]odies to prison at the King’s pleasure”).

Others have explored the evolution of this prohibition in England.<sup>42</sup> What is important for this Essay is that several early American states expressly incorporated versions of the Statute of Northampton into their laws.<sup>43</sup> In those states, constables, magistrates, or justices of the peace had the authority to arrest anyone who traveled armed contrary to prohibitions derived from the Statute of Northampton. As a North Carolina jurist, James Davis, put it in 1774:

Justices of the Peace, upon their own View, or upon Complaint, may apprehend any Person who shall go or ride armed with unusual and offensive weapons, in an Affray, or among any great Concourse of the People, or who shall appear, so armed, before the King's Justices sitting in Court.<sup>44</sup>

These types of restrictions on the right to bear arms were widely considered permissible at the Founding.<sup>45</sup>

Modern proponents of an expansive right to public carry downplay this early regulation, insisting, for example, that it only covered “arms carrying with the specific intent of terrorizing the public.”<sup>46</sup> This reading is partially due to the fact that some early American versions of the Statute of Northampton, exemplified by a 1790s Massachusetts law, gave justices of the peace the authority to arrest “such as shall ride or go armed offensively, *to the fear or terror of the good citizens.*”<sup>47</sup> But as William Blackstone suggested in his *Commentaries on the Laws of England*, terrorizing the public was the

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42. For a helpful exposition of how the Statute of Northampton evolved through the centuries, see 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).

43. See 1852 Del. Laws 330-33; 1795 Mass. Acts 436; 1821 Me. Laws 285; 1792 N.C. Sess. Laws 60-61; 1801 Tenn. Pub. Acts 710; 1786 Va. Acts 33.

44. See J. DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 13 (Newbern, James Davis 1774) (citing Michael Dalton, THE COUNTRY JUSTICE CONTAINING THE PRACTICE, DUTY AND POWER OF THE JUSTICES OF THE PEACE AS WELL IN AS OUT OF THEIR SESSIONS 37 (London 1705)).

45. See Charles, *supra* note 42, at 31-36 (describing the express adoption of similar prohibitions in many parts of early America and the common understanding that these prohibitions barred public carry to preserve the public peace).

46. David B. Kopel & Clayton Cramer, *State Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1127, 1133-34 (2010); see also *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1154-55 (9th Cir. 2014), *reh'g en banc granted*, 781 F.3d 1106 (9th Cir. 2015); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. R. SIDEBAR 97, 101-02 (2009).

47. 1795 Mass. Acts 436 (emphasis added). For a contemporary analysis of the statute, see 1 WILLIAM CHARLES WHITE, A COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS 116 (1809).

consequence of going armed.<sup>48</sup> Blackstone wrote that “by the laws of Solon, every Athenian was finable who walked about the city in armour,” and similarly, in England “*riding or going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”<sup>49</sup> In other words, the act of traveling armed in a populated place was sufficient under common law to constitute the offense. Accordingly, an 1805 treatise written for justices of the peace in New Jersey made clear that peace officers could, on their own initiative, apply this restriction to a man traveling armed “though he may not have threatened any person in particular, or committed any particular act of violence.”<sup>50</sup> Similarly, other early American versions of the Statute of Northampton omitted any mention of “terror.” North Carolina’s statute, for example, stated that “no man great nor small [shall] go nor ride armed by night nor day, in fairs, markets, nor in the presence of the King’s Justices, or other ministers, nor in no part elsewhere.”<sup>51</sup> By its plain terms the North Carolina prohibition applied categorically, regardless of any “intent to terrorize.”

In 1836, Massachusetts revised its public carry restriction, omitting any reference to “fear or terror” and adding a new exception for public carry in the limited circumstances where a person had a “reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property.”<sup>52</sup> Under the statute, any person publicly carrying a weapon could be arrested upon the complaint of any other person “having reasonable cause to fear an injury, or breach of the peace.”<sup>53</sup> Defendants were permitted the opportunity to provide a

48. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*148-49.

49. *Id.* (emphasis added).

50. JAMES EWING, A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE, SHERIFF, CORONER, CONSTABLE, AND OF EXECUTORS, ADMINISTRATORS, AND GUARDIANS 546 (1805). Similarly, as early as 1682, New Jersey constables pledged “to arrest all such persons, as in [their] presence, shall ride or go arm’d offensively.” See A Bill for the Office of Coroner and Constable, ch. 18 (Mar. 1, 1682), reprinted in AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 250, 251 (1881).

51. FRANCOIS-XAVIER MARTIN, A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA, 60-61 (New Bern, Editor’s Press 1792).

52. 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 . . .”).

53. 1795 Mass. Acts 436, ch. 2; see also Arrest Warrant of Benjamin Bullock (August 13, 1853) (on file with author). In Bullock’s case, after he was arrested, a justice of the peace heard evidence and determined that Bullock was not guilty of the offense. Record, Grover v. Bullock (Worcester Cty. August 16, 1853) (No. 185) (on file with author). One might infer that the lack of Westlaw-searchable case law relating to the Massachusetts-type restrictions is evidence that these restrictions were not enforced. But traditional case law research is not

defense, such as proving that they reasonably had armed themselves in response to a threat. If, after a hearing, the justice of the peace determined that the defendant violated the statute, the defendant would be required to provide “sureties for his keeping the Peace,”<sup>54</sup> a common enforcement tool in early America. At common law, sureties were similar to present-day guarantors in the bail context: members of the community who would pledge responsibility for the defendant and risk losing their bond if the defendant failed to “keep the peace.”<sup>55</sup> In a rural society before the age of police forces or an administrative state, this citizen-complaint process was an efficient way to deal with the danger posed by public carrying, especially where that danger was limited because public carry was not “engrafted” on the regional culture.<sup>56</sup>

The same year Massachusetts revised its law, the respected jurist Peter Oxenbridge Thacher, whose judicial decisions and other writings “had made him known throughout the country,”<sup>57</sup> issued a grand jury charge explaining the restrictions on public carry in Massachusetts. He instructed that in the Commonwealth, “no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property.”<sup>58</sup> Judge Thacher’s charge was praised in the contemporary press as “sensible,”

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especially probative of the application of these restrictions; *Bullock*, for example, did not result in any published opinions and was only discovered after uncovering paper records created by the local justices of peace. And in many cases those records did not survive the passage of time, and those that did are not well indexed or digitally searchable. In light of the fact that restrictions on public carry were well accepted in places like Massachusetts, *see, e.g., infra* note 59 and accompanying text, and were included in the relevant manuals for justices of the peace, *see, e.g., supra* notes 44, 50 and accompanying text, the better inference is that violations were enforced at the justice of peace level, but did not result in expensive appeals that would have produced searchable case law.

54. *See* 1795 Mass. Acts 436, ch. 2.

55. *See* 5 WILLIAM BLACKSTONE, COMMENTARIES \*251-53 (discussing the common law practice of providing sureties for keeping the peace). *See generally* RICHARD BURN, BURN’S ABRIDGMENT, OR THE AMERICAN JUSTICE; CONTAINING THE WHOLE PRACTICE, AUTHORITY AND DUTY OF JUSTICES OF THE PEACE; WITH CORRECT FORMS OF PRECEDENTS RELATING THERETO, AND ADAPTED TO THE PRESENT SITUATION OF THE UNITED STATES 386-400 (1792) (explaining the mechanics of sureties of the peace in early American law).

56. *See supra* notes 30-32 and accompanying text.

57. 3 THE AMERICAN REVIEW: A WHIG JOURNAL OF POLITICS, LITERATURE, ART AND SCIENCE 222, 223 (1846) (reviewing REPORTS OF CRIMINAL CASES TRIED IN THE MUNICIPAL COURT OF THE CITY OF BOSTON, BEFORE PETER OXENBRIDGE THACHER, JUDGE OF THAT COURT, FROM 1823 TO 1843 (Horatio Woodman ed., 1845)).

58. PETER OXENBRIDGE THACHER, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK, FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF THE TERMS OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, ON MONDAY, DECEMBER 5TH, A. D. 1836, AND ON MONDAY, MARCH 13TH, A. D. 1837, 27 (1837); *see also* Charles, *supra* note 42, at 39 & n.209; Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1720 & n.134 (2012).

“practical,” and “sage.”<sup>59</sup> It lies of course in stark contrast to Chief Justice Lumpkin’s later pronouncements on the unconstitutionality of open carry regulations.<sup>60</sup>

Massachusetts was not alone in its broad regulation of public carry. Over the next several decades, Wisconsin, Maine, Michigan, Virginia, Minnesota, Oregon, and Pennsylvania passed laws modeled on the 1836 Massachusetts statute.<sup>61</sup> While modern regulatory schemes, such as the “good cause”

59. See *Judge Thacher’s Charges*, CHRISTIAN REG. & BOS. OBSERVER, June 10, 1837, at 91.

60. See *supra* notes 3-4 and accompanying text.

61. See An Act to Prevent the Commission of Crimes, § 16, reprinted in STATUTES OF THE TERRITORY OF WISCONSIN 379, 381 (1839) (“If any person shall go armed with a dirk, dagger, sword, pistol or pistols, 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 other 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.”); ME. REV. STAT. ch. 169, § 16 (1840), reprinted in THE REVISED STATUTES OF THE STATE OF MAINE 707, 709 (1841) (“Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without a reasonable cause to fear an assault on himself, or any of his family or property, may, on the complaint of any person having cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace for a term, not exceeding one year, with the right of appeal as before provided.”); MICH. REV. STAT. ch. 162, § 16, reprinted in THE REVISED STATUTES OF THE STATE OF MICHIGAN 690, 692 (1846) (“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.”); Of Proceedings to Prevent the Commission of Crimes, ch. 14, § 16, 1847 Va. Acts 127, 129 (“If any person shall go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may be required to find sureties for keeping the peace for a term not exceeding twelve months, with the right of appealing as before provided.”); Of Proceedings to Prevent the Commission of Crimes, ch. 112, § 18, reprinted in THE REVISED STATES OF THE TERRITORY OF MINNESOTA 526, 528 (1851) (“If any person shall go armed with a dirk, dagger, sword, pistol or pistols, 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 other 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.”); Proceedings to Prevent Commission of Crimes, ch. 16, § 17 (1853), reprinted in THE STATUTES OF OREGON 218, 220 (1854) (“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, injury, or other violence to his person, or to his family or property, he may, on complaint of any other 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.”); Proceedings to Detect the Commission of Crimes, § 6 (1861), reprinted in A DIGEST OF THE LAWS OF PENNSYLVANIA 248, 250 (John Purdon comp., 1862) (“If any person, not being an officer on duty in the

permitting policy at issue in *Peruta*, do not operate in exactly the same manner as these regulations passed primarily outside the South in the nineteenth century, they are a logical analogue given present-day circumstances. Significantly, both regimes presume that the state's police power justifies limiting the right to carry arms in public to circumstances in which there is a clear justification, such as a heightened need for self-defense.<sup>62</sup>

After the Civil War, the Massachusetts model—generally restricting public carry with limited exceptions for people with reasonable cause to fear attack—gained traction in parts of the South. One of the fullest judicial expositions of the scope of this regulatory model occurred after Texas enacted a statute that reflected the Massachusetts one, titled, “Act to regulate the keeping and bearing of deadly weapons.”<sup>63</sup> The Texas law prohibited “[a]ny person [from] carrying on or about his person” pistols, knives, and other specified weapons.<sup>64</sup> The Act provided an affirmative defense if a defendant could show that he or she faced an “immediate and pressing” danger that would “alarm a person of ordinary courage.”<sup>65</sup> In *State v. Duke*, the Texas Supreme Court upheld this statute as “a legitimate and highly proper regulation” that “appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business.”<sup>66</sup>

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military or naval service of the state or of the United States shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his family, person or property, he may, on complaint of any person having reasonable cause to fear a breach of the peace therefrom, be required to find surety of the peace as aforesaid.”).

62. Research into public carry restrictions contrary to the *Nunn* regime only recently received attention in academic literature. See Cornell, *supra* note 58, at 1720 & n.134. Moreover, the substance of this research was not referenced in briefs submitted to the Ninth Circuit before the original *Peruta* decision was filed. Only after the Court voted to rehear the case en banc and called for additional briefs, over a year after the initial *Peruta* decision, did an amicus brief discuss this new historical research. See Brief for Everytown for Gun Safety as Amicus Curiae Supporting Appellees at 15-17, *Peruta v. Cty. of San Diego*, No. 10-56971 (9th Cir. Apr. 30, 2015), ECF No. 257.
63. Law of April 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25, reprinted in 6 H. GAMMEL, LAWS OF TEXAS 927 (1898). For a compilation of other state statutes restricting carrying weapons in public, see Mark Frassetto, *Firearms and Weapons Legislation up to the Early Twentieth Century* (Jan. 15, 2013), <http://ssrn.com/abstract=2200991> [<http://perma.cc/QB43-SFLU>].
64. Law of April 12, 1871, in GAMMEL, *supra* note 63, at 927.
65. *Id.*
66. *State v. Duke*, 42 Tex. 455, 459 (1874). The *Peruta* majority rejected *Duke* because the Texas constitution made express what has always been implicit in the state police power: that the right to bear arms could be limited by “such regulations as the legislature may prescribe.” *Peruta*, 742 F.3d at 1160 (quoting Texas Constitution of 1869) (alteration omitted). Regulation of firearms and gunpowder has been at the heart of the police power throughout our nation’s history. See WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 53-54 (1996) (describing the scope of police power in

Meanwhile, outside both the South and North, frontier towns adopted public carry regulations by the era of the Fourteenth Amendment that were far stricter than even those in Massachusetts and Texas.<sup>67</sup> Desiring to reduce violence and attract businessmen who might not invest in places where they felt endangered, many frontier towns prohibited public carry altogether.<sup>68</sup> Even famed “wild west” places like Tombstone and Dodge City banned carrying firearms within town limits.<sup>69</sup>

Thus, it appears that much of the country did not share *Nunn*'s view that broad regulation of public carry ran afoul of the right to bear arms. Most regions, and parts of the South itself, were amenable to substantial restrictions on public carry rights in the interest of public safety, restrictions that were reflected in statutes, the press, grand jury charges, and Reconstruction-era opinions such as *Duke*.

### CONCLUSION

In recent years, courts have been asked to strike down public carry restrictions on the basis of the original understanding of the Second Amendment. If the judges deciding those cases choose to look to history, they should keep in mind that diverse regional understandings of the right to carry firearms have persisted throughout our nation's history. While *Nunn* represents one perspective on the constitutionality of public carry restrictions, it falls woefully short of reflecting a national consensus. Indeed, the value of cases like *Nunn* is greatly diminished by the fact that a great many Americans in the antebellum years lived outside the South, in places less enthusiastic

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early America and how “it was never doubted in this well-regulated society that something as potentially injurious to the public as gun powder . . . was decidedly regulatable”); *id.* at 57 (noting exercise of police power in 1813 to prohibit the discharge of firearms in New York City); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 683-84 (2008) (Breyer, J., dissenting) (compiling early gunpowder and firearm laws). Moreover, the textual distinction between the Texas Constitution as it was interpreted in *Duke* and the Second Amendment is not as clear as *Peruta* makes it out to be. *See* Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. (forthcoming 2015) (arguing that, in light of *Heller*'s definition of “militia” as including “the body of all citizens capable of military service,” the reference to a “well regulated Militia” in the Second Amendment's preamble is a textual authorization of firearms regulation).

67. *See* Blocher, *supra* note 11, at 117-18 (describing severe firearms restrictions in Western towns within the broader American tradition of more restrictive firearms regulations in American population centers).

68. ADAM WINKLER, *GUN FIGHT* 171-73 (2011).

69. *See* ROBERT R. DYKSTRA, *THE CATTLE TOWNS* (1983); WINKLER, *supra* note 68, at 13, 163-65 (summarizing historical research such as Dykstra's showing that carrying dangerous weapons was “nearly always proscribed” in frontier towns).

about public carry and more accepting of public carry restrictions. Rather than relying on regional case law derived from the antebellum South, whose gun culture and jurisprudence were influenced by the culture of slavery and honor, judges seeking historical guidance in public carry cases today can and should seek guidance from the alternative tradition that presumed the constitutional soundness of broad public carry restrictions. At a minimum, persuasive historical precedent exists for a view of the Second Amendment that accommodates modern “good cause” permitting schemes requiring applicants to show a heightened need for self-defense in order to carry handguns in public.

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