CIVIL NO: 07-15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs and Appellants,

vs.

MARY V. KING, et al.,

Defendants and Appellees.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HON. MARTIN J. JENKINS,
(CASE NO. CV-99-04389-MJJ)

APPELLEES' SUPPLEMENTAL BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court is aware from Appellee's Answering Brief, the Ordinance challenged in this lawsuit generally prohibits firearms possession on a limited category of Alameda County's own property, consisting principally of open space venues, such as County-owned parks, recreational areas, historic sites, parking lots of public buildings (the State prohibits gun possession within the same buildings), and the County fairgrounds. The existence of a separate corporate body, the Housing Authority of the County of Alameda, precludes the County from owning any residential property. *See* Cal. Health & Safety Code Sections 34240, 34201(c), 34400(d), 34315(b), (e), (f). Because the County owns no residential property, the Ordinance does not reach any residential property. The Ordinance was enacted in the wake of a mass shooting at the County Fairgrounds.

The Supreme Court's recent decision in *District of Columbia v. Heller*, – U.S. –, 128 S.Ct. 2783, – L.Ed. 2d – (2008), mandates several conclusions regarding the challenged Ordinance and the

Second Amendment. First, the Second Amendment is a constraint only on Congress, not the States and their political subdivisions and, therefore, whatever the scope of the right protected by that Amendment, it does not constrain the County. *See* Section III below.

Second, as Justice Scalia has explained, "properly understood, [the Second Amendment] is no limitation upon arms control by the states." Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law*, 136-137, n.13 (Princeton University Press 1997). As explained below, this conclusion is mandated by the nature of the right which the Supreme Court understands and explains in *Heller* is at the heart of the Second Amendment – the right of self-preservation. This conclusion is also mandated by the structure of our federal system, which denies to the national government and reposes in the States, the police power, a power essential to ensuring self-preservation. *See* Sections III.A, F and G below.

Further, under the Supreme Court's modern incorporation test, there would be no basis for incorporating the Second Amendment as a constraint on the States. The relevant historical sources and practices demonstrate that an individual right to possess firearms for

purely personal self-defense purposes is not so rooted in the traditions of this country to be ranked as fundamental. To give but one example, while the first constitutions of the original thirteen States all provided for a right to a jury trial in criminal cases, only one of those constitutions provided for a right to possess "arms" in any context other than public defense. *See* Section III.D.1 below. Many States have never provided constitutional protection for arms possession for purely personal self defense. Of the States that do provide such protection today, in only three have the state courts found the right protected to be fundamental. *See* Section III.G.1 below.

Moreover, even if the incorporation bar did not exist, the Second Amendment is not implicated by the Ordinance. Under *Heller*, the Ordinance is presumptively valid because it regulates "sensitive" venues. The Ordinance is also presumptively valid under *Heller* because the Nordykes challenge the impact of the Ordinance with respect to commercial sales of firearms at their gun shows, and *Heller* states the regulation of commercial sales of guns is presumptively valid. No plaintiff in this lawsuit has ever claimed that the Ordinance burdens his individual right to possess a firearm for the

purpose of self-defense from some sudden and imminent threat of violence. *See* Section IV below. The narrow right acknowledged in *Heller*, individual possession of a handgun in the home for personal self-defense, has no relevance to this lawsuit.

II. THE SECOND AMENDMENT HAS NOT BEEN INCORPORATED THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876), the Supreme Court held that the Second Amendment constrains only the federal government. "The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . ." *Id* at 553.

On the same basis, a few years later, the Court rejected a Second Amendment challenge to the Military Code of Illinois, citing *Cruikshank*. *Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed.2d 615 (1886). The Court again relied upon *Cruikshank* in

upholding a Texas ban on carrying dangerous weapons against a Second Amendment challenge: "[I]t is well settled that the restrictions of th[is] amendment[] operate only upon the federal power, and have no reference whatever to proceedings in state courts." *Miller v. Texas*, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed 812 (1894).

Heller acknowledges that it had no occasion to opine upon *Cruikshank's* validity today. *Heller*, 128 S.Ct. at 2813 n.23. It nevertheless mentions that *Presser* and *Miller* "reaffirmed that the Second Amendment applies only to the Federal Government." *Ibid.* After *Heller*, the law remains that the Second Amendment constrains only the Federal Government and not the States and their political subdivisions.

This Court expressly observed in *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 729 (9th Cir. 1992), that the Ninth Circuit is foreclosed by *Cruikshank* and *Presser* from considering whether the Second Amendment is (or should be) incorporated through the Fourteenth Amendment. On that issue, "it is for the Supreme Court, not us, to revisit the reach of the Second Amendment." *Id.* at 730. "Needless to say, only th[e] [Supreme]

Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) (per curiam reversal of Ninth Circuit decision that wrongly concluded Supreme Court precedent no longer good law).

Accordingly, this Court's earlier ruling in *Nordyke v. King*, 319 F.3d 1185, 1192 (9th Cir. 2003), that the Nordykes cannot maintain a claim under the Second Amendment, still stands (although now for a different reason).

III. EVEN HAD THIS COURT NOT PREVIOUSLY HELD THAT THE SECOND AMENDMENT CONSTRAINS ONLY CONGRESS, IT SHOULD SO CONCLUDE BECAUSE, AS JUSTICE SCALIA HAS EXPLAINED, PROPERLY UNDERSTOOD, THE SECOND AMENDMENT IS NO LIMITATION UPON ARMS CONTROL BY THE STATES.

A. As *Heller* Reveals, In Our Federal System, Effectuation Of The Core Right Protected By The Second Amendment Mandates That The Amendment Remain A Constraint Only on Congress.

Justice Scalia, author of the majority opinion in *Heller,* has long maintained that the Second Amendment is a guarantee that the *federal* government will not interfere with "an individual's right to bear arms for self-defense" and that, "properly understood it is no limitation upon arms control by the states." Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law*, 136-137, n.13 (Princeton University Press 1997). The *Heller* decision is fully compatible with Justice Scalia's long-held position that the Second

Amendment is a constraint only on Congress because, while declining to define the scope of the Second Amendment right, what the Court makes clear in *Heller* is that the core right protected by that Amendment is the right of self-defense or self- preservation. 128 S.Ct. at 2798-2799. Within our constitutional system, delineation of this right is left to the "ordinary administration of criminal and civil justice" within the states. *See, e.g., The Federalist No. 17* (Hamilton)("There is one transcendent advantage belonging to the province of the State governments . . . – I mean the ordinary administration of criminal and civil justice.").

The linkage by the *Heller* Court between the Second Amendment and self-defense, a right firmly established in the common law tradition at the time of the Founding, explains why the Second Amendment was understood by the Founders, and should be understood today, only as a constraint against federal invasion of a power reserved to the States – the power to implement, administer, and develop the common law in accordance with the decisions of the people of each State. *See, e.g., The Federalist No. 45* (James Madison), explaining that "[t]he powers delegated by the proposed

Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . .The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and posterity of the State."

In reaching its conclusion about the core right protected by the Second Amendment, the Court in *Heller* relies heavily upon Blackstone's *Commentaries on the Laws of England*, noting that the Court has acknowledged Blackstone's works to constitute " the preeminent authority on English law for the founding generation.' [Citation]." 128 S.Ct. at 2798. According to Blackstone, the right of personal security is, along with the right to liberty and the right to property, one of the three primary rights of all individuals. 1 Blackstone at 125. Moreover, it is principally for the purpose of achieving personal security that the individual enters into society and "obliges himself to conform to those laws which the community has thought proper to establish" for the "general advantage of the public."

"But every man, when he enters into society, gives, up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain that absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and there would be no security to individuals in any of the enjoyments of life. Political therefore, or, civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."

1 Blackstone at 121.

Blackstone's concept that personal security or self-preservation is best achieved when each individual's "natural liberty" is restrained by laws enacted by the community for the general welfare clearly resonated with the American Founders. John Dickinson, known as the "Penman of the Revolution," one of the most influential delegates to the Constitutional Convention, and the only influential contributor to the U.S. Constitution who actually studied law in England, expanded on this concept in his famous *Letters of Fabius*. *See* Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 Penn St. L. Rev. 415 (2003); *see also* Gregory S. Ahern, *The Spirit of American Constitutionalism: John Dickinson's Fabius Letters*, Vol. XI, No. 2, Humanitas, National Humanistics Institute (1998). These essays, written in defense of the proposed Constitution, were widely published throughout the country in 1788 and profoundly influenced ratification. Natelson, 108 Penn St. L. Rev. at 426-427.

In his Letter III, Dickinson explains that "[e]ach individual then must contribute such a share of his rights, as is necessary for attaining **that security that is essential to freedom**." *Fabius*, First

Series, Letter III (emphasis added). In forming a political society, each individual "contributes some of his rights, in order that he may, from a common stock of rights, derive greater benefits, than he would merely from his own . . ." What the individual would lose by this submission was the "power of doing injury to others - and the dread of suffering injuries from them." What the individual would gain, on the other hand, was "protection against injuries," a "capacity of enjoying his undelegated rights to the best advantage," and the "perfect liberty" that consists in freedom from fear. *Id.*

That individuals must give up their right to use force (the power of doing injury to others) however they choose to achieve security and attain political or ordered liberty, as described by Blackstone, or "perfect liberty" as described by Dickinson, of course includes relinquishment of the right to use deadly force however and whenever one chooses. Thus, among the laws which the "community has thought proper to establish" and to which the individual "must conform" to achieve personal security and ordered liberty, are laws governing the use of deadly force, traditionally a legislative function reserved and entrusted to, the police power of the States.

This is not to say that the common law tradition has not long recognized the right of individuals to defend themselves against sudden and imminent violence. However, as Blackstone's Commentaries on self-defense reflect, even the exercise of that right is defined by the common law, which limits it to "sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law." 4 Blackstone Commentaries at 184. Moreover, the common law has traditionally defined when deadly force may be used in the face of an imminent, violent attack. According to Blackstone, all killing was a breach of the peace and thus a "public wrong." 4 Blackstone at 176-177. There were three kinds of homicide at common law: justifiable, excusable, and felonious homicide. 4 Blackstone at 176-177. According to Blackstone, only when the killing occurred out of some unavoidable necessity, and for the advancement of public justice, or for the prevention of any forcible or atrocious crime, was the killing justifiable. Killing in self-defense was excusable in certain, limited circumstances, and the common law required a person to retreat before resorting to deadly force. *Id.* at 184.

Moreover, in Blackstone's view, the common law tradition rejects the Lockean notion that all manner of force without right upon a person puts that person in a state of war with the aggressor, which thus allows the person attacked to lawfully kill the aggressor. Instead, "the law of England, like that of every other well-regulated community, is too tender of public peace, too careful of the lives of its subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death." 4 Blackstone at 181-182.

As the United States Supreme Court has made clear, it is and always has been the province of the States to legislate and regulate regarding the use of deadly force and the suppression of violence within each State, through the police power, which the Founders "denied the National Government and reposed in the States." *See United States v. Morrison*, 529 U.S. 598, 617-618 (2000) (in which the Court struck down the Violence Against Women Act as beyond the power of the federal government, stating "[t]he regulation and punishment of intrastate violence that is not directed to the

instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States . . . .[internal citations omitted.] Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims.").

Under our constitutional system, it is up to the community, through the exercise of the police power, to determine how to regulate deadly weapons within the context of lawful use of force and criminal use of force, because every weapon that may be an instrument of self-defense is equally capable of being used against another human being as an instrument of violence. As *Heller* makes clear, properly understood, the Second Amendment constrains the federal government from disarming those members of the community who are allowed by the community to possess and use arms for self-preservation, subject to those laws the community has enacted to best secure the safety of all who comprise that community. So interpreted, the Second Amendment is consistent with the long line of cases in which the Supreme Court has respected the "preeminent role of the

States in preventing and dealing with crime" and has expressed reluctance "to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced . . . ." *See Martin v. Ohio*, 480 U.S. 228, 232 (1987) (rejecting a Federal Due Process challenge to a state law placing on the accused the burden of proving the affirmative defense of self-defense by a preponderance of the evidence, and cases cited therein.)[1]

Moreover, the understanding that the Second Amendment constrains only Congress, which lacks power to regulate use of deadly force in the context of assuring public safety, provides congruity between the Amendment and that provision of the English Bill of Rights from which the *Heller* Court traced the Amendment's lineage – An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (English Bill of Rights),

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[1]As a result, the States have had wide latitude in developing the relevant legal doctrines to meet the needs of their communities and there is wide variance from state to state with respect to regulation of dangerous weapons, and the law of self defense, including under substantive and procedural criminal law and under tort law. *See* Section III.G.2 below.

1689, 1 W. & M., Sess.2, ch.2, Article 7. Article 7 provides: "That the Subjects which are Protestants may have Arms for Their Defence suitable to their Condition, and as allowed by Law." The English Bill of Rights applies only against the Crown, not Parliament. As enacted, Article 7 extended the right to personally possess arms to Protestants who otherwise met all conditions Parliament had imposed or might impose on arms possession, and subject to all restrictions on arms possession Parliament had imposed or might impose in the future. *See generally* Lois. G. Schwoerer, *To Hold and Bear Arms: The English Perspective,* 76 Chi.-Kent L. Rev. 27 (2000); *See also* H. Richard Uviller and William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 449-454 (2000). For example, Parliament currently prohibits almost all personal possession of handguns. *See* 1 Blackstone at 139, referencing this provision of the English Bill of Rights as the "fifth and auxiliary right of the subject" and describing it as "a public allowance, **under due restrictions**, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."

(emphasis added). Thus, Blackstone also understood the auxiliary right to have arms as subject to "due restrictions" under all circumstances.

Moreover, Blackstone plainly did not understand that this was an auxiliary right necessary to preserving the people's right to overthrow a government **established by the people**, because he explicitly rejected the Lockean notion that the people had any such inherent right at all:

> "It must be owned that Mr. Locke, and other theoretical writers, have held, that there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby forfeited, and devolves to those who gave it.' But however just this conclusion may be in theory, we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of

> government established by that people, reduces all members to their original state of equality, and by annihilating the sovereign power repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual. So long as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control."

1 Blackstone at 157.

As shown above, the *Heller* decision is fully compatible with Justice Scalia's long held position that the Second Amendment constrains only Congress, and protects the right to keep and bear arms against infringement by the federal government. The core right protected by the Amendment, the right of self-preservation (or in Blackstone's vernacular, the primary right of security) is best advanced through the establishment and exercise of the police power,

for the welfare of the individual and the whole community. "Perfect liberty" as understood by the Founders, requires the protection of the individual that is gained through public order. *Fabius*, First Series, Letter III.[2] Thus, incorporation of the Second Amendment against the

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[2]As noted above, Dickinson participated in the federal Constitutional Convention, as one of Delaware's delegates, and is considered one of the drafters of the Constitution. Among other things, he was used as a resource on English common law during the Convention. *See* Natelson, *supra*, at 449-450 (2003) (explaining that when the issue of whether an ex post facto law could be civil as well as criminal in nature, it was Dickinson who examined Blackstone's Commentaries and reported back to the house on that issue). Dickinson was a fierce advocate of federalism, and of retaining strong state governments. The Dickinson Plan, discovered when Dickinson's notes of the Convention were first published, was Dickinson's own draft constitution, and shares aspects of the final document. The Dickinson Plan is believed to have played a significant role in the ultimate decision to enumerate Congressional powers and was prepared during the time that Madison was advocating consolidation. *Id.* at 427, 453 - 457. Dickinson also served as the President of two States, Delaware and Pennsylvania, and campaigned for ratification of the Constitution by composing and publishing the "Fabius" letters in 1788. Delaware then became the first state to ratify the Constitution. Four years later Dickinson presided over the Constitutional Convention that produced the Delaware Constitution of 1792. *Id.* Significantly, neither that Constitution nor its predecessor, the Delaware Declaration of Rights of 1776, contained a "right to bear arms" provision at all. It was not until 1987 that a right to bear arms provision was added to the Delaware Bill of Rights. *See* Dr. Samuel B. Hoff, Delaware's Constitution and Its Impact on Education, on line at http://www.iccjournal.biz/Scholarly_Articles/Hoff.

States would undermine the most fundamental principles of liberty and personal security that underlie all our civil and political institutions.

B. <u>There Is Also No Basis For Incorporating The Second Amendment Under the Supreme Court's Modern Incorporation Test</u>

As noted above, in *Heller* the Supreme Court identified the right of self-preservation as the core right advanced by the Second Amendment. As also discussed above, that "primary right" is deeply imbedded in this country's common law tradition and the scope and legal constraints on that right have evolved in each State in different ways. Effectuation of that right depends upon the police power of the States. Under our constitutional system, it is up to the people of each State to determine how the balance will be struck between use of force and possession of deadly weapons in the context of best ensuring public order, a necessary predicate to the security and "true liberty" of its citizens. As shown more fully below, there is no historic or current consensus by the citizens of the States that

securing an individual's right to possess firearms for personal self-defense against infringement by the State through a constitutional provision is a necessary corollary of protecting the individual's right of personal self-defense. Further, historically, and today, those state constitutional provisions that do protect an individual right to possess firearms are highly individualistic, reflecting how the citizens of those states have struck a balance between weapons control to secure public order and weapons control to promote self-defense. *See* Section III.F below.

Moreover, to the extent that the Second Amendment traces its lineage to Article 7 of the English Bill of Rights, Blackstone characterized that right to have arms as "allowed by law" as an auxiliary, not a primary right. 1 Blackstone at 139. As noted above, it was a restriction only upon the Crown, precluding the Monarchy from disarming those British citizens whom Parliament allowed to possess arms. It was not a fundamental right, or indeed no constraint at all, as against Parliament, whose legislative authority Blackstone acknowledged to be "absolute." 1 Blackstone at 157. For these reasons, and the additional reasons set forth below, the Second

Amendment fails the Court's test for incorporation, and incorporation of that Amendment would be inimical to the right of self-preservation at the heart of the Amendment.

In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (*Duncan*), the Supreme Court iterated the factors informing whether "the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment." *Id.* at 148. The Court observed in the context of the Fifth and Sixth Amendments "[t]he question has been asked whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' [citation] [or] whether it is basic in our system of jurisprudence.' [citation.]" *Id.* at 148-149. Using slightly different phrasing, the Court decided that trial by jury in criminal cases "is fundamental to the American scheme of justice." *Id.* at 149.

A right is fundamental if "necessary to an Anglo-American regime of ordered liberty." *Id.* at 149 n.14. The *Duncan* court observed that various constitutional protections recognized in past

precedents all were fundamental "in the context of the criminal processes maintained by the American States." *Ibid.*

Duncan examined English common law, as analyzed by Blackstone and other commentators, and concluded that the right to trial by jury had existed in England for several centuries. *Id.* at 151. English colonists brought the jury trial system to America, as evidenced by the guarantees in every constitution of the original States. Moreover, every state entering the Union thereafter in one form or another protected the right to a jury trial in a criminal case. *Id.* at 152-154. At the time of *Duncan*, every state mandated jury trials in serious criminal cases. *Id.* at 154.

The practice of examining English common law, and of canvassing the constitutional, statutory, and common law developed by American States, carries forward into later decisions. A plurality of justices (Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas) consulted these sources in *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (*Egelhoff*).

In *Egelhoff*, the State of Montana prohibited the trier of fact from considering the voluntary intoxication of the accused in

determining whether he possessed the mental state that was an element of the charged offense. *Id* at 39-40. The plurality determined that Montana's law did not offend the Due Process Clause of the Fourteenth Amendment. *Id.* at 56. The state law was constitutional " unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. [Citation.]'" *Id* at 43 (internal quotations omitted).

The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Id.* at 44 (emphasis added). English common law, as understood by Blackstone and other commentators, treated an intoxicated defendant the same as one who had command of all faculties at the time of the charged offense. Voluntary inebriation did not confer a privilege upon a defendant. *Id.* at 44.

The plurality also recounted the relevant common law developed by states since the early 19th century. A survey of earlier cases revealed that some state courts did consider intoxication in deciding whether a defendant possessed the mental state required for conviction of a particular crime. *Id.* at 46-47. But the consideration

of intoxication in early state decisions did not conclusively establish a fundamental right that intoxication be considered on the issue of criminal intent. *Id.* at 48. That was because "fully one-fifth of the States either never adopted the new common-law' rule at issue here [intoxication may be considered] or ha[d] recently abandoned it." *Ibid.* Many states had clung to the English common law rule prohibiting consideration of intoxication – a rule which the plurality found to be justified. Other states had resurrected it. *Id.* at 49. The recent practice of adhering to the English common law rule "alone casts doubt upon the proposition that the opposite rule is a fundamental principle.'" *Ibid.*

As shown below, the English common law tradition does not recognize an individual's right to possess a firearm as a fundamental right, and the varied historic practices of the States with respect to the treatment of arms possession demonstrate there is no consensus that arms possession is a fundamental right.

C. <u>The Relevant Historical Sources Support the Conclusion That Individual Arms Possession Is NOT Fundamental To Our System Of Justice</u>.

As noted above, the *Heller* court observed that William Blackstone was " the preeminent authority on English law for the founding generation.' [Citation.]" 128 S.Ct. at 2798. In his *Commentaries on the Law of England*, Blackstone articulated a primary right of self-preservation or personal security. 1 Blackstone, 125. The goal of achieving personal security was one of the fundamental reasons that human beings enter into society. *Id.*

The *Heller* court nowhere concludes that an individual right to possess firearms for personal self-defense is a fundamental right. The other historical sources cited in *Heller* also do not so conclude. For example, St. George Tucker, the law professor who edited the "most important early American edition of Blackstone's Commentaries," *Heller*, 128 S.Ct. at 2799, wrote that "Americans understood the *right of self-preservation*' as permitting a citizen to repe[l] by force' when the intervention of society in his behalf, may be too late to

prevent an injury.'" *Id.,* citing 1 Blackstone's Commentaries 145-146, n. 42 (1803) (emphasis added).

Moreover, Tucker never explicitly linked a personal right to possess firearms to this right of self-preservation. Recent scholarship points out that Tucker's earliest writings on the Second Amendment linked its "bear arms" provision to the States' right to maintain their militias and, further, that Tucker's reference to the Amendment as the "true palladium of liberty" must be understood in the context of his strongly held view that the Second Amendment, with its protection of the militia, was a federalism provision, reserving to the States their existing power to arm their militias. In his early writings, Tucker also explicitly linked the Second Amendment to the Tenth Amendment. *See* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstanding*, 47 Wm. & Mary L. Rev. 1123, 1125-1131 (2006)(tracing the evolution of Tucker's understanding of the Second Amendment).

Tucker shared Madison and Jefferson's belief that the rights of the states and the rights of individuals were intertwined and that

protection of individual rights was ensured by safeguarding the integrity of the States. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 391-398; *see also* Cornell, 47 Wm. & Mary L. Rev. 1123, at 1136. Other scholars have also pointed out the militia-centered comments of Tucker with respect to the Second Amendment. *See* H. Richard Uviller & William G. Merkel, *The Authors' Reply To Commentaries On, and Criticisms Of The Militia, And the Right To Arms, Or, How The Second Amendment Fell Silent*, 12 Wm. & Mary Bill Rts. J. 357, 359-360 (2004).

Tucker's theory of rights also did not link self-defense with a personal, constitutional right to possess weapons Tucker divided rights into four categories – natural, social, civil and political. The individual right of self-defense he placed in the category of natural rights, which had to be substantially narrowed when the individual entered into civil society. The Second Amendment's right to bear arms fit into the categories of political and civil rights. Cornell, 47 Wm. & Mary L. Rev. 1123, 1145-1147 (also noting that Blackstone treated Article 7 of the English Bill of Rights alongside the "political rights" such as the right to petition the government).

Likewise, a number of scholars have noted Justice Joseph Story's emphasis on the militia in connection with the "right to bear arms." *Id.* at 1130-1131; *see also* H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent*, pp. 30-31 (Duke University Press 2002). Thus, the influential authors of the leading legal treatises and writings in the decades immediately following adoption of the Second Amendment did not expound upon a right of arms possession for purely personal self-defense in their expositions on a right of self-preservation or the Constitution.

Using a novel research approach to ascertain whether the term "bear arms" was used to convey one consistent meaning between 1763 and 1791, one scholar has used keyword searching capabilities of the digital archives of Readex's Early American Imprints and Early American Papers and of the Library of Congress, which together contain most of the American newspapers, pamphlets, broadsides, and Congressional proceedings published during this era. He then reviewed the primary sources located as a result of the keyword searches. Most, but not all the sources so located used the term "bear

arms" in a military sense or in reference to issues related to community defense. There was no pattern of consistent use of the term to describe a constitutional right to possess firearms for personal security. In fact, none of the sources linked personal safety with a constitutional right to bear arms. *See* Nathan Kozuskanich, *Originalism, History, and The Second Amendment: What Did Bearing Arms Really Mean To The Founders*?, 10 U. Pa. J. Const. L. 413, 415-438 (2008). Similarly, and as shown more fully below, a review of the state constitutional provisions pertaining to "arms" and the evolution of such provisions also mandates the conclusion that there is no historic or current pattern suggesting that the people of the several states have ever reached a consensus that an individual right to possess firearms for personal self-defense is necessary to our scheme of American justice and ordered liberty.

D. State Constitutions And Statutes In The Founding Era Do Not Support The Incorporation Of The Second Amendment As A Constraint Against The States.

1. The Overwhelming Majority Of The Original 13 States Did Not Provide An Individual Right To Bear Arms In Their Constitutions.

Turning to the "historical practice" that Justice Scalia focused upon in *Egelhoff*, 518 U.S. at 44 (plurality opinion) (joined by Justice Ginsburg concurring, 518 U.S. at 59), a study of the constitutions of the original 13 States shows no common understanding in the Founding Era of an individual right to possess firearms for personal self-defense. At the time of the Founding until well after the Second Amendment was ratified in 1791, eight of the original 13 States – Connecticut, Delaware, Maryland, New Hampshire, New Jersey, New York, Rhode Island, and South Carolina – had *no* provision in their constitutions even mentioning arms (Appendix A).[3] Moreover, none

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[3] The County has filed Appendices concurrently with filing this supplemental brief. Appendix A is a list of state constitutional provisions and some of their antecedents (though not all), prepared by Professor Eugene Volokh and published as *State Constitutional*

(continued...)

of these States rushed to adopt arms language in the wake of the Second Amendment. Connecticut did not adopt a constitutional provision mentioning arms until 1818; Delaware in 1987 (Delaware's Bill of Rights adopted in 1792 included rights mirroring each of the first eight amendments of the new U.S. Constitution **except** the Second Amendment [*see* footnote 2 *supra*]; New Hampshire in 1982; Rhode Island in 1842; and South Carolina in 1895. Among those provisions there is substantial variation in language and in how the state courts have interpreted the scope of the "arms" provision (Appendix A).[4] Maryland, New Jersey and New York have never adopted provisions mentioning arms (Appendix A). Moreover, the early militia statutes of the original colonies did not uniformly require that militia members appear armed with firearms when called into

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[3](...continued)
Rights to Keep and Bear Arms, 11 Texas Review of Law & Politics 191 (2006). This journal is online at www.trolp.org.

[4] The early constitutions (or other governing documents) of some of those eight states included provisions mentioning militias, but even those provisions did not refer to arms and, much less, any individual right to arms. *See, e.g,* Delaware Declaration of Rights of 1776 (Appendix B, section 18); Constitution of New Hampshire - 1776 (Appendix C, p. 2 ¶ 5).

service by the state for common defense. For example, the Georgia Militia Act of 1778 provided that the Governor or "Commander in Chief for the time being" would be responsible for the calling forth of the militia and for arming them. Ga. Act. of Nov. 15, 1778 (Appendix D at p. 20). New York's 1794 Militia Act likewise required the state to purchase and provide arms for militia members. Act of Mar. 22, 1794 N.Y. Laws 503 (Appendix D at p. 27). North Carolina's 1778 Militia Act and Pennsylvania's 1777 Militia Act also required the state to provide the militia members with arms. Act of 1778, 1778 N.C. Sess. Laws 4, § VI (Appendix D at p. 28); Act of Mar. 17, 1777, Ch. 750, § XIV, 9 PA. Stat. 84 (Appendix D at p. 29). Virginia's Militia Act of 1795 also required the Governor to annually procure four thousand small arms to equip militia members when called into actual service. Act of Dec. 26, 1795, Ch. XII, §§ I-III, 1795 Va. Acts 17 (Appendix D at p. 33-34). Thus, both before and after adoption of the Second Amendment, there was substantial variation in the States with respect to how the militia members were to be armed when called forth by the state. There was no uniform

expectation that all militia members would possess arms necessary for state militia service and would come armed when called forth.

Two other States mentioned arms but only with respect to serving in the military. Georgia's Constitution of 1777 provided for bearing arms as a member of a "battalion" (Appendix E, art. XXXV). The Virginia Declaration of Rights adopted in 1776 provided for a militia composed of people "trained to arms" (Appendix F, art. 13).

Only the remaining three states – Massachusetts, North Carolina, and Pennsylvania – had constitutions mentioning the right of "people" or "citizens" to keep and bear arms. But Massachusetts and North Carolina did not tether that right to the individual. Massachusetts in 1780 provided that the right was for the "common defense" (Appendix A). North Carolina's Constitution of 1776 called for bearing arms in "defense of the State" (Appendix A).

Only Pennsylvania's Constitution of 1776 arguably could have been construed as implying an individual right: the right of "citizens" to bear arms in "defense of themselves and the state" (Appendix A). Even that right was limited by the requirement adopted a decade earlier that anyone who refused an oath of loyalty to the

Commonwealth could not possess a firearm. *See* Act of Apr. 1, 1778, ch. 796, §§ 2, 5; 9 Pa. Stat. 238-39 (Appendix D at pp. 29-30). Furthermore, Pennsylvania's arms provision was drafted in the wake of a decades long struggle to achieve community safety. *See* Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 Rutgers L.J. 1041 (2007). Professor Kozuskanich chronicles in detail the events that led to the adoption of the right to arms for purposes of defense. Briefly, beginning in the 1750s, Pennsylvanians grew weary of their Assembly's failure to prevent Indian incursions on the frontier. *Id.* at 1047. "The failure of the provincial Assembly to ensure the safety of its own citizens shaped reactionary constitutional ideology that valued physical protection and community safety." *Ibid.* For the next two decades, loosely organized militias formed to provide that protection. *Id.* at pp. 1048-1057. Finally, in the fall of 1775, the Assembly requested all men from 16 to 50 years of age to acquire military training. *Id.* at 1059. Subsequent to the formal Declaration of Independence the following year, the Constitutional Convention adopted a resolution that all citizens of Pennsylvania should contribute to the defense of

society. *Id.* at 1062. Thus, the guarantee in the Pennsylvania Constitution of the right to bear arms for the "defense of themselves and the State" was focused upon "community safety." *Id.* at 1064. "Indeed, the safety of the whole depended on the contributions and diligence of every individual, and participation in civil society came with certain responsibilities. Bearing arms was the paramount obligation in the new state . . ." *Id.* at 1046. "Defense was for the community, the citizens as a whole, and the responsibility for ensuring community security lay on all of its members." *Id.* at 1065-1066.

Pennsylvania's conception of arms bearing in furtherance of a civilized society protecting public safety echoes Blackstone's view that ordered liberty is achieved only by citizens contributing to the safety of all, and benefitting from that effort, rather than each citizen pursuing his own definition of justice. As the *Heller* court observed, the founding generation surely considered Blackstone the preeminent authority on English law. *Heller*, 128 S.Ct. at 2798.

2. Early State Constitutions and Statutes Reflect That Each State Had Its Own Approach To The Regulation of Arms.

The Supreme Court's modern incorporation approach considers whether the States have ever reached any sort of a consensus in their approach to the constitutional right in question. *See, e.g., Duncan*, 391 U.S. at 152-154 (discussing right to criminal jury trial in early America and in the States); *Egelhoff*, 518 U.S. at 48-49 (examining whether States consider voluntary intoxication in assessing criminal intent). As shown above, there was no consensus at the time of the Founding within the states that individual possession of firearms for purely personal self-defense should be protected by the state constitution at all. Moreover, the states differed then and differ today on the purposes for which "bearing arms" receives constitutional protection. *See* Section III.G.2 below.

From the time of the Founding Era, the States have adopted widely divergent practices with respect to arms. As explained above, eight of the original States had constitutions that originally did not mention arms at all, and some not until more than a century later. The

constitutions of two other States mentioned arms only as related to military service, and did not expressly provide for any "right" to bear arms. Still two others provided a right to arms but only for the common defense. Finally, only one provided a right to arms that even arguably encompassed such possession for purely personal self-defense.

Other constitutional provisions attested to the varied and individual approaches of the States. The Pennsylvania Constitution included a time and place restriction on hunting: Residents "shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed . . ." Pa. Const. of 1776, § 43 (Appendix G). The Delaware Constitution prohibited any weapons at places where local and state officials were elected: "To prevent any violence or force being used at the said elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day . . ." Del. Const. of 1776 art. 28 (Appendix H).

Pennsylvania mandated the confiscation of weapons from individuals serving in the militia who refused to swear a loyalty oath.

See Act of Apr. 1, 1778, ch. 796, §§ 2, 5 Pa. Stat. 238-39 (Appendix D at pp. 29-30). Massachusetts did the same. *See* Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31-33 (Appendix D at p. 23) (when an individual refuses to swear or affirm loyalty, the State shall proceed "without Delay, to disarm the said Delinquent, and take from him all his Arms, Ammunition and Warlike Implements."). Virginia also disarmed citizens for failing to take a loyalty oath. *See* Act of May 5, 1777, ch. III, 1777 Va. Acts 8 (Appendix D at pp. 31-32). Moreover, Massachusetts prohibited any person from taking a loaded firearm into any dwelling, stable, barn, out-house, warehouse, shop or building. The fine for violation of the statute was ten pounds, and the firearm was subject to seizure and could then be sold at auction if the jury found a violation of the statute. Act of Mar. 1, 1783, Ch. XIII, 1788 Mass. Acts 218-19 (Appendix D at pp. 25-26).

In *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004), Professors Cornell and DeDino chronicle many of the early statutes regulating the use of firearms. They divide the regulations into several categorical types: (1) statutes providing for confiscation of firearms from those

unwilling to pledge allegiance to the State; (2) statutes regulating use as part of militia obligations; and (3) statutes regulating the storage of gunpowder. *Id.* at 506-512.

In addition to the loyalty oaths required by several states, Connecticut, Massachusetts, New York, and Pennsylvania tightly regulated their militias by defining who was required to participate, who was excused from duty, and what weaponry was required. *Id.* at 508-510. As noted above, New York did not require that militia members possess arms but instead provided them to the militia when called forth. Massachusetts, New York, Pennsylvania and Tennessee regulated the storage and transport of gun powder. *Id.* at 510-512 & n.159.

From the beginning of America there emerged an individual State by State approach to arms regulation. As the Court will see, even as some States added individualistic arms provisions to their constitutions, those constitutional provisions, coupled with statutory law and case law, reflected ever wider differences among the States in their approaches to arms possession and regulation.

E. The Varied And Divergent Approaches To Arms Regulation Continued In The Nineteenth Century.

In the nineteenth century, 27 States either adopted or revised constitutional provisions mentioning arms: Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington and Wyoming (Appendix A). The century no doubt saw an increase in state constitutional provisions expressing a right to bear arms for self-defense, but any discerned commonality in approach to such a right ended with the constitutional text.

Of the 27 States recognizing some sort of arms right, only eight (Connecticut, Kansas, Michigan, Oregon, Rhode Island, South Dakota, Washington, and Wyoming) observed a right to possess arms for self-defense that was not qualified by other constitutional language or by court decision.

The remaining 19 States either did not recognize a right of possession for self-defense at all, or recognized a right of possession

for self-defense that could be regulated by the legislature in various ways. Four of the 19 – Arkansas, Maine, South Carolina, and Tennessee – recognized a right of possession only for the "common defense," and not for self-defense (Appendix A). Even that right was subject to legislative regulation. *See State v. Buzzard*, 4 Ark. 18 (1842) (Arkansas Supreme Court upheld law prohibiting carrying of concealed weapons); *Aymette v. State*, 21 Tenn. 154, 159 (1840) (Tennessee Supreme Court recognized that right to possess firearms subject to legislative regulation). *Aymette* explained that possession of ordinary weapons was not constitutionally protected while possession of weapons commonly associated with militia services was protected ("political right") but also was subject to regulation. The court described several circumstances where the legislature could limit the exercise of the right. "[I]t is somewhat difficult to draw the precise line where legislation must cease and where political right begins, but it is not difficult to state a case where the right of legislation would exist." *Id.* at 159-160.

Seven of the 19 – Colorado, Kentucky, Louisiana, Mississippi, Missouri, Montana, and North Carolina – observed a right of self-

defense qualified by constitutional provisions either prohibiting the carrying of concealed weapons or authorizing State legislatures to adopt laws regulating or prohibiting the carrying of concealed weapons (Appendix A). Kentucky's 1850 constitutional amendment authorizing the legislature to regulate concealed weapons upended the Kentucky Supreme Court's earlier decision in *Bliss v. Commonwealth*, 12 Ky. 90 (1822). That decision invalidated the State's concealed weapons law under Kentucky's original constitution.

Five of the 19 – Florida, Georgia, Idaho, Texas and Utah – had constitutions expressly providing that their legislatures could regulate the manner in which firearms are used for self-protection or in which the right of self-defense is exercised (Appendix A). Georgia's constitutional provision, adopted in 1865 and revised in 1868 and 1877, was no doubt a rebuke of the Georgia Supreme Court's decision in *Nunn v. State*, 1 Ga. 243 (1846), holding that a gun control law was invalid under the Second Amendment.

Three of the 19 – Alabama, Indiana, and Ohio – limited the constitutional right of self-defense (Appendix A) with case law or

statutes recognizing the legislative prerogative to regulate firearms. *See State v. Reid*, 1 Ala. 612 (1840) (Alabama Supreme Court held state had police power to regulate firearms for safety purposes); *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833) (Indiana Supreme Court upheld concealed weapons ban). Ohio adopted "An Act to Prohibit the Carrying of Concealed Weapons." Act of Mar. 18, 1859, 1860 Ohio Acts 452 (Appendix I).

Other States parted company with these decisions. For example, in *State v. Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly. Some States held that the right to arms could be denied to free black citizens. *See, e.g., Aldrich v. Commonwealth*, 4 Va. 447, 2 Va. Cas. 447, 449 (Va.Gen.Ct. 1824); *Waters v. States*, 1 Gill 302, 309 (Md. 1843).

The variety of approaches to arms adopted by the States in the nineteenth century is further reflected in their laws, some of which generated the court decisions noted above. In *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L.

Rev. 487 (2004), Professors Cornell and DeDino observed the proliferation of state regulations in this area.

Ohio (in 1859), Tennessee (in 1821), and Virginia (in 1838) criminalized the carrying of concealed weapons with limited exceptions. *Id.* at 513-514 & n.176-180. In 1837, Georgia prohibited the sale of concealed weapons, and Tennessee followed suit in 1838. *Id.* at 514 & n.182-183. Several States and local governments enacted time, place and manner restrictions on firearms use. In 1820, Cleveland prohibited the discharge of firearms. *Id.* at 515 & n.187. Ohio made it a crime to shoot at a target within the limits of any recorded town plat. *Id.* at 515 & n.188. Tennessee adopted a law in 1825 authorizing certain local officials to regulate the shooting and carrying of guns. *Id.* at 515 & n.190.

In addition to the above regulations chronicled by Cornell and DeDino, Kentucky adopted a law in 1813 prohibiting anyone but travelers from carrying "[a] pocket pistol [and other items] concealed as a weapon." Act of Feb. 3, 1813, ch. LXXXIX, 1813 Ky. Acts 100-111 (Appendix J). Louisiana banned the carrying of concealed

weapons the same year. Act of Mar. 25, 1813, 1813 La. Acts 172-175 (Appendix K).

The different and widely varied constitutional language adopted by the States in the nineteenth century, together with their eclectic regulations and the lack of uniformity in the case law, undermine any notion of the developed consensus that courts look for in determining whether a constitutional right should be incorporated.

F. Modern State Constitutions Reflect Splintered Textual Approaches To Arms Regulation.

Six States – California, Iowa, Maryland, Minnesota, New Jersey, and New York – do not have any provision in their constitutions mentioning a right to keep or bear arms (Appendix A).

Ten States – Arkansas, Hawaii, Kansas, Massachusetts, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, and Virginia – have constitutions conferring a right to possess arms only in the context of the defense of, or service to, the State (Appendix A). In those constitutions, the right is qualified by different words and phrases. Arkansas, Massachusetts and Tennessee confer the right for

the "common defense." Tennessee then provides for regulation with "a view to prevent crime." Kansas and Ohio confer the right upon "people" for "their defense and security," and Virginia for the "defense of a free state." Rhode Island is silent with respect to purpose. Hawaii, North Carolina and South Carolina track the language of the Second Amendment.

Within this category of States, the case law has created further division. For example, the highest courts in Kansas and Massachusetts have construed the right in their constitutions as protecting only those who serve in the military. *See City of Salina v. Blaksley*, 83 P. 619, 621 (Kan. 1905); *Commonwealth v. Davis*, 343 N.E.2d 847, 849 (Mass. 1976). Additional case law discussed in the following section shows variance in the views of other States.

Eighteen States – Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Michigan, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington, and Wyoming – have constitutions conferring a right to possess firearms for purposes of self-defense or defense of the State (Appendix A). With one exception, each of these constitutions, or

their antecedents, expressly mentions "defense" or "security."[5] But the common language ends there as shown by a comparison of the constitutional provisions in Appendix A.

Florida's Constitution provides that "the manner of bearing arms may be regulated by law." Georgia's states that "the General Assembly shall have power to prescribe the manner in which arms may be borne." Idaho describes the types of laws its legislature may adopt, including those governing (1) concealed weapons, (2) crimes committed with firearms, (3) other acts using firearms, and (4) possession of firearms by felons. Illinois declares that the right is subject "to the police power." The Kentucky Constitution authorizes its legislature "to enact laws to prevent persons from carrying concealed weapons." Texas declares that "the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." The varying provisions in these State constitutions betray any notion of uniformity.

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[5]The Illinois Constitution mentions neither, but uses the phrase "bear arms" (Appendix A). In the context of the Second Amendment, the *Heller* court construed "bear arms" to imply the purpose of "defensive action." 128 S.Ct. at 2793.

The constitutions of the remaining sixteen States confer individual rights broader than "self-defense" with respect to possessing firearms. Those states are Colorado, Delaware, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Utah, West Virginia, and Wisconsin (Appendix A). These constitutions authorize the possession of firearms for the protection of "home," "person," "family," or "property," and in several cases mention "hunting" and "recreational use."

Again, there is marked divergence in language (*see* Appendix A). Colorado, Louisiana, Mississippi, Missouri, Montana, and New Mexico authorize their legislatures to regulate concealed weapons. Nebraska, Nevada, New Mexico, North Dakota, and Wisconsin provide that firearms may be used for certain listed purposes, and also for any "other lawful purposes." Oklahoma acknowledges that nothing in its constitution "shall prevent the Legislature from regulating the carrying of weapons." Utah qualifies the right by noting "nothing herein shall prevent the legislature from defining the lawful use of arms." West Virginia's constitution

implies legislative authority to the extent it provides for "lawful hunting and recreation use."

The variety of provisions in modern State constitutions is itself sufficient to show that no consensus has developed among the States as to the existence of, or the scope of, a constitutional right to possess a firearm for personal self-defense. Some States view the right to possess arms as related to service in the military. Even among the many States that view the right as an individual one, the parameters of the right are different. The case law to which the County now turns reflects further divergence among the States.

G. Current Case Law Reveals Not Only The Broad Array Of Regulatory Approaches Among The States, But Also The Continuing Opportunity For States To Enact Regulations Tailored To Local Conditions.

1. Only Three States Have Held That The Right To Bear Arms In Their Constitutions Is Fundamental.

Of the 44 States with constitutions referring to arms, only three – Montana, Ohio and Wisconsin – have determined that the

right to keep and bear arms is fundamental. Even in those States, the courts have approved regulatory standards that allow the State and local jurisdictions to adopt laws suited to the needs of the polity. *See, e.g., State v. Rathbone*, 100 P.2d 86, 91 (Mont. 1940) (right under Montana Constitution is fundamental and state may regulate that right under police power to extent reasonably necessary to preserve public welfare); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169, 171-173 (Ohio 1993) (right under Ohio Constitution is fundamental and subject to reasonable exercise of the police power); *State v. Cole*, 665 N.W.2d 328, 336-337 (Wis. 2003) (right under Wisconsin Constitution is fundamental and subject to reasonable exercise of police power).

The regulatory standards articulated in these cases – "reasonably necessary to preserve public safety" and "reasonable exercise of the police power" – leave ample room for State and local legislative bodies to craft arms laws tailored to community conditions. After all, whatever the balance of regulatory authority struck between State and local government in a particular State, those

governments are uniquely qualified to determine the needs of their citizens based on a multitude of factors.

2. The Remaining States Have Adopted A Diverse Spectrum Of Arms Regulations Under Flexible Standards Allowing Consideration Of Local Needs.

There are 41 states with a constitutional right to bear arms that has not been held to be fundamental. Nine confer the right in connection with defense or service to the State – Arkansas, Hawaii, Kansas, Massachusetts, North Carolina, Rhode Island, South Carolina, Tennessee and Virginia (Appendix A). In that subgroup of nine, where the constitutional language has been construed as conferring an individual right, courts have regularly upheld a variety of regulations under a deferential standard. *See, e.g., Carroll v. State*, 28 Ark. 99, 101 (Ark. 1872) (prohibition against concealed carrying of deadly weapons upheld as police regulation necessary for benefit of society), more recently cited with approval in *Jones v. City of Little Rock*, 862 S.W.2d 273 (Ark. 1993); *State v. Mendoza*, 920 P.2d 357, 368 (Haw. 1996) (requirement of permit to obtain a firearm a

reasonable regulation under police power); *State v. Dawson*, 159 S.E.2d 1, 10-11 (N.C. 1968) (prohibition against being "armed to the terror of the people" a reasonable regulation bearing "fair relation" to public safety); *Mosby v. Devine*, 851 A.2d 1031, 1039 (R.I. 2004) (law requiring permits to carry concealed weapons a "reasonable regulation by the state in exercising its police power"); *State v. Johnson*, 56 S.E. 544, 545 (S.C. 1907) (local ordinance prohibiting discharge of firearms within city limits a reasonable exercise of police power).

Almost all of the remaining 32 states – those with an individual right to bear arms in their constitutions – allow the regulation of firearms under a reasonableness or other deferential standard. Two of those states – Idaho and Utah – provide for legislative regulation directly in their constitutions (Appendix A). One state – South Dakota – has not yet articulated a standard for evaluating regulations of firearms. Twenty-seven of those States in their case law have used a reasonableness standard to uphold a wide variety of regulations implicating the right to bear arms in their constitutions. A

catalogue of those decisions, most issued by State Supreme Courts, and parenthetical explanations of each, are located in Appendix L.

Only two states – Alaska and New Hampshire – subject regulations of the constitutional right to bear arms to a standard other than reasonableness. *See, e.g., Gibson v. State*, 930 P.2d 1300, 1302 (Alaska Ct. App. 1997) (regulation must bear a "close and substantial relationship" to a legitimate State interest); *State v. Smith*, 571 A.2d 279, 281 (N.H. 1990) (regulation must "narrowly serve[] a significant governmental interest.")

The cases from almost all 50 States provide just a few examples of the vast array of arms regulations adopted by the States and their political subdivisions over the last century. As the Court can see, legislative bodies regulate who may carry or possess a firearm, the type of firearm that may be carried or possessed, the particular use to which a firearm may be put, the particular characteristics of a firearm, the location where a firearm may be brought or used, and any other number of aspects of firearms. The ability of communities across the country to address their own particular safety concerns is born of the reasonableness standard used

by almost all State courts in evaluating regulations against State constitutional provisions. It is therefore not surprising that there is no general consensus among the States as to whether and how particular firearms should be regulated. The only consensus that emerges is that States do not view a right to possess firearms for personal self-defense as a fundamental right.

H. The Regulation Of Arms From The Founding To Today Confirms That The Second Amendment Does Not Operate As A Constraint Against The States.

Taking together the State constitutions, statutes, and case law from the Founding Era through today, it cannot reasonably be said that a right to possess firearms for personal self-defense is "necessary to an Anglo-American regime of ordered liberty" such that it would constrain the States. *Duncan*, 391 U.S. at 149 n.14. Unlike the right to trial by jury in *Duncan*, which existed unadulterated in England for several centuries (*Id.* at 151), and was found in the original State constitutions, there has never been an individual right to possess a

firearm for personal self-defense either under English common law or in the early State constitutions.

Early State constitutions and case law reflect the understanding of American colonists. They, like Blackstone, envisioned a civilized society where firearms could be regulated in furtherance of the greater social good. Future generations of lawmakers and jurists developed a similar view as the States were added to the union and constitutions were drafted and adopted. Thus, there has never been a consensus among the States that arms provisions in their own constitutions have at any time protected a right to possess firearms for personal self-defense.

The *Heller* court found through text and history that it has been understood since the Founding that the Second Amendment constrains Congress from infringing upon an individual's right to possess firearms for personal self-defense. 128 S.Ct. at 2797-2811. That is a far different issue than the issue informing the incorporation analysis under *Duncan* and *Egelhoff*: Whether the States have historically understood their own constitutions to provide for any such right. The above analysis of the text and history of State

constitutional arms provisions, and the interpretation of those provisions by the courts, reveal many understandings of the right to bear arms afforded by States, almost all of which are quite different from the historic understanding of the Second Amendment discussed in *Heller*.

Furthermore, *Heller* itself acknowledges firearms regulation in a way difficult to reconcile with ranking as "fundamental" an individual right to possess a firearm for personal self-defense:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and

> the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of, arms.

128 S.Ct. at 2816-2817. The footnote immediately following the above passage states: "We identify these *presumptively valid* regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 2817 n.26 (emphasis added).

Describing a regulation impacting a constitutional right as "presumptively valid" is at odds with the notion that the right is " so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [Citation.]" *Egelhoff*, 518 U.S. at 43. One searches in vain for any case that analyzes a regulation impacting a fundamental right where the analysis begins with the presumption that the regulation is valid. Indeed, the Supreme Court has articulated the opposite rule: "It is well settled that . . . if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional'. [Citation.]." *Harris v. McRae*,

448 U.S. 297, 312, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). *Heller's* observation that certain firearms regulations are "presumptively valid" cannot be squared with the position that the individual right to possess firearms for personal self-defense protected by the Second Amendment is fundamental so as to be incorporated against the States and their political subdivisions.

The deferential standard of review employed by an overwhelming majority of States is akin to the presumption of validity recognized in *Heller*.[6] It might seem novel to subject regulation of an enumerated constitutional right to this level of review. But unlike other enumerated rights, the exercise of which does not per se threaten physical harm to others (i.e. expression or practicing one's religion), the exercise of a right involving firearms

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[6]*Heller* in dicta rejects applying "rational basis" review of regulations for purposes of evaluating their validity under the Second Amendment. 128 S.Ct. at 2817 n.27. Rational basis review examines whether a law is a rational means of furthering a legitimate governmental interest. This is different from the reasonable regulation standard employed by the overwhelming majority of States. That standard does not look to the fit between the law and the government's interest. Instead, it evaluates whether a law is a reasonable method of regulating a right so as not to erode the right altogether. *See Mosby v. Devine*, 851 A.2d 1031, 1045 (R.I. 2004).

possession may very easily lead to violence. The deference yielded to State legislatures and local governments in regulating firearms reflects that reality. *Heller*'s potentially broad carve-out of presumptively valid laws – "our list does not purport to be exhaustive," 128 S.Ct. at 2817 n.26 – implicitly acknowledges society's broad objection to the use of guns to kill and injure others. That potential use, and the historic and widespread practice of enacting laws to minimize gun violence and crime, belie any notion that the Second Amendment protects a fundamental right.

IV. EVEN IF THE SECOND AMENDMENT WERE INCORPORATED – AND IT SHOULD NOT BE – THE ORDINANCE IS VALID UNDER *HELLER*.

Under *Heller*, the Federal government may not invade the interest protected by the Second Amendment – the interest in possessing a weapon for self-defense.

Neither the Nordykes nor any other plaintiff asserts any desire to possess firearms on the County Fairgrounds for the purpose of self-defense, the only purpose protected under *Heller*. There is not one

allegation, and much less an established fact, in the record that the Nordykes or other plaintiffs seek to possess firearms on County-owned property for self-defense purposes (*see, e.g.,* Third Amended Complaint – ER II, pp. 284-323).[7] Instead, the Nordykes conducted gun shows on the Alameda County Fairgrounds for the purpose of facilitating the display, exhibition, and sale of thousands of firearms (ER III, p. 444, Fact Nos. 35-36). The purpose of the gun shows was to make a profit; the Nordykes complained that the County's Ordinance prevented them from profitably conducting gun shows at the County Fairgrounds (ER III, p. 442, Fact No. 18). *Heller* does not even suggest a Second Amendment right to possess firearms on government property for purposes of making a profit. Indeed, *Heller* suggests otherwise: "[N]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." 128 S.Ct. at 2816-2817. *Heller* holds the Second Amendment guarantee as protecting against federal interference a right of self-defense, and not a right to sell firearms.

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[7] Citations to the earlier filed Excerpts of Record appear as follows: ER volume number, page number and, if appropriate, paragraph or line number.

Moreover, *Heller* is a case about the use of handguns in the home. The opening sentence of *Heller* frames the issue decided: "We consider whether a District of Columbia [District] prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." *Heller*, 128 S.Ct. at 2787-2788. The case arose when Mr. Heller applied to register a handgun to keep in his home, and the District refused his application. *Id.* at 2788. In short, the Court examined the Second Amendment's protection of "the possession of usable handguns in the home." *Id.* at 2787-2788.

After concluding that the Second Amendment prohibits the federal government from invading the right of the individual to possess a firearm regardless of participation in a militia, the Court examined the District's law banning handgun possession in the home. *Id.* at 2817-2822. The Court observed that "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 2817. Furthermore, the District's ban prohibited people from using handguns for the "lawful purpose" of self-defense, and the ban extended "to the home, where the need for defense of self, family and property is most acute." *Ibid.* "There are many reasons that a citizen

may prefer a handgun for home defense [followed by list of reasons]." *Id.* at 2818. "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home . . ." *Ibid.* "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment as does its prohibition against rendering any lawful firearm in the home operable for the purposes of immediate self-defense." *Id.* at 2821-2822. Thus, "the absolute prohibition of handguns held and used for self-defense in the home" is invalid. *Id.* at 2822.

The Ordinance at issue here does not regulate the possession or use of handguns in the home. The Ordinance at issue here prohibits the possession of firearms only on the County's *own* property (ER III, p. 440, Fact No. 13). The County owns no residential property.

Heller also proclaims that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in *sensitive places* such as schools and government buildings, or laws *imposing conditions and qualifications on the commercial sale of arms*." 128 S.Ct. at 2816-2817 (emphasis

added). These types of regulations are "presumptively valid regulatory measures." *Id.* at 2817 n.26.

The Ordinance at hand, insofar as the Nordykes challenge its application to the County Fairgrounds, prohibits the possession of firearms in a sensitive place. The County owns this property in trust for the public. Cal. Gov't Code § 23004. A year before the Ordinance was adopted, eight people were injured by gunfire in a mass shooting at the County Fairgrounds during the annual County Fair (ER III, p. 438, Fact No. 1). Also, crowd control in open space venues raises particular public safety concerns. The Nordykes' shows brought thousands of firearms to the County Fairgrounds for potential sale (ER III, p. 444, Facts Nos. 35-36). Attendance at each show was at least 4,000 people (ER III, p. 444, Fact No. 37). These circumstances render the County Fairgrounds a sensitive place such that the Ordinance is a presumptively valid regulation of the Nordykes' activities.

Furthermore, the purpose of the Nordykes' shows was to sell firearms (*See* ER III, p. 442, Fact No. 18; p. 444, Fact Nos. 35-36). A

regulation of the "commercial sale of arms" is presumptively valid under *Heller*. 128 S.Ct. at 2817.

In the midst of the historical discussion over the meaning of the Second Amendment's operative clause, *Heller* references that the elements of that clause collectively "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 2797. In light of the facts of *Heller*, this statement is dicta, with no binding force: The holding of the case, and other language in the opinion, show that the quoted language cannot be read to mean that an individual has a right to possess a firearm in any place at any time on the chance the individual might be involved in a confrontation. Such an interpretation would ignore *Heller's* focus on the home-setting, would add to the self-defense linchpin a new "self-offense" rationale, and would nullify the presumption of validity cloaking regulations of firearms in sensitive places, including prohibitions on the carrying of concealed weapons, and prohibitions on possessing certain classes of weapons. Furthermore, the Court clarified that it "do[es] not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." *Id.* at 2799 (italics original). *Heller*

makes clear that it is limited to holding that the Second Amendment's guarantee protects against federal invasion of the right of individuals to possess firearms for personal self-defense in the event of confrontation in their homes. The Court specifically declined to further delineate the scope of the right. 128 S.Ct. at 2821-2822.

In addition to focusing on the place to which the right of possession reaches (the home), and the purpose for which the right of possession may be exercised (personal self-defense in the event of a confrontation), the Court further limits the scope of the Second Amendment's protection to situations where weapons are used for "traditionally lawful purposes." *See* 128 S.Ct. at 2789, 2815-2816. The County is not aware of any literature and, much less, any authority, suggesting a county must provide its property as a venue for thousands of weapons brought there for the purposes of display and sale, on the theory that commercial activity is supposedly a "traditionally lawful purpose."[8] This stands in sharp contrast to

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[8]Large trade shows involving sales of firearms are not traditional and are a recent development. The recent proliferation in such events results directly from the provisions of the 1986 Firearms Owners' Protection Act (aka the McClure-Volkmer Act) which for

(continued...)

Heller's determination that Americans traditionally have chosen to possess handguns in their homes for purposes of self-protection. *Id.* at 2817-2818. Under this formulation, the Second Amendment does not protect the activities of the Nordykes giving rise to this lawsuit.

Finally, *Heller's* treatment of local firearms regulation lends great weight to the County's authority to regulate uses on its *own* property. The historical sources cited in *Heller*, as discussed above, recognize the need to circumscribe arms possession and arms use consistent with local public safety concerns. Hence, the "presumptively valid" status accorded to the regulation of weapons in sensitive places. As noted in the *amicus curiae* brief filed by the Legal Community Against Violence in January 2008, the California Supreme Court observed that California has already engaged in

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[8](...continued)
the first time liberalized restrictions on licensed firearms dealers to allow licensed dealers to sell firearms at a location other than their licensed premises if that location was a "gun show or event" held in the state in which the dealer is licensed. *See* Tom Diaz, Making A Killing: The Business of Guns in America, at 49 (1999)(citing a letter submitted by the National Alliance of Stocking Gun Dealers to the U.S. House Subcommittee on Crime and Criminal Justice in connection with hearings before that subcommittee).

legislative balancing with respect to public property (Brief at pp. 10-12).

Specifically, in *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853, 118 Cal.Rptr.2d 746, 44 P.3d 120 (2002), the California Supreme Court observed that the "Legislature has enacted several statutes specifically pertaining to the regulation of gun shows." *Id.* at 864. After canvassing those statutes, the court stated "[e]ven assuming arguendo that a county is prevented from instituting a general ban on gun shows within its jurisdiction, it is nonetheless empowered to ban such shows on its own property." *Id.* at 868. "Thus, a county has broad latitude under Government Code section 23004, subdivision (d), to use its property, consistent with its contractual obligations, as the interests of its inhabitants require.'" *Id.* at 870.

This same principle drove the California Supreme Court's decision in the instant case upholding the Ordinance against a state preemption challenge.

> [U]nder Government Code section 23004, subdivision (d), a county is given substantial authority to manage its property, including the most fundamental decision as to how the property will be used, and . . . nothing in the gun show statutes evinces an intent to override that authority.

Nordyke v. King, 27 Cal.4th 875, 882, 118 Cal.Rptr.2d 761, 44 P.3d 133 (2002).

The California Legislature has already balanced some of the interests involved with gun shows, and has left to local regulation the balancing of other interests, particularly with respect to property owned by a local government agency. *Heller* gives no indication of an intent to upset that balance. Indeed, its reliance upon historical resources respecting legislative discretion, and its observation of "presumptively valid" regulations, strongly indicate that at least insofar as California is concerned, *Heller* leaves room for political subdivisions to decide what uses involving firearms are permitted on their property.

V. CONCLUSION

It is one thing to conclude the Second Amendment was intended to create a constitutional barrier so that the federal government, which is denied the power to regulate in the interests of the public health and safety, cannot disarm citizens who wish to have a firearm in the home because they believe it is useful for self-defense. It is quite another to conclude that individual firearms possession for personal self-defense is a right fundamental to the American scheme of liberty and justice. Our English ancestors did not enjoy any such fundamental right because Article 7, the right to have arms under the English Bill of Rights, was a qualified right (by class, religion and other factors), and was not enforceable against Parliament. There is also no evidence that there is, or ever has been, any consensus in this country that individual possession of firearms for personal self-defense is a fundamental right. It is a minority position.

It is also a minority of Americans who choose today to possess a firearm in the home for self-defense. A 1998 study by the National Opinion Research Center and Johns Hopkins Center for Gun Policy

and Research found that only about 35% of American households make that choice. *Fall 1998 National Gun Policy Survey*, Johns Hopkins Center for Gun Policy and Research 1998. Evidence also indicates that by a margin of 3 to 1, Americans today would feel **less safe**, not safer, if others in their community acquired firearms. M. Miller, D. Azrael, D. Hemenway, *Firearms and Community Fear*, Journal of Epidemiology 2000; 11: 709-714. There is credible evidence that this perception is well-founded. A recent ten-year study of the relationship between firearm availability and unintentional death, homicide and suicide for 5 to 14 year-olds across the 50 states showed that children in states with many guns have elevated rates of unintentional gun deaths, suicides and homicides . M. Miller, D. Azrael, D. Hemenway, *Availability and Unintentional Firearm Deaths, Suicides, and Homicides Among 5-14 Year Olds*, Journal of Trauma 2002; 52: 267-75.

These statistics, and many others, indicate that individual firearms possession is a personal choice that can and does have significant, negative health and safety consequences for our communities, giving rise to difficult policy choices. In our

constitutional system, ordinary citizens have a fundamental right to have their state and local legislators make the difficult policy decisions regarding public health and safety. The Second Amendment does not change that equation. It creates no barrier to the County's decision to protect people who use its property, by prohibiting firearms on that property.

DATED: September 11, 2008

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CERTIFICATE OF CONFORMITY

In accordance with Rule 32(a)(7)(c)(i) of the Federal Rules of Appellate Procedure, this certifies that the Appellees' Supplemental Brief in the case of Russell Allen Nordyke, *et al.* v. Mary V. King, *et al.*, does not exceed 14,000 words, including footnotes and excluding the title page, table of contents, table of authorities, and certificate of conformity. According to the word count function on the word processing program used, this brief contains 13,333 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 11, 2008.

_____

T. Peter Pierce

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A

STATE CONSTITUTIONAL RIGHTS TO KEEP AND BEAR ARMS

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II. PROVISIONS BY STATE, CURRENT AND PAST

Each provision is listed with the year it was first enacted; moves to different sections are not noted. If a provision first enacted in one year was changed very slightly some years later, the latter version is listed together with the original year, and the changes and change dates are noted in the footnotes.

Alabama 1819: "That every citizen has a right to bear arms in defense of himself and the state."[1]

Alaska 1994: "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. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."[2]

1959: "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."[3]

Arizona 1912: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men."[4]

Arkansas 1868: "The citizens of this State shall have the right to keep and bear arms, for their common defense."[5]

1864: "That the free white men of this State shall have a right to keep and to bear arms for their common defence."[6]

1861: "That the free white men and Indians of this State have the right to keep and bear arms for their individual or common defense."[7]

1. ALA. CONST. art. I, § 27 ("[t]hat" added, and "defence" changed to "defense," in 1875).
2. ALASKA CONST. art. I, § 19.
3. *Id.*
4. ARIZ. CONST. art. II, § 26.
5. ARK. CONST. art. II, § 5 (comma after "arms" added, and "defence" changed to "defense," in 1874).
6. ARK. CONST. of 1864, art. II, § 21.

1836: "That the free white men of this State shall have a right to keep and to bear arms for their common defence."[8]

California: No provision.

Colorado 1876: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."[9]

Connecticut 1818: "Every citizen has a right to bear arms in defense of himself and the state."[10]

Delaware 1987: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use."[11]

Florida 1990: "(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, 'purchase' means the transfer of money or other valuable consideration to the retailer, and 'handgun' means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

7. ARK. CONST. of 1861, art. I, § 21.
8. ARK. CONST. of 1836, art. II, § 21.
9. COLO. CONST. art. I, § 13.
10. CONN. CONST. art. I, § 15 ("defence" changed to "defense" in 1956).
11. DEL. CONST. art. I, § 20.

(d) This restriction shall not apply to a trade in of another handgun."[12]

1968: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."[13]

1885: "The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne."[14]

1868: "The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State."[15]

1865: Provision deleted.

1838: "That the free white men of this State shall have a right to keep and to bear arms for their common defence."[16]

Georgia 1877: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne."[17]

1868: "A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne."[18]

1865: "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."[19]

Hawaii 1959: "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."[20]

12. FLA. CONST. art. I § 8.
13. *Id.*
14. FLA. CONST. of 1885, art. I, § 20.
15. FLA. CONST. of 1868, art. I, § 22.
16. FLA. CONST. of 1838, art. I, § 21.
17. GA. CONST. art. I, § 1, para. VIII.
18. GA. CONST. of 1868, art. I, § 14.
19. GA. CONST. of 1865, art. I, § 4.
20. HAW. CONST. art. I, § 17.

Idaho 1978: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony."[21]

1889: "The people have the right to bear arms for their security and defence; but the Legislature shall regulate the exercise of this right by law."[22]

Illinois 1970: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."[23]

Indiana 1851: "The people shall have a right to bear arms, for the defense of themselves and the State."[24]

1816: "That the people have a right to bear arms for the defence of themselves, and the State; and that the military shall be kept in strict subordination to the civil power."[25]

Iowa: No provision.

Kansas 1859: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."[26]

21. IDAHO CONST. art. I, § 11.
22. IDAHO CONST. of 1889, art. I, § 11.
23. ILL. CONST. art. I, § 22.
24. IND. CONST. art. I, § 32.
25. IND. CONST. of 1816, art. I, § 20.
26. KAN. CONST. bill of rights, § 4.

Kentucky 1891: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons."[27]

1850: "That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed arms."[28]

1799: "That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."[29]

Louisiana 1974: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person."[30]

1879: "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 abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed."[31]

Maine 1987: "Every citizen has a right to keep and bear arms and this right shall never be questioned."[32]

1819: "Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned."[33]

Maryland: No provision.

Massachusetts 1780: "The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power

27. KY. CONST. bill of rights § 1.
28. KY. CONST. of 1850, art. XIII, § 25.
29. KY. CONST. of 1792, art. XII, cl. 23 ("That" and the "s" in "rights" added in 1799).
30. LA. CONST. art. I, § 11.
31. LA. CONST. of 1879, art. 3.
32. ME. CONST. art. I, § 16 (enacted after Maine Supreme Court interpreted original provision as securing only collective right, State v. Friel, 508 A.2d 123, 125 (Me. 1986)).
33. ME. CONST. of 1819, art. I, § 16.

shall always be held in an exact subordination to the civil authority, and be governed by it."[34]

Michigan 1963: "Every person has a right to keep and bear arms for the defense of himself and the state."[35]

1850: "Every person has a right to bear arms for the defence of himself and the state."[36]

1835: "Every person has a right to bear arms for the defence of himself and the State."[37]

Minnesota: No provision.

Mississippi 1890: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the Legislature may regulate or forbid carrying concealed weapons."[38]

1868: "All persons shall have a right to keep and bear arms for their defence."[39]

1817: "Every citizen has a right to bear arms in defence of himself and of the State."[40]

Missouri 1945: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons."[41]

1875: "That the right of no citizen to keep and bear arms in defence of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons."[42]

34. MASS. CONST. pt. 1, art. 17.
35. MICH. CONST. art. I § 6.
36. MICH. CONST. of 1850, art. XVIII, § 7.
37. MICH. CONST. of 1835, art. I, § 13.
38. MISS. CONST. art. III, § 12.
39. MISS. CONST. of 1868, art. I, § 15.
40. MISS. CONST. of 1817, art. I, § 23 ("of" before "the State" added, and comma after "arms" deleted, in 1832).
41. MO. CONST. art. I, § 23.
42. MO. CONST. of 1875, art. II, § 17.

1865: "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms in defence of themselves and of the lawful authority of the State cannot be questioned."[43]

1820: "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned."[44]

Montana 1889: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."[45]

Nebraska 1988: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof."[46]

Nevada 1982: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes."[47]

New Hampshire 1982: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."[48]

43. MO. CONST. of 1865, art. I, § 8.
44. MO. CONST. of 1820, art. XIII, § 3.
45. MONT. CONST. art. II, § 12.
46. NEB. CONST. art. I, § 1 (right added to preexisting provision).
47. NEV. CONST. art. I, § 11(1).
48. N.H. CONST. pt. 1, art. 2-a.

New Jersey: No provision.

New Mexico 1986: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms."[49]

1971: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons."[50]

1912: "The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons."[51]

New York: No provision.

North Carolina 1971: "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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice."[52]

1876: "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; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent

49. N.M. CONST. art. II, § 6
50. *Id.*
51. N.M. CONST. of 1912, art. II, § 6.
52. N.C. CONST. art. I, § 30.

the legislature from enacting penal statutes against said practice."[53]

1868: "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; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power."[54]

1776: "That the people have a right to bear arms for the defence of the State; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by the civil power."[55]

North Dakota 1984: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed."[56]

Ohio 1851: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."[57]

1802: "That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."[58]

Oklahoma 1907: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil

53. N.C. CONST. of 1876, art. I, § 24.
54. N.C. CONST. of 1868, art. I, § 24.
55. N.C. DECLARATION OF RIGHTS § XVII.
56. N.D. CONST. art. I, § 1 (right to bear arms added to preexisting provision).
57. OHIO CONST. art. I, § 4.
58. OHIO CONST. of 1802, art. VIII, § 20.

power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."[59]

Oregon 1857: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power."[60]

Pennsylvania 1790: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned."[61]

1776: "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."[62]

Rhode Island 1842: "The right of the people to keep and bear arms shall not be infringed."[63]

South Carolina 1895: "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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it."[64]

1868: "The people have a right to keep and bear arms for the common defence. As, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the general assembly. The military power ought always to be held in an exact subordination to the civil authority, and be governed by it."[65]

59. OKLA. CONST. art. II, § 26.

60. OR. CONST. art. I, § 27.

61. PA. CONST. art. 1, § 21 ("the" before "citizens" added in 1838; commas after "arms" and "State" deleted in 1873).

62. PA. DECLARATION OF RIGHTS, cl. XIII.

63. R.I. CONST. art. I, § 22.

64. S.C. CONST. art. I, § 20.

65. S.C. CONST. of 1868, art. I, § 28.

South Dakota 1889: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied."[66]

Tennessee 1870: "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."[67]

1834: "That the free white men of this State have a right to keep and to bear arms for their common defence."[68]

1796: "That the freemen of this State have a right to keep and to bear arms for their common defence."[69]

Texas 1876: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."[70]

1868: "Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the legislature may prescribe."[71]

1845: "Every citizen shall have the right to keep and bear arms, in the lawful defence of himself or the State."[72]

1836: "Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power."[73]

Utah 1984: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."[74]

66. S.D. CONST. art. VI, § 24.
67. TENN. CONST. art. I, § 26.
68. TENN. CONST. of 1834, art. I, § 26.
69. TENN. CONST. of 1796, art. XI, § 26.
70. TEX. CONST. art. I, § 23.
71. TEX. CONST. of 1868, art. I, § 13.
72. TEX. CONST. of 1845, art. I, § 13 (comma added after "arms" in 1866).
73. REPUB. TEX. CONST. of 1836, DECLARATION OF RIGHTS, cl. 14.
74. UTAH CONST. art. I, § 6.

1895: "The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law."[75]

Vermont 1777: "That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power."[76]

Virginia 1971: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."[77]

Washington 1889: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."[78]

West Virginia 1986: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."[79]

Wisconsin 1998: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."[80]

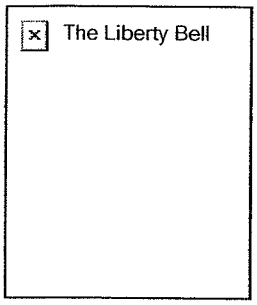
Wyoming 1889: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied."[81]

75. UTAH CONST. of 1895, art. I, § 6.
76. VT. CONST. ch. I, art. 16.
77. VA. CONST. art. I, § 13 (right added to preexisting 1776 provision).
78. WASH. CONST. art. I, § 24.
79. W. VA. CONST. art. III, § 22.
80. WIS. CONST. art. I, § 25.
81. WYO. CONST. art. I, § 24.

B

The Laws Of Nature And Nature's God

laws of nature, god's law, laws of nature's god, laws of nature and nature's god, divine law, law of god



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New!
Reassert the Rule of Law
Reform Civil Government
Reclaim The Church

Delaware Declaration of Rights
September 11, 1776

A Declaration of Rights and Fundamental Rules of the Delaware State, formerly stiled, The Government of the counties of New-Castle, Kent and Sussex, upon Delaware.

SECT. 2. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

SECT. 3. That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society.

SECT. 4. That people of this state have the sole exclusive and inherent right of governing and regulating the internal police of the same.

SECT. 5. That persons intrusted with the Legislative and Executive Powers are the Trustees and Servants of the public, and as such accountable for their conduct; wherefore whenever the ends of government are perverted, and public liberty manifestly endangered by the Legislative singly, or a treacherous combination of both, the people may, and of right ought to establish a new, or reform the old government.

SECT. 6. That the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent, and every freeman, having sufficient evidence of a permanent common interest with, and attachment to the community, hath a right of suffrage.

SECT. 7. That no power of suspending laws, or the execution of laws, ought to be exercised unless by the Legislature.

SECT. 8. That for redress of grievances, and for amending and strengthening of the laws, the Legislature ought to be frequently convened.

SECT. 9. That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner.

SECT. 10. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto; but no part of a man's property can be justly taken from him or applied to public uses without his own consent or that of his legal Representatives: Nor can any man that is conscientiously scrupulous of bearing arms in any case be justly compelled thereto if he will pay such equivalent.

SECT. 11. That retrospective laws, punishing offences committed before the existence of such laws, are oppressive and unjust, and ought not to be made.

SECT. 12. That every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land, and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

SECT. 13. That trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people.

SECT. 14. That in all prosecutions for criminal offences, every man hath a right to be informed of the accusation against him, to be allowed counsel, to be confronted with the accusers or witnesses, to examine evidence on oath in his favour, and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

SECT. 15. That no man in the Courts of Common Law ought to be compelled to give evidence against himself.

SECT. 16. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

SECT. 17. That all warrants without oath to search suspected places, or to seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend all persons suspected, without naming or describing the place or any person in special, are illegal and ought not to be granted.

SECT. 18. That a well regulated militia is the proper, natural and safe defence of a free government.

SECT. 19. That standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature.

SECT. 20. That in all cases and at all times the military ought to be under strict subordination to and governed by the civil power.

SECT. 21. That no soldier ought to be quartered in any house in time of peace without the consent of the owner; and in time of war in such manner only as the Legislature shall direct.

SECT. 22. That the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people.

SECT. 23. That the liberty of the press ought to be inviolably preserved.

The Avalon Project [Autumn in the White Mountains of New Hampshire] at Yale Law School

Constitution of New Hampshire - 1776 (1)

IN CONGRESS AT EXETER, *January 5, 1776.*

VOTED, That this Congress take up CIVIL GOVERNMENT for this colony in manner and form following, viz.

WE, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony, and authorized and empowered by them to meet together, and use such means and pursue such measures as we should judge best for the public good; and in particular to establish some form of government, provided that measure should be recommended by the Continental Congress: And a recommendation to that purpose having been transmitted to us from the said Congress: Have taken into our serious consideration the unhappy circumstances, into which this colony is involved by means of many grievous and oppressive acts of the British Parliament, depriving us of our natural and constitutional rights and privileges; to enforce obedience to which acts a powerful fleet and army have been sent to this country by the ministry of Great Britain, who have exercised a wanton and cruel abuse of their power, in destroying the lives and properties of the colonists in many places with fire and sword, taking the ships and lading from many of the honest and industrious inhabitants of this colony employed in commerce, agreeable to the laws and customs a long time used here.

The sudden and abrupt departure of his Excellency John Wentworth, Esq., our late Governor, and several of the Council, leaving us destitute of legislation, and no executive courts being open to punish criminal offenders; whereby the lives and properties of the honest people of this colony are liable to the machinations and evil designs of wicked men, *Therefore,* for the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony, we conceive ourselves reduced to the necessity of establishing A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain; PROTESTING and DECLARING that we neaver sought to throw off our dependence upon Great Britain, but felt ourselves happy under her protection, while we could enjoy our constitutional rights and privileges. And that we shall rejoice if such a reconciliation between us and our parent State can be effected as shall be approved by the CONTINENTAL CONGRESS, in whose prudence and wisdom we confide.

Accordingly pursuant to the trust reposed in us, WE DO Resolve, that this Congress assume the name, power and authority of a house of Representatives or Assembly for the *Colony of New-Hampshire* And that said House then proceed to choose twelve persons, being. reputable freeholders and inhabitants within this colony, in the following manner, viz. five in the county of Rockingham, two in the county of Stratford, two in the county of Hillsborough, two in the county of Cheshire, and one in the county of Grafton, to be a distinct and separate branch of the Legislature by the name of a COUNCIL for this colony, to continue as such until the third Wednesday in December next; any seven of whom to be a quorum to do business. That such Council appoint their President, and in his absence that the senior counsellor preside; that a Secretary be appointed by both branches, who may be a counssellor, or otherwise, as they shall choose:

That no act or resolve shall be valid and put into execution unless agreed to, and passed by both branches of the legislature

That all public officers for the said colony, and each county, for the current year, be appointed by the Council and Assembly, except the several clerks of the Executive Courts, who shall be appointed by the Justices of the respective Courts.

That all bills, resolves, or votes for raising, levying and collecting money originate in the house of Representatives.

That at any session of the Council and Assembly neither branch shall adjourn from any longer time than from Saturday till the next Monday without consent of the other.

And it is further resolved, That if the present unhappy dispute with Great Britain should continue longer than this present year, and the Continental Congress give no instruction or direction to the contrary, the Council be chosen by the people of each respective county in such manner as the Council and house of Representatives shall order.

That general and field officers of the militia, on any vacancy, be appointed by the two houses, and all inferior officers be chosen by the respective companies.

That all officers of the Army be appointed by the two houses, except they should direct otherwise in case of any emergency.

That all civil officers for the colony and for each county be appointed, and the time of their continuance in office be determined by the two houses, except clerks of Courts, and county treasurers, and recorders of deeds.

That a treasurer, and a recorder of deeds for each county be annually chosen by the people of each county respectively; the votes for such officers to be returned to the respective courts of General Sessions of the Peace in the county, there to be ascertained as the Council and Assembly shall hereafter direct.

That precepts in the name of the Council and Assembly, signed by the President of the Council, and Speaker of the house of Representatives, shall issue annually at or before the first day of November, for the choice of a Council and house of Representatives to be returned by the third Wednesday in December then next ensuing, in such manner as the Council and Assembly shall hereafter prescribe.

(1) Verified by "Acts and Laws of the State of New Hampshire in America, by order of The General Assembly. To which is prefixed, The Resolution of the American Congress for Establishing a Form of Government in New Hampshire and the Resolve of the Provincial Congress, for taking up Government in Form. With the Declaration of Independence. America: Printed at Exeter in the State of New Hampshire, MDCCLXXX." pp. 2-4.

This constitution was framed by a convention, or "congress," which assembled at Exeter, December 21, 1775, (in accordance with a recommendation from the Continental Congress,) and completed its labors January 5, 1776. The constitution was not submitted to the people. This was the first constitution framed by an American Commonwealth. Back

Source:
The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America

D

APPENDIX D
STATE MILITIA STATUTES

Connecticut:

1. Act of Dec. 18, 1776, 1776 Conn. Pub. Acts 441, 443, 445, provides in relevant part:

It is therefore further Enacted by the Authority aforesaid, That all male Persons from Sixteen Years of Age to Sixty, not included in that part of the Militia called the Train-band, or exempted from common and ordinary Training, shall continue an Alarm List in this State, (excepting Members of the Council, of the House of Representatives, and *American Congress*, for the Time being, the Treasurer and Secretary of the State, Ministers of the Gospel, the President, Tutors and Students of *Yale*-College, for the Time being, and Negroes, Indians, and Molattoes); and is of sufficient Ability in the Judgment of the Select-men of the Town where they have their usual Place of Abode, shall respectively provide for and equip themselves with such Arms and Accoutrements as by Law is directed for those of the Train-band in the Militia aforesaid; and shall, in Case of an Alarm, or Orders given, be under the Command of such Officers as by this Act is directed; any Law, Usage, or Custom to the contrary notwithstanding.

* * * * *

Be it further enacted, That when the Select men shall adjudge any Person unable to equip and arm himself as in this Act is required, they shall certify the same under their Hands to the Captain or commanding Officer of the Company to which such Person shall belong; and the said Select-men shall, at the Expence of the Town, arm and equip such deficient Person, and the Arms so provided shall be the Property of such Town, and the Fines and Penalties in this Act provided for such as shall neglect or refuse to join and march when called for, shall be

require material alterations; in order to which it has been thought more adviseable to revise the whole system, than to amend it by supplementary statutes; therefore * * *.

Georgia:

4. Act of Nov. 15, 1778, reprinted in 19 Colonial Records of the State of Georgia 103-04 (Allen Candler ed., 1911), provides in relevant part:

AN ACT, *for the better ordering and regulating the Militia of this State.*

WHEREAS a well ordered and disciplined Militia, is essentially necessary, to the Safety, peace and prosperity, of this State, and a Militia Law, upon just principles hath ever been regarded, as the best Security of Liberty and the most effectual Means, of drawing forth and exerting the Natural Strength of a State, BE IT ENACTED and it is hereby enacted by the Representatives of the People of the State of Georgia in general Assembly met, and by the authority of the same, That the Governor or Commander in Chief for the time being, with the advice and consent of the Executive Council, shall have power to assemble and call together all Male Persons, except as hereafter excepted, in this State, from the age of Fifteen to Sixty Years, within the Towns, divisions, Counties, Parishes or places within this State, at such times, and Arm and Array them, in such manner as is hereafter expressed and declared, and to form them into Companies, Troops and Regiments, and in case of Insurrection, Rebellion or Invasion them to lead, conduct, or employ, or cause to be led, conducted, and employed, as well within the said Towns, divisions, Counties, parishes or places, where such Persons reside, as into any other division, parish, County or place within this State, for suppressing all such insurrections, as may happen to be * * *.

5. Act of Feb. 18, 1799, 1799 Ga. Laws 76, provides in relevant part:

An act to alter and amend the Militia Law of this State, and to *provide for arming the militia thereof*:

WHEREAS the defence and safety of republican states must greatly depend on their militia, which cannot be well organized and disciplined without arms and experienced officers; and no adequate provision has been made by this state for the attainments of those desirable objects * * *.

Massachusetts:

6. Act of Mar. 14, 1776, ch. VII, 1775-76 Mass. Acts 31-33, provides in relevant part:

AN ACT for the executing in the Colony of the *Massachusetts-Bay*, in *New-England*, one Resolve of the *American Congress*, dated March 14, 1776, recommending the disarming such persons as are notoriously disaffected to the cause of America, or who refuse to associate to defend by arms the *United American Colonies*, against the hostile attempts of the *British* Fleets and Armies, and for the restraining and punishing persons who are inimical to the Rights and Liberties of the said *United Colonies*, and for directing the proceedings therein:

WHEREAS on the fourteenth of March *One Thousand seven Hundred and Seventy-six, a certain Resolve was made and passed by the* American *Congress, of the following Tenor*, viz. "*Resolved*, That it be recommended to the several Assemblies, Conventions and Councils, or Committees of Safety of the United Colonies, immediately to cause all Persons to be disarmed within their respective Colonies, who are notoriously disaffected to the Cause of *America*, or who have not associated and refuse to associate to defend by

Arms these United Colonies, against the hostile Attempts of the *British* Fleets and Armies; and to apply the arms taken from such Persons in each respective Colony, in the first Place, to the arming of the Continental Troops raised in said Colony; in the next, to the arming such Troops as are raised by the Colony for it's own Defense, and the Residue to be applied to the arming the Associators; that their Arms when taken, be appraised by indifferent Persons, and such as are applied to the arming Continental Troops, be paid for by Congress; and the Residue by the respective Assemblies, Conventions or Councils, or Committees of Safety:"

Be it therefore enacted by the Council, and House of Representatives in General Court assembled, and by the Authority of the same, That every Male Person above sixteen Years of Age, resident in any Town or Place in this Colony, who shall neglect or refuse to subscribe a printed or written Declaration of the Form and Tenor herein after prescribed, upon being required thereto by the Committee of Correspondence, Inspection and Safety for the Town or Place in which he dwells, or any one of them, shall be disarmed, and have taken from him in Manner hereafter directed, all such Arms, Ammunition and Warlike Implements, as by the strictest Search can be found in his Possession or belonging to him; which Declaration shall be in the Form and Words following, *viz.*

* * * * *

And be it further enacted by the Authority aforesaid, That the Committee of Correspondence, Inspection and Safety in each and every Town and Place in this Colony, or some one Member of such committee, shall without Delay tender the said Declaration to every Male Person in their respective Town and Places above the Age of sixteen Years, requiring them severally to subscribe the same with his Name or Sign in his or their Presence; and

if any one shall refuse or neglect so to do for the Space of twenty-four Hours after such Tender is made, the said Committee, or some one of them, shall forthwith give Information of such Refusal or Neglect, to some Justice of the Peace for the County in which such delinquent dwells: And the Justice to whom such Information is given, shall forthwith make his Warrant, directed to the Sheriff of the same County, or his Deputy, or one of the Constables of the Town in which such supposed Delinquent hath his usual Place of Abode, or any indifferent Person, by Name requiring him forthwith to make the Body of such Delinquent, and him bring before the said Justice to answer to such Information, and to shew cause, if any he hath, why he should not be disarmed, and have taken from him all his Arms, Ammunition and Warlike Implements; and in Case it shall be made to appear to the said Justice, that the said Information is true, and he should not shew any sufficient Cause why he should not forthwith be disarmed, &c: then the said Justice shall make his Warrant, directed to some proper Person, requiring him, without Delay, to disarm the said Delinquent, and take from him all his Arms, Ammunition and Warlike Implements; and in case such Delinquent shall refuse to resign and give up all his Arms, Ammunition and Warlike Implements, the person to whom the said Warrant is directed, shall have Power, after demanding Admission to enter the Dwelling House, or any other Place belonging to the Delinquent, where he may have Reason to suspect such Arms are concealed, and make strict and diligent Search for the Articles aforesaid: And in case he shall find any of the said Articles, he shall take them and immediately carry and deliver them to the Justice who made the said Warrant, which Justice is hereby required to receive them, and to appoint some indifferent and judicious Person or Persons to appraise the same; and the said Justice shall keep a

true Account of all such Arms, ammunition and Accoutrements, the person or Persons they were taken from, and the Sum or Sums they were appraised at, and shall return a true Account thereof into the Secretary's Office as soon as may be, and shall keep the said Arms, &c. safely to be disposed of and paid for as the General Court shall order. And if the Person to whom the Warrant is directed, shall meet with Resistance, or shall have Reason to apprehend that he shall meet with Resistance in the Execution of the said Warrant, then he shall give Information thereof to the Justice of the Peace who issued the said Warrant, who if he shall judge it needful for carrying such Warrant into Execution, shall go in Person to some Military Officer in the same County, and require him immediately to raise such a Number of the Militia as the said Justice shall judge necessary, and the said Justice shall proceed in Person with the said Militia, and the person to whom the said warrant is directed, and in the most prudent Way he can, cause the delinquent to be disarmed, and all the Articles aforesaid to be taken from him, and appraised and retained in Manner as is above directed.

And in case it shall be made to appear to any Justice of the Peace, that there is Reason to suppose that any of the Arms, Ammunition or warlike Implements, belonging to any Person who shall refuse or delay as abovesaid to subscribe the said Declaration, are concealed in any Dwelling-House or other Place not belonging to such Delinquent, such Justice shall have Power, and is hereby directed to make his Warrant to some proper Person, requiring him to make diligent search in such suspected Place or Places, to be particularly described or mentioned in such Warrant for the Articles aforesaid; and in case they shall be found, such Proceedings shall be thereupon had touching the same, as it above prescribed, when they are in the actual Possession of the Delinquent aforesaid;

and in case of Resistance or Opposition made to the Execution of such Warrant, the like Proceedings shall thereupon be had as are above directed, when Resistance is made to the searching for or taking such Articles, when in the actual Possession of such Delinquent.

7. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218-19, provides in relevant part:

An Act in addition to the several acts already made for the prudent storage of gun-powder within the town of *Boston*:

WHEREAS the depositing of loaded Arms in the Houses of the Town of Boston, *is dangerous to the Lives of those who are* disposed *to exert themselves when a Fire happens to break out in the said Town*:

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the Authority of the same, That if any Person shall take into any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building, within the Town of *Boston*, any Cannon, Swivel, Mortar, Howitzer, or Cohorn, or Fire-Arm, loaded with, or having Gun-Powder in the same, or shall receive into any Dwelling-House, Stable, Barn, Out-house, Store, Warehouse, Shop, or other Building, within the said Town, any Bomb, Grenade, or other Iron Shell, charged with, or having Gun-Powder in the same, such Person shall forfeit and pay the Sum of *Ten Pounds*, to be recovered at the Suit of the Firewards of the said Town, in an Action, of Debt, before any Court proper to try the same; one Moiety thereof to the Use of the said Firewards, and the other Moiety to the Support of the Poor of the Town of *Boston*.

And be it further enacted by the Authority aforesaid, That all Cannon, Swivels, Mortars, Howitzers, Cohorns, Fire-Arms, Bombs, Grenades, and Iron Shells of any

Kind, that shall be found in any Dwelling House, Out-House, Stable, Barn, Store, Warehouse, Shop, or other Building, charged with, or having in them any Gun-Powder, shall be liable to be seized by either of the Firewards of the said Town: And upon Complaint made by the said Firewards to the Court of Common Pleas, of such Cannon, Swivels, Mortars, or Howitzer, being so found, the Court shall proceed to try the Merits of such Complaint by a Jury; and if the Jury shall find such Complaint supported, such Cannon, Swivel, Mortar, or Howitzer, shall be adjudged forfeit, and be sold at public Auction; and one Half of the Proceeds thereof shall be disposed of to the Firewards, and the other Half to the Use of the Poor of the Town of *Boston*. And when any Fire-Arms, or any Bomb, Grenade, or other Shell, shall be found in any House, Out-House, Barn, Stable, Store, Warehouse, Shop, or other Building, so charged, or having Gun-Powder in the same, the same shall be liable to be seized in Manner aforesaid; and on complaint thereof, made and supported before a Justice of the Peace, shall be sold and disposed of as is above provided for Cannon.

Be it further enacted, That Appeals shall be allowed in Prosecutions upon this Act as is usual in other Cases.

8. Act of June 26, 1792, ch. X, 1792 Mass. Acts 208-09, provides in relevant part:

An Act in addition to the several Acts now in force, which respect the carting and transporting Gun-Powder, through the streets of the Town of *Boston*, and the storage thereof in the same Town:

WHEREAS the provision in the said acts made, have been found insufficient to prevent the carting and transporting gun-powder, through the streets of the said town, in a dangerous and alarming mode:

11. Act of Mar. 22, 1794, ch. 27, 1794 N.Y. Laws 503, provides in relevant part:

AN ACT to provide field artillery, arms accoutrements and ammunition for the use of the militia of this State:

Be it enacted by the People of the State of New York represented in Senate and Assembly, That a sum not exceeding seventy five thousand dollars be appropriated to the purchase of field artillery, arms, accoutrements and ammunition for the use of the militia of this State, and that Matthew Clarkson, James Watson and Benjamin Walker be commissioners for that purpose and that they or any two of them are hereby, authorized to purchase such field artillery, arms, accoutrements, and ammunition agreeably to such instructions as they may receive from the person administering the government of this State.

12. Act of Aug. 27, 1798, ch. 5, 1798 N.Y. Laws 299, provides in relevant part:

AN ACT for the further defence of this State and for other purposes:

* * * * *

And be it further enacted, That the arms, ammunition, cannon and military stores, now belonging to the people of this State, and such as may be purchased by virtue of this act, shall be distributed or deposited in such place or places, as the person administering the government of this State shall from time to time direct.

North Carolina:

13. Act of Apr. 8, 1777, ch. XV, §§ I, II, 1777 N.C. Sess. Laws 58, provides in relevant part:

An Act to amend an Act, intitled An act to establish a militia in this state:

I. Whereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State;

II. *BE it Enacted by the General Assembly of the State of* North Carolina, *and it is hereby Enacted by the Authority of the same*, That every captain of Militia within this state, once in every Six Months, shall return a Muster Roll of his Company, divided and numbered as by the Act aforesaid is directed, to the commanding Officer of the Regiment, under Pain of forfeiting Five Pounds for every Default; and the commanding Officer of each Regiment shall make an exact Return from such Lifts within Twenty Days after receiving the same to the Brigadier General of the District, under Pain of forfeiting Twenty Five Pounds for every default.

14. Act of 1778, 1778 N.C. Sess. Laws 4, §VI, provides in relevant part:

VI. *AND be it further Enacted, by the Authority aforesaid*, That the Brigadier Generals of each District shall take into their Possession, and distribute to the Troops so raised, such Guns as belong to the Public, and are good and sufficient; and in case there should not be Arms for every man, then, and in that Case, the Colonel or commanding Officer of each County shall purchase Guns for the Men marching from the same, and shall give Certificates to those from whom the Guns are bought; which Certificates, countersigned by the Clerks of the respective counties, shall be paid by the Treasurer of either District, and allowed in the settlement of their accounts with the public.

Pennsylvania:

15. Act of Mar. 17, 1777, ch. 750, § XIV, 9 Pa. Stat. 84, provides in relevant part:

An Act to Regulate *the* Militia of the Commonwealth of Pennsylvania:

[Section XIV] (Section XVIII, P. L.) And be it further enacted by the authority aforesaid, That arms and accoutrements sufficient for two classes in each company shall be provided at the expense of the state as soon as convenient by the lieutenant of the city of Philadelphia and of the several counties of this state, and shall be in the care and under the direction of the said lieutenants respectively and marked with the name of the county and the number of the battalion to which they belong.

16. Act of Apr. 1, 1778, ch. 796, §§ I, II, V, 9 Pa. Stat 238-39, provides in relevant part:

An ACT *for the further Security of the Government.*

SECTION 1. WHEREAS the welfare and happiness of the good people of this Common-Wealth, do, next under God, entirely depend upon the maintaining and supporting the independence and sovereignty of the State, as declared by Congress;

SECT. 2. *Be it therefore enacted, and it is hereby enacted by the Representatives of the Freemen of the Common-Wealth of Pennsylvania, in General Assembly met, and by the authority of the same,* That all male white inhabitants of this State above the age of eighteen years, who have not hitherto taken the oath or affirmation mentioned and appointed to be taken in the Act of Assembly intitled, "An Act obliging the male white inhabitants of this State to give assurances of allegiance to the same, and for other purposes therein mentioned," enacted the thirteenth day of June last, shall, on or before the first day of June next, take and subscribe the

same in manner and form as by the said Act is directed; and that every such person, neglecting to take the said oath or affirmation, shall, during the time of such neglect, be liable to all the disabilities, incapacities and penalties to which they are subjected by the said Act; and also shall be disabled, from and after the said day, to sue or use any action, bill, plaint or information, in courte of Law, or to prosecute any suit in equity or otherwise howsoever, or to be guardian of the person or estate of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to make any will or testament, and moreover shall be liable and compelled to pay double the taxes, which another person of equal estate, who has taken such oath or affirmation, shall be rated or assessed at, to be levied by the Collector of the public taxes of the Township, Ward or District in which such offender dwells.

* * * * *

SECT. 5. *And be it further enacted*, That every such person who shall refuse or neglect to take the oath or affirmation before mentioned on or before the said first day of June next, and shall refuse or neglect to deliver up his arms to the Lieutenant, or one of the Sub-Lieutenants, of the City or County where he inhabits, on or before the tenth day of June next, or who shall, from and after the same day last mentioned, carry any arms about his person or keep any arms or ammunition in his house or elsewhere, shall forfeit the said arms and ammunition to the State, and also double the value thereof to such person or persons who shall discover the same to any Justice of the Peace of the County where such offender resides, and shall legally prosecute him to conviction before two or more Justices of the Peace for the said County, who are hereby authorised, impowered and required to hear, try, and finally determine the same, and

to award the legal costs without appeal to the Supream or any other Court whatsoever.

17. Act of Mar. 20, 1780, ch. 902, §§ I, II, 10 Pa. Stat. 144, provides in relevant part:

An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania:

(Section I, P. L.) Whereas a militia law founded upon just and equitable principles hath been ever regarded as the best security of liberty, and the most effectual means of drawing forth and exerting the natural strength of a state:

(Section II, P. L.) And whereas a well regulated militia is the only safe and constitutional method of defending a free state, as the necessity of keeping up a standing army, especially in times of peace is thereby superceded:

Virginia:

18. Act of May 5, 1777, 1777 Va. Acts 8, provides in relevant part:

An ACT to oblige the free male inhabitants of this state above a certain age to give assurance of ALLEGIANCE to the same, and for other purposes.

WHEREAS allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the latter: Therefore, BE it enacted by the General Assembly, that all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service, shall, on or before the tenth day of October next, take and subscribe the following oath or affirmation before some one of the justices of the peace of the county, city, or borough, where they shall respectively inhabit; and the said justice shall give a certificate thereof to every such

person, and the said oath or affirmation shall be as followeth, viz. I do swear or affirm, that I renounce and refuse all allegiance to George the third, king of Great Britain, his heirs and successours, and that I will be faithful and bear true allegiance to the commonwealth of Virginia, as a free and independent state, and that I will not, at any time, do or cause to be done, any matter or thing that will be prejudicial or injurious to the freedom and independence thereof, as declared by Congress; and also, that I will discover and make known to some one justice of the peace for the said state, all treasons or traiterous conspiracies which I now or hereafter shall know to be formed against this or any of the United States of America. And the form of the said certificate shall be as follows, to wit: I do hereby certify that hath taken and subscribed the oath or affirmation of allegiance and fidelity, as directed by an act of General Assembly intituled An act to oblige the free male inhabitants of this state above a certain age to give assurance of allegiance to the same, and for other purposes. Witness my hand and seal, this day of A. B.

* * * * *

AND be it farther enacted, by the authority aforesaid, that within one month after the passing of this act, or at the next succeeding court, the court of every county in this commonwealth shall appoint some of their members to make a tour of the county, and tender the oath or affirmation aforesaid to every free born male person above the age of sixteen years, except as before excepted; and that in the certificate directed to be returned, of those who take the oath or affirmation, shall be mentioned the names of such as refuse. And the justices tendering such oath or affirmation are hereby directed to deliver a list of the names of such recusants to the county lieutenant, or chief commanding officer of the militia, who

is hereby authorised and directed forthwith to cause such recusants to be disarmed.

19. Act of 1785, 1785 Va. Acts 1, ch. 1 §§ 1-2, provides in relevant part:

An ACT *to amend and reduce into one Act, the several* Laws *for* Regulating *and* Disciplining *the* Militia, *and guarding against* Invasions *and* Insurrections:

SECTION I. WHEREAS the defence and safety of the Commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty, and the different laws heretofore enacted being found inadequate to such purposes, and in order that the same may be formed into one plain and regular system;

SECT. II. *BE it enacted by the General Assembly*, That the Officers of the militia who were displaced and removed from office, by virtue of an Act "For amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections," are hereby reinstated, and shall take precedency of rank agreeable to the dates of the commissions they severally held prior to the passing of the said Act; and vacancies supplied by appointment of the Governor, with the advice of the Privy Council, or recommendation from the respective County Courts.

20. Act of Dec. 26, 1795, ch. XII, §§ I-III, 1795 Va. Acts 17, provides in relevant part:

An ACT authorizing *the Executive to procure arms for the defence of the Commonwealth*:

WHEREAS a well trained militia is the only natural and safe defence of a free state, and in order to carry this principle into effect, it is essentially expedient that the militia of this commonwealth should be armed in such manner as to answer the end of its institution:

SEC. I. *BE it therefore enacted by the General Assembly*, That the Governor, with the advice of the Privy Council, shall, and he is hereby authorized and required, annually to procure for the use and defence of this commonwealth, four thousand stand of small arms and accoutrements, to be distributed amongst the militia, when called into actual service, in such manner as the Executive may direct.

SEC. II. *AND be it further enacted*, That the Executive shall be authorized to furnish each company of artillery with one field piece in good order, if there be a sufficient number of field pieces belonging to this commonwealth, and that the commanding officer of each company shall be responsible for the preservation and return of the field piece.

SEC. III. THIS act shall commence and be in force from and after the passing thereof.

21. Act of Feb. 4, 1806, ch. XCIV, §§ 1-4, 1805-06 Va. Acts 51, provides in relevant part:

An ACT *concerning Free Negroes and Mulattoes*:

* * * * *

Section 1. *BE it enacted by the General Assembly*, That no 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 of the county or corporation in which he resides, which license may at any time be withdrawn by an order of such court. Any free negro or mulatto who shall so offend, shall, on conviction before a justice of the peace, forfeit all such arms and ammunition to the use of the informer.

Sec. 2. It shall be the duty of every constable to give information against, and prosecute every free negro or

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The Avalon Project at Yale Law School

Constitution of Georgia; February 5, 1777 (1)

Whereas the conduct of the legislature of Great Britain for many years past has been so oppressive on the people of America that of late years they have plainly declared and asserted a right to raise taxes upon the people of America, and to make laws to bind them in all cases whatsoever, without their consent; which conduct, being repugnant to the common rights of mankind, hath obliged the Americans, as freemen, to oppose such oppressive measures, and to assert the rights and privileges they are entitled to by the laws of nature and reason; and accordingly it hath been done by the general consent of all the people of the States of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the counties of New Castle, Kent, and Sussex on Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, given by their representatives met together in general Congress, in the city of Philadelphia;

And whereas it hath been recommended by the said Congress, on the fifteenth of May last, to the respective assemblies and conventions of the United States, where no government, sufficient to the exigencies of their affairs, hath been hitherto established, to adopt such government as may, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general;

And whereas the independence of the United States of America has been also declared, on the fourth day of July, one thousand seven hundred and seventy-six, by the said honorable Congress, and all political connection between them and the Crown of Great Britain is in consequence thereof dissolved:

We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it IS hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State:

ARTICLE I. The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.

ART. II. The legislature of this State shall be composed of the representatives of the people, as is hereinafter pointed out; and the representatives shall be elected yearly, and every year, on the first Tuesday in December; and the representatives so elected shall meet the first Tuesday in January following, at Savannah, or any other place or places where the house of assembly for the time being shall direct.

On the first day of the meeting of the representatives so chosen, they shall proceed to the choice of a governor, who shall be styled *"honorable;"* and of an executive council, by ballot out of their own body, viz: two from each county, except those counties which are not yet entitled to send ten members. One of each county shall allways attend, where the governor resides, by monthly rotation, unless the members of each county agree for a longer or shorter period. This is not intended to exclude either member attending. The remaining number of representatives shall be called the house of assembly; and the majority of the members of the said house shall have power to proceed on business.

ART. III. It shall be an unalterable rule that the house of assembly shall expire and be at an end, yearly and every year, on the day preceding the day of election mentioned in the foregoing rule.

good behavior.

ART. XXXV. Every county in this State that has, or hereafter may have, two hundred and fifty men, and upwards, liable to bear arms, shall be formed into a battalion; and when they become too numerous for one battalion, they shall be formed into more, by bill of the legislature; and those counties that have a less number than two hundred and fifty shall be formed into independent companies.

ART. XXXVI. There shall be established in each county a court, to be called a superior court, to be held twice in each year.

On the first Tuesday in March, in the county of Chatham.

The second Tuesday in March, in the county of Effingham.

The third Tuesday in March, in the county of Burke

The fourth Tuesday in March, in the county of Richmond.

The next Tuesday, in the county of Wilkes.

And Tuesday fortnight, in the county of Liberty.

The next Tuesday, in the county of Glynn.

The next Tuesday, in the county of Camden.

The like courts to commence in October and continue as above.

ART. XXXVII. All causes and matters of dispute, between any parties residing in the same county, to be tried within the county.

ART. XXXVIII. All matters in dispute between contending parties residing in different counties shall be tried in the county where the defendant resides, except in cases of real estate, which shall be tried in the county where such real estate lies.

ART. XXXIX. All matters of breach of the peace, felony, murder, and treason against the State to be tried in the county where the same was committed. All matters of dispute, both civil and criminal, in any county where there is not a sufficient number of inhabitants to form a court, shall be tried in the next adjacent county where a court is held.

ART. XL. All causes, of what nature soever, shall be tried in the supreme court, except as hereafter mentioned; which court shall con sist of the chief-justice, and three or more of the justices residing in the county. In case of the absence of the chief-justice, the senior justice on the bench shall act as chief-justice, with the clerk of the county, attorney for the State, sheriff, coroner, constable, and the jurors; and in case of the absence of any of the aforementioned officers, the justices to appoint others in their room *pro tempore.* And if any plaintiff or defendant in civil causes shall be dissatisfied with the determination of the jury, then, and in that case, they shall be at liberty, within three days, to enter an appeal from that verdict, and

demand a new trial by a special jury, to be nominated as follows, viz: each party, plaintiff and defendant,

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HISTORIC HUMAN RIGHTS DOCUMENTS

The Virginia Declaration of Rights

[Final Draft,12 June 1776]

A DECLARATION OF RIGHTS made by the Representatives of the good people of VIRGINIA, assembled in full and free Convention; which rights do pertain to them and their posterity, as the basis and foundation of Government.

Article 1

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Article 2

That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

Article 3

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

Article 4

That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.

Article 5

That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

Article 6

That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

Article 7

That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.

Article 8

That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers.

Article 9

That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Article 10

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

Article 11

That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

Article 12

That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.

Article 13

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.

Article 14

That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

Article 15

That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

Article 16

That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

Adopted unanimously June 12, 1776
Virginia Convention of Delegates

First Draft by George Mason , ca. May 20-26, 1776

Committee Draft, May 27, 1776

For images of Mason's first draft, see the Library of Congress, American Treasures online exhibit, or directly at page 1, page 2, page 3.

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The Avalon Project at Yale Law School

Constitution of Pennsylvania - September 28, 1776 (1)

WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness. AND WHEREAS the inhabitants o f this commonwealth have in consideration of protection only, heretofore acknowledged allegiance to the king of Great Britain; and the said king has not only withdrawn that protection, but commenced, and still continues to carry on, with unabated vengeance, a most cruel and unjust war against them, employing therein, not only the troops of Great Britain, but foreign mercenaries, savages and slaves, for the avowed purpose of reducing them to a total and abject submission to the despotic domination of the British parliament, with many other acts of tyranny, (more fully set forth in the declaration of Congress) whereby all allegiance and fealty to the said king and his successors, are dissolved and at an end, and all power and authority derived from him ceased in these colonies. AND WHEREAS it is absolutely necessary for the welfare and safety of the inhabitants of said colonies, that they be henceforth free and independent States, and that just, permanent, and proper forms of government exist in every part of them, derived from and founded on the authority of the people only, agreeable to the directions of the honourable American Congress. We, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great Governor of the universe (who alone knows to what degree of earthly happiness mankind mav attain, by perfecting the arts of government) in permitting the people of this State, by common consent, and without violence, deliberately to form for themselves such just rules as they shall think best, for governing their future society, and being fully convinced, that itis our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever, do, by virtue of the authority vested in use by our constituents, ordain, declare, and establish, the following Declaration of Rights and Frame of Government, to be the CONSTITUTION of this commonwealth, and to remain in force therein for ever, unaltered, except in such articles as shall hereafter on experience be found to require improvement, and which shall by the same authority of the people, fairly delegated as this frame of government directs, be amended or improved for the more effectual obtaining and securing the great end and design of all government, herein before mentioned.

A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH OR STATE OF PENNSYLVANIA

I. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or

SECT. 40. Every officer, whether judicial, executive or military, in authority under this commonwealth, shall take the following oath or affirmation of allegiance, and general oath of office before he enters on the execution of his office.

THE OATH OR AFFIRMATION OF ALLEGIANCE

I do swear (or affirm) that I will be true and faithful to the commonwealth of Pennsylvania: And that I will not directly or indirectly do any act or thing prejudicial or injurious to the constitution or government thereof, as established by the-convention. -

THE OATH OR AFFIRMATION OF OFFICE

I-do swear (or affirm) that I will faithfully execute the office of for the of-and will do equal right and justice to all men, to the best of my judgment and abilities, according to law.

SECT. 41. NO public tax, custom or contribution shall be imposed upon, or paid by the people of this state, except by a law for that purpose: And before any law be made for raising it, the purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be, if not collected; which being well observed, taxes can never be burthens.

SECT. 42. Every foreigner of good character who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years residence.

SECT. 43. The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property

SECT. 44. A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted In one or more universities.

SECT. 45. Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution: And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this state.

SECT. 46. The declaration of rights is hereby declared to be a part of the constitution of this commonwealth, and ought never to be violated on any presence whatever.

SECT. 47. In order that the freedom of the commonwealth may be preserved inviolate forever, there shall be chosen by ballot by the freemen in each city and county respectively, on the second Tuesday in October, in the Year one thousand seven hundred and eighty-three, and on the second Tuesday in October, in every seventh year thereafter, two persons in each city and county of this state, to be called the COUNCIL OF CENSORS; who shall meet together on the second Monday of November next

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The Avalon Project at Yale Law School

Constitution of Delaware; 1776 (1)

The Constitution, or System of Government, agreed to and resolved upon by the Representatives in full Convention of the Delaware State, formerly styled "The Government of the Counties of New Castle, Kent, and Sussex, upon Delaware," the said Representatives being chosen by the Freemen of the said State for that express Purpose.

ARTICLE 1. The government of the counties of New- Castle, Kent and Sussex, upon Delaware, shall hereafter in all public and other writings be called The Delaware State.

ART. 2. The Legislature shall be formed of two distinct branches; they shall meet once or oftener in every year, and shall be called, " The General Assembly of Delaware."

ART. 3. One of the branches of- the Legislature shall be called, " The House of Assembly," and shall consist of seven Representatives to be chosen for each county annually of such persons as are freeholders of the same.

ART. 4.4 The other branch shall be called " The council," and consist of nine members; three to be chosen for each county at the time of the first election of the assembly, who shall be freeholders of the county for which they are chosen, and be upwards of twenty-five years of age. At the end of one year after the general election, the councillor who had the smallest number of votes in each county shall be displaced, and the vacancies thereby occasioned supplied by the freemen of each county choosing the same or another person at a new election in manner aforesaid. At the end of two years after the first general election, the councillor who stood second in number of votes in each county shall be displaced, and the vacancies thereby occasioned supplied by a new election in manner aforesaid. And at the end of three years from the first general election, the councillor who had the greatest number of votes in each county shall be displaced, and the vacancies thereby occasioned supplied by a new election in manner aforesaid. And this rotation of a councillor being displaced at the end of three years in each county, and his office supplied by a new choice, shall be continued afterwards in due order annually forever, whereby, after the first general election, a councillor will remain in trust for three years from the time of his being elected, and a councillor will be displaced, and the same or another chosen in each county at every election.

ART. 5. The right of suffrage in the election of members for both houses shall remain as exercised by law at present; and each house shall choose its own speaker, appoint its own officers, judge of the qualifications and elections of its own members, settle its own rules of proceedings, and direct writs of election for supplying intermediate vacancies. They may also severally expel any of their own members for misbehavior, but not a second time in the same sessions for the same offence, if reelected; and they shall have all other powers necessary for the legislature of a free and independent State.

continue, until altered or repealed by the legislature of this State, unless where they are temporary, in which case they shall expire at the times respectively limited for their duration.

ART. 25. The common law of England, as-well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, &c., agreed to by this convention.

ART. 26. No person hereafter imported into this State from Africa ought to be held in slavery under any presence whatever; and no negro, Indian, or mulatto slave ought to be brought into this State, for sale, from any part of the world.

ART. 27. The first election for the general assembly of this State shall be held on the List day of October next, at the court-houses in the several counties, in the manner heretofore used in the election of the assembly, except as to the choice of inspectors and assessors, where assessors have not been chosen on the 16th day of September, instant, which shall be made on the morning of the day of election, by the electors, inhabitants of the respective hundreds in each county. At which time the sheriffs and coroners, for the said counties respectively, are to be elected; and the present sheriffs of the counties of Newcastle and Kent may be rechosen to that office until the 1st day of October, A. D. 1779; and the present sheriff for the county of Sussex may be rechosen to that office until the 1st day of October, A. D. 1778, provided the freemen think proper to reelect them at every general election; and the present sheriffs and coroners, respectively, shall continue to exercise their offices as heretofore, until the sheriffs and coroners, to be elected on the said 21st day of October, shall be commissioned and sworn into office. The members of the legislative council and assembly shall meet, for transacting the business of the State, on the 28th day of October next, and continue in office until the 1st day of October, which will be in the year 1777; on which day, and on the 1st day of October in each year forever after, the legislative council, assembly, sheriffs, and coroners shall be chosen by ballot, in manner directed by the several laws of this State, for regulating elections of members of assembly and sheriffs and coroners; and the general assembly shall meet on the 20th day of the same month for the transacting the business of the State; and if any of the said 1st and 20th days of October should be Sunday, then, and in such case, the elections shall be held, and the general assembly meet, the next day following.

ART. 28. To prevent any violence or force being used at the said elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day; nor shall any battalion or company give in their votes immediately succeeding each other, if any other voter, who offers to vote, objects thereto; nor shall any battalion or company, in the pay of the continent, or of this or any other State, be suffered to remain at the time and place of holding the said elections, nor within one mile of the said places respectively, for twenty-four hours before the opening said elections, nor within twenty-four hours after the same are closed, so as in any manner to impede the freely and conveniently carying on the said election: *Provided always*, That every elector may, in a peaceable and orderly manner, give in his vote on the said day of election.

ART. 29. There shall be no establishment of any one religious sect in this State in preference to another; and no clergyman or preacher of the gospel, of any denomination, shall be capable of holding any civil once in this State, or of being a member of either of the branches of the legislature, while they continue in the exercise of the pastorial function.

ART. 30. No article of the declaration of rights and fundamental rules of this State, agreed to by this convention, nor the first, second, fifth, (except that part thereof that relates to the right of sufferage,) twenty-sixth, and twenty-ninth articles of this constitution, ought ever to be violated on any presence whatever. No other part of this constitution shall be altered, changed, or diminished without the consent

Published for the State of Ohio and distributed to its officers, under the act of the General Assembly, passed March 16, 1860.

THE

REVISED STATUTES

OF THE

STATE OF OHIO

OF A GENERAL NATURE,

In force August 1, 1860

WITH NOTES DESIGNATING THE SECTIONS REPEALED PRIOR TO AUGUST 1, 1860, AND REFERENCES TO SWAN & SAYLER'S STATUTES FOR THE LAWS SUPPLYING THE REPEALED SECTIONS.

COLLATED BY

JOSEPH R. SWAN.

WITH NOTES OF THE DECISIONS OF THE SUPREME COURT

BY

LEANDER J. CRITCHFIELD.

IN TWO VOLUMES.

VOL. I.

CINCINNATI:
ROBERT CLARKE & CO.,
LAW PUBLISHERS.
1870.

chattels stolen, etc., of less value than thirty-five dollars, etc.

or chattels of less value than thirty-five dollars, that shall have been stolen or taken by robbers, knowing the same to be stolen or taken by robbers, with intent to defraud the owner, every person so offending shall, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, for a term not exceeding thirty days, at the discretion of the court.

Curwen's R. S., 181. Curwen's Laws, 361.

An Act supplementary to an act providing for the punishment of crimes, passed March 7, 1835.

[Passed April 4, and took effect May 1, 1859. 56 vol. Stat. 158.]

Seduction under promise of marriage, etc.;

(210.) SEC. I. *Be it enacted by the General Assembly of the State of Ohio*, That any person over the age of eighteen years, who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, under the age of eighteen years, shall be deemed guilty of seduction, and upon conviction, shall be imprisoned in the penitentiary for not less than one, nor more than three years, or be imprisoned in the county jail not exceeding six months; but in such case the evidence of the female must be corroborated to the extent required as to the principal witness in cases of perjury.

—Evidence required.

An Act to prohibit the carrying or wearing of concealed weapons.

[Passed March 18, and took effect April 1, 1859. 56 vol. Stat. 56.]

The offense of carrying or wearing concealed weapons.

(211.) SEC. I. *Be it enacted by the General Assembly of the State of Ohio*, That whoever shall carry a weapon or weapons, concealed on or about his person, such as a pistol, bowie knife, dirk, or any other dangerous weapon, shall be deemed guilty of a misdemeanor, and on conviction of the first offense shall be fined not exceeding two hundred dollars, or imprisoned in the county jail not more than thirty days; and for the second offense, not exceeding five hundred dollars, or imprisoned in the county jail not more than three months, or both, at the discretion of the court.

Penalty.

When the jury shall acquit the accused.

(212.) SEC. II. If it shall be proved to the jury, from the testimony on the trial of any case presented under the first section of this act, that the accused was, at the time of carrying any of the weapon or weapons aforesaid, engaged in the pursuit of any lawful business, calling, or employment, and that the circumstances in which he was placed at the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid for the defense of his person, property or family, the jury shall acquit the accused.

SEC. III. This act to take effect and be in force from and after the first day of April next.

An Act to protect literary societies.

[Passed and took effect April 2, 1859. 56 vol. Stat. 113.]

Punishment for disturbing school or literary society.

(213.) SEC. I. *Be it enacted by the General Assembly of the State of Ohio*, That if any person or persons shall hereafter willfully disturb, molest or interrupt any literary society, or any school or society formed for the intellectual improvement of its members, such person or persons so offending shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not less than five nor more than twenty dollars, with costs of prosecution, and shall stand committed until such fine shall have been paid: Provided, such commitment shall not exceed five days; and provided, further, that the judgment for costs shall not be abated until such costs shall have been fully paid.

(a) Repealed. Supplied, Sup. 255.

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(214.) SEC. II. That it shall be the duty of any judge of probate, Prosecution therefor; ce of the peace, or mayor of any city, town, or incorporated vil- in this state, upon information by affidavit, to issue his warrant, ing the body of the accused forthwith to be brought before him, if, upon investigation, shall be found guilty, to adjudge against said party or parties, the penalty provided in the first section of this act.

(215.) SEC. III. All prosecutions under this act shall be in the Same, and disposition of fines. e of the state of Ohio, and all such fines collected shall be paid to the township treasury of the proper township, for the benefit of common schools therein.

SEC. IV. This act shall be in force from and after its passage.

An act to amend the act entitled "an act to amend the act entitled 'an act for the Swan's R. S. 306. prevention of certain immoral practices,'" passed February 17, 1831—said last act being passed March 26, 1841.

[*Passed and took effect April* 12, 1858. 55 *vol. Stat.* 151.]

(216.) SEC. I. *Be it enacted by the General Assembly of the State of Ohio*, That no person shall sell, or expose for sale, give, barter, or otherwise dispose of in any way, or at any place, any spiritous or other liquors, or any article of traffic whatever, at or within the distance of two miles from the place where any religious society, or assemblage of people, are collected or collecting together for religious worship in any field or woodland: Provided, that nothing in this act shall affect tavern keepers exercising their calling, nor distillers, manufacturers, or others, in prosecuting their regular trades at their places of business, or any persons disposing of any ordinary articles of provision, excepting spiritous liquors, at their residences, nor any person having a written permit from the trustees or managers of any such religious society or assemblage, to sell provisions for the supply of persons attending such religious worship, their horses or cattle, such persons acting in conformity to the regulations of said religious assembly and to the laws of the state. *a* Selling liquors, etc., within two miles of any religious meetings.

(217.) SEC. II. That any person found guilty of committing a breach of the provisions of this act, shall forfeit and pay for every such offense a fine of not less than ten or more than one hundred dollars, into the township treasury for the use of the common schools in said township where said offense was committed; and any judge of the common pleas, sheriff, coroner, or justice of the peace of the county, or any constable thereof, shall, upon view or information, and with or without warrant, apprehend any person so offending, and seize all such liquors or other articles of traffic, and the utensils or furniture containing them, and convey them before a justice of the peace; and the said justice, upon the complaint under oath or affirmation of said officer apprehending such offender, or any person giving information, shall issue his warrant of arrest, which shall be formally served by the proper officer, and proceed to inquire into the truth of said accusation, and if found true, shall proceed to bind said offender in such amount not exceeding five hundred dollars, as he shall deem proper, to answer at the next regular term of the common pleas in said county, to be proceeded with by indictment, the fine and costs to be collected as in other criminal cases: Provided, that if such defendant or defendants shall plead guilty, said justice shall affix the penalty and proceed to judgment; and in such case he shall immediately issue an execution against the property and body of the defendant or defendants for the fine and costs, unless paid or secured; and said defendant or defendants shall not be discharged until said judgment and costs shall be fully paid or secured to be paid. Prosecution therefor.

(*a*) Repealed. Supplied, Sup. 288.

J

ACTS

Franklin County Court

PASSED AT THE FIRST SESSION

OF THE

TWENTY-FIRST GENERAL ASSEMBLY

FOR THE

COMMONWEALTH

OF

KENTUCKY,

Franklin County Court Book

BEGUN AND HELD IN THE CAPITOL, IN THE TOWN OF FRANKFORT ON MONDAY THE SEVENTH DAY OF DECEMBER, ONE THOUSAND EIGHT HUNDRED AND TWELVE, AND OF THE COMMONWEALTH THE TWENTY-FIRST.

PUBLISHED BY AUTHORITY.

FRANKFORT, (KEN.)

GERARD & BERRY—PRINTERS TO THE STATE.

FEBRUARY 26, 1813.

accept of the serv of any volunteer company or compa- ies (not exceedi ree thousand as aforesaid) who shall tender their services within such time, and for such term, not exceeding six months, as the Governor in his discretion, shall proclaim and appoint. And the Governor shall designate and commission for that purpose, all officers necessary and proper for the command of such volunteers.

Sec. 3. *Be it further enacted*, That all volunteer officers, non-commissioned officers, musicians and privates, whose service may be tendered and accepted under the provisions of this act, shall, at such place or places of rendezvous as the Governor shall appoint within this state, be entitled to receive in advance, the sum of ten dollars, to be taken and considered as a part of their pay.

Sec. 4. *Be it further enacted*, That the forces to be raised and organized, as provided by this act, shall be disposed of according to the discretion of their Governor (that discretion subject only to the requisitions of the general government) and shall be liable to be marched to any place, and engaged in the service of the U. States, as the exigencies of the present war may, in the opinion of the executive, require.

Sec. 5. *Be it further enacted*, That the governor of this commonwealth, for the purpose of carrying into effect the third section of this act, shall be authorized to draw from the Treasury of this state, any sums of money that may be necessary therefor; or in case of deficiency in the public funds, to borrow from any Bank or individuals, upon the best terms he can obtain such additional sums as may be necessary for the purpose aforesaid.

Sec. 6. *Be it further enacted*, That the powers vested in the Governor by the first and second sections of this act, shall be exercised and carried into effect by him to such extent, and in such a manner and time, as his own discretion and the emergency of public affairs may dictate.

CHAP. LXXXIX.

AN ACT to prevent persons in this Commonwealth from wearing concealed Arms, except in certain cases.

Approved, February 3, 1813.

Sec. 1. *Be it enacted by the general assembly of the commonwealth of Kentucky*, That any person in this commonwealth, who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined in any sum, not less than one hundred dollars; which

may be recovered in any court having jurisdiction of like sums, by action of debt, or on the presentment of a grand jury—and a prosecutor in such presentment shall not be necessary. One half of such fine shall be to the use of the informer, and the other to the use of this commonwealth.

This act shall commence and be in force, from and after the first day of June.

CHAP. XC.

AN ACT to amend the Militia Law.

Approved February 3, 1813.

Sec. 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That if any non-commissioned officer, musician or private, failing to march, or furnishing an able bodied substitute in his place, when ordered and lawfully called on, or leaving the service without a discharge from the proper officer, shall be considered as a deserter, & treated as followeth, to wit: Any person may apprehend such deserter, and deliver him to the officer commanding such detachment, or any recruiting officer within this commonwealth, and take his receipt for the same; which receipt shall describe the name of such deserter, and the length of time he was to serve, and by whom he was delivered—which receipt shall be assignable, and the reward for taking and so delivering such deserter, as aforesaid, shall be a credit for a tour or tours of duty for the length of time such deserter was bound to serve; and such deserter shall serve out the term of time aforesaid before he shall be discharged, in addition to the time he was to serve, if such term of time is then required; otherwise he shall serve said tour or tours, when required so to do. And any person holding such receipt, when he is called on to perform a tour or tours of duty, and producing the same to the captain calling on him, it shall be the duty of said captain to receive the same, and give the owner thereof a credit for as many tours as is therein contained.

Sec. 2. And where any delinquent militia-man shall belong to any society who hold a community of property, the sheriff shall call on the agent or superintender of the common stock, or firm of said society, or compact, for the fine; and if he fails to pay the same as before described, the sheriff shall make distress, and sell so much of the property belonging to said stock, as will satisfy the fine, cost, &c. as is before directed.

Sec. 3. *And be it further enacted*, That brigade inspectors and brigade quarter masters, when not taken from the line, shall each be entitled to the rank, pay, and emoluments

ACTS

PASSED

AT THE FIRST SESSION

OF THE FIRST

GENERAL ASSEMBLY

OF THE

STATE OF LOUISIANA,

BEGUN AND HELD IN THE CITY OF NEW-ORLEANS,

ON MONDAY

THE TWENTY-SEVENTH OF JULY

IN THE YEAR 1812.

BY AUTHORITY.

NEW-ORLEANS:

PRINTED BY THIERRY, PRINTER OF THE STATE OF LOUISIANA.

1812.

greeable to the assessment; and the said trustees shall at the end of the time for which they were elected, render an account of the same to the parish judge, and should any sums be unappropriated, the same shall be paid into the hands of the parish judge in trust for the succeeding trustees, and in case of default of the trustees whose term of time is thus expired, it shall be the duty of the parish judge to summon them to a settlement, enter judgment and issue execution for arrearages if necessary.

Render account

Penalty for default.

SECT. 3. *And be it further enacted*, That the trustees shall appoint one clerk and one collector, whose term of service shall expire at the same time with that of the trustees, which said officers shall be entitled to such fees as the said trustees may deem proper to allow them.

Clerk and collector.

Fees.

STEPHEN A. HOPKINS,
Speaker of the house of representatives.
J. POYDRAS,
President of the senate.

APPROVED, March 25th, 1813.

WILLIAM C. C. CLAIBORNE,
Governor of the state of Louisiana.

AN ACT

Against carrying concealed weapons, and going armed in public places in an unnecessary monner.

Preamble

Whereas assassination and attempts to commit the same, have of late been of such frequent occurrence as to become a subject of serious alarm to the peaceable and well disposed inhabitants of this state; and whereas the same is in a great measure to be attributed to the dangerous and wicked practice of carrying about in public places concealed and deadly weapons, or going to the same armed in an unnecessary manner, therefore;

SECT. 1. *Be it enacted by the senate and house of representatives of the state of Louisiana, in general assembly convened*, That from and after the passage of this act, any person who shall be found with any concealed weapon, such as a dirk, dagger, knife, pistol or any other deadly weapon concealed in his bosom, coat or in any other place about him that do not appear in full open view, any person so offending, shall on conviction thereof before any justice of the peace, be subject to pay a fine not to exceed fifty dol-

Penalty for carrying concealed weapons.

How distributed.

lars nor less than twenty dollars, one half to the use of the state, and the balance to the informer; and should any person be convicted of being guilty of a

For the second offence.

second offence before any court of competent jurisdiction, shall pay a fine not less than one hundred dollars to be applied as aforesaid, and be imprisoned for a time not exceeding six months.

Penalty for stabbing &c.

SECT. 2. *And be it further enacted*, That should any person stab or shoot, or in any way disable another by such concealed weapons, or should take the life of any person, shall on conviction before any competent court suffer death, or such other punishment as in the opinion of a jury shall be just.

Suspected persons may be searched.

SECT. 3. *And be it further enacted*, That when any officer has good reason to believe that any person or persons have weapons concealed about them, for the purpose of committing murder, or in any other way armed in such a concealed manner, on proof thereof being made to any justice of the peace, by the oath of one or more credible witnesses, it shall be the duty of such judge and justice to issue a warrant against such offender and have him searched,

Fine.

and should he be found with such weapons, to fine him in any sum not exceeding fifty dollars nor less

Sureties of the peace.

than twenty dollars, and to bind over to keep the peace of the state, with such security as may appear necesary for one year; and on such offender failing to give good and sufficient security as aforesaid; the said justice of the peace shall be authorised to commit said offender to prison for any time not exceeding twenty days.

STEPHEN A. HOPKINS,
Speaker of the house of representatives.
J. POYDRAS,
President of the senate.

APPROVED, March 25th, 1813.
WILLIAM C. C. CLAIBORNE,
Governor of the state of Louisiana.

AN ACT

To establish a permanent seat of justice in and for the parish of St. Tammany.

Commissioners.

SECT. 1. *Be it enacted by the senate and house of representatives of the state of Louisiana, in general assembly convened*, That Thomas Spell, Robert Badony, Benjamin Howard, Joseph Hertraire and Ben-

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APPENDIX L

1. *Hyde v. Birmingham*, 392 So.2d 1226, 1227 (Ala. Crim. App. 1980) (Alabama Court of Criminal Appeals upheld as a reasonable exercise of the police power an ordinance that banned the possession of a firearm in a public place such that it would provoke a breach of the peace).

2. *City of Tucson v. Rineer*, 971 P.2d 207, 213 (Ariz. Ct. App. 1998) (Arizona Court of Appeals approved an ordinance prohibiting the use or possession of firearms in city parks as "a proper exercise of the city's police power").

3. *Trinen v. City and County of Denver*, 53 P.3d 754, 757-758 (Colo. Ct. App. 2002) (Colorado Court of Appeals upheld a Denver ordinance outlawing the carrying of unconcealed weapons on one's person, and the carrying of concealed weapons in a motor vehicle).

4. *Benjamin v. Bailey*, 662 A.2d 1226, 1232 (Conn. 1995) (Connecticut Supreme Court ruled that a statute banning the sale, transfer and possession of assault weapons was a reasonable regulation).

5. *Application of Wolstenholme*, 1992 WL 207245, *6 (Del. Super. Ct. 1992) (Superior Court of Delaware recognized that right to carry a concealed weapon is not a fundamental right under the Delaware Constitution, noting the State's authority "to impose reasonable restrictions on a license to carry a concealed deadly weapon").

6. *Rinzler v. Carson*, 262 So.2d 661, 665-666 (Fla. 1972) (Florida Supreme Court held that a State statute prohibiting the possession of a short-barreled long gun or machine gun was a valid legislative effort "to promote the health, morals, safety and general welfare of the people").

7. *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978) (Georgia Supreme Court held that a prohibition on the possession of a sawed-off shotgun was "legitimate and reasonably within the police power").

8. *People v. Marin*, 795 N.E.2d 953, 958 (Ill. Ct. App. 2003) (Illinois Court of Appeal upheld an unlawful weapons statute as "'bear[ing] a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective.' [Citations.]").

9. *Baker v. State*, 747 N.E.2d 633, 638 (Ind. Ct. App. 2001) (Indiana Court of Appeals upheld a statute regulating firearms possession by criminals, noting that the law "is subject to a rational basis review, and we will not invalidate it unless it draws distinctions that simply make no sense").

10. *Posey v. Commonwealth*, 185 S.W.3d 170, 181 (Ky. 2006) (Kentucky Supreme Court upheld a statute outlawing the possession of a firearm by a convicted felon, finding that it was "enacted to ensure the liberties of all persons by maintaining the proper and responsible exercise of the general right" to bear arms).

11. *State v. Amos*, 343 So.2d 166, 168 (La. 1977) (Louisiana Supreme Court held that a statute prohibiting certain types of felons from carrying firearms was a reasonable regulation pursuant to the legislative police power).

12. *Hilly v. City of Portland*, 582 A.2d 1213, 1215 (Me. 1990) (Supreme Judicial Court of Maine upheld a concealed weapons ordinance as a "reasonable regulation consistent with the State's police power to promote public health, welfare, safety and morality").

13. *People v. Swint*, 572 N.W.2d 666, 676 (Mich. Ct. App. 1997) (Michigan Court of Appeals upheld a statute prohibiting possession of firearms by felons, finding that the right to bear arms "is not absolute and is subject to the reasonable limitations set forth in [the statute] as part of the state's police power").

14. *James v. State*, 731 So.2d 1135, 1137 (Miss. 1999) (Mississippi Supreme Court upheld a statute prohibiting firearms possession by felons, noting "the state is reasonably exercising its power to protect in the interest of the public").

15. *State v. White*, 253 S.W. 724, 727 (Mo. 1923) (Missouri Supreme Court upheld a statute prohibiting the brandishing of a deadly weapon, finding that the "right to bear arms may be taken away or limited by reasonable restrictions").

16. *State v. Comeau*, 448 N.W.2d 595, 597 (Neb. 1989) (Nebraska Supreme Court upheld a prohibition on possessing a firearm with altered identification marks, observing " that courts throughout the country . . . have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the

safety and welfare of its citizens").

17. *State v. Rivera*, 853 P.2d 126, 129 (N.M. Ct. App. 1993) (New Mexico Court of Appeals held that outlawing negligent use of a deadly weapon was reasonably related to the public health, welfare and safety).

18. *State v. Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987) (North Dakota Supreme Court held that prohibiting convicted felons from possessing firearms was a reasonable regulation under the State's police power).

19. *State v. Warren*, 975 P.2d 900, 902-903 (Okla. 1998) (Oklahoma Supreme Court upheld as a reasonable regulation under the State's police power a statute prohibiting an individual arrested for a felony from obtaining a concealed handgun license).

20. *State v. Smoot*, 775 P.2d 344, 345 (Ore. Ct. App. 1989) (Oregon Court of Appeals held that a law banning the possession of a concealed switchblade was reasonably related to public safety).

21. *Minich v. County of Jefferson*, 919 A.2d 356, 361 (Pa. Commw. Ct. 2007) (Commonwealth Court of Pennsylvania upheld an ordinance prohibiting the possession of weapons in County buildings;

the right to bear arms under the Pennsylvania Constitution may be restricted "for the good order of society and the protection of the citizens").

22. *Masters v. State*, 653 S.W.2d 944, 946 (Tex. Ct. App. 1983) (Texas Court of Appeals upheld a statute prohibiting the unlawful carrying of certain weapons, noting that the State Constitution commands "the Legislature to enact reasonable regulations concerning the keeping and bearing of such arms in order that the Legislature prevent disorder in our society").

23. *State v. Duranleau*, 260 A.2d 383, 386 (Vt. 1969), disapproved on other (procedural) grounds by *State v. Carpenter*, 412 A.2d 285, 289 (Vt. 1980) (Vermont Supreme Court upheld a statute prohibiting the carrying of a loaded firearm in a vehicle, finding statute "reasonable" and deciding that the State's "constitutional provision does not suggest that the right to bear arms is unlimited and undefinable").

24. *Morris v. Blaker*, 821 P.2d 482, 488 (Wash. 1992) (Washington Supreme Court upheld the revocation of a concealed weapons permit as a reasonable regulation under the State's police power)

25. *Rohrbaugh v. State*, 607 S.E.2d 404, 414 (W.Va. 2004) (West Virginia Supreme Court of Appeals ruled that a statute prohibiting felons from possessing firearms was a proper exercise of the State's police power).

26. *State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003) (Wisconsin Supreme Court upheld as a "reasonable exercise of police power" a statute prohibiting the carrying of concealed weapons).

27. *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986) (Wyoming Supreme Court upheld a statute forbidding the carrying of concealed deadly weapons, observing that a "balance must be struck between the individual's right to exercise each constitutional guarantee and society's right to enact laws which will ensure some semblance of order").

CIVIL NO: 07-15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs and Appellants,

vs.

MARY V. KING, et al.,

Defendants and Appellees.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HON. MARTIN J. JENKINS,
(CASE NO. CV-99-04389-MJJ)

APPELLEES' CERTIFICATE OF SERVICE OF:

APPELLEES' APPENDICES IN SUPPORT OF SUPPLEMENTAL BRIEF

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PROOF OF SERVICE

I, Debbie Nager Reid, declare that I am employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action; my business address is 355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101.

On September 11, 2008, I served the following document:

APPELLEES' APPENDICES IN SUPPORT OF SUPPLEMENTAL BRIEF

on the following interested party in this action:

Donald J. Kilmer, Jr.
Law Offices of Donald Kilmer
1645 Willow Street, Suite 150
San Jose, California 95125

By contracting with a commercial carrier for delivery to the address listed above within three (3) calendar days from February 7, 2008, in accordance with Federal Rule of Appellate Procedure 25(a)(2)(B)(i), (ii). Said document was also dispatched for filing with the Clerk of the Court for delivery by a third party commercial carrier pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B)(i), (ii). This was done by placing the orders for shipment, making all payments, and delivering the documents to a Federal Express agent before midnight on September 11, 2008.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 11, 2008, at Los Angeles, California.

Debbie Nager Reid