No. 12-845

In The
Supreme Court of the United States

ALAN KACHALSKY, CHRISTINA NIKOLOV,
JOHNNIE NANCE, ANNA MARCUCCI-NANCE,
ERIC DETMER, AND SECOND
AMENDMENT FOUNDATION, INC.,

Petitioners,

v.

SUSAN CACACE, JEFFREY A. COHEN,
ALBERT LORENZO, ROBERT K. HOLDMAN,
AND COUNTY OF WESTCHESTER,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

AMICUS BRIEF OF ACADEMICS FOR THE SECOND AMENDMENT IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interests of the *Amicus* 1

Argument 1

I. The History of the "Sullivan Act" 3

A. "Big Tim" Sullivan, George LeBrun, and the Untold History of the Sullivan Act 3

B. The Sullivan Act in the Legislature...... 5

C. The Sullivan Act, Favoritism, and Abuse 9

II. The Circuit Court Treatment of Early American Law Relating to Firearms Use and Carrying 12

A. Founding Era Examples 13

B. Early Restrictions on Concealed Carrying of Arms 17

C. Post Civil War Arms Limitations.......... 18

D. Examples of Statutes Forbidding Sale of Certain Arms 23

Conclusion.. 24

TABLE OF AUTHORITIES

Page

CASES

Andrews v. State, 50 Tenn. 165 (1871)................20, 21

Bliss v. Commonwealth, 12 Ky. 90 (1822).................17

Day v. State, 37 Tenn. 495 (1857)..............................23

English v. State, 35 Tex. 473, 14 Am. Rep. 374 (1872)...22

Federation of New York State Rifle and Pistol Clubs v. McGuire, 101 Misc. 2d 104, 420 N.Y.S.2d 602 (1979)..11

Fife v. State, 31 Ark. 455, 25 Am. Rep. 556 (1876)...20

Nunn v. State, 1 Ga. 243 (1846) 23

Sir John Knight's Case, 87 Eng. Rep. 75, 90 Eng. Rep. 300 (King's Bench, 1686) 14

State v. Chandler, 5 La. App. 489, 52 Am. Dec. 599 (1850)..18

State v. Duke, 42 Tex. 455 (1875) 22

State v. Reid, 1 Ala. 612 (1840) 18

Wilson v. State, 33 Ark. 557 (1878) 20

STATUTES

An Act to Suppress the sale and use of Bowie Knifes and Arkansas Tooth Picks in this State, 1837-1838 TENN. PUBLIC ACTS, Ch. 137 23

TABLE OF AUTHORITIES – Continued

Page

An Act to amend the penal law, in relation to the sale and carrying of dangerous weapons, 1911 N.Y. LAWS Ch. 195 7

An Act to amend the penal law generally, in relation to the carrying, use and sale of dangerous weapons, 1913 N.Y. LAWS Ch. 608....................8

JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820)....................19

Act of Dec. 24, 1774, 1774 PA. STAT. 410....................13

Act of Apr. 22, 1785, 1785 N.Y. LAWS 83 13

Act of Nov. 16, 1821, 1821 TENN. ACTS 78-79....................13

Act of Jan. 30, 1847, 1846-47 VA. LAWS 67 13

Statute of Northampton, 2 Edw. 3, c. 3 (1328) 14

A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA (1792) 16

An Act forbidding and punishing Affrays, A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 33 (1786)....................16

An Act to enforce such Parts of the Statute and Common Laws as have been heretofore in Force and Use here, 1778 N.C. LAWS 36, 113 15

TABLE OF AUTHORITIES – Continued

Page

An Act for repealing an Act, made and passed in the year of our Lord one thousand Six Hundred and Ninety two, 2 PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION TO THE SECOND SESSION OF THE GENERAL COURT Ch. 25 (1799)....16

WYOMING COMPILED STATUTES §§ 5824, 5899 (1910)....19

PERIODICALS

Janie's Got A Gun Permit? Aerosmith Flap Lands Cop In Hot Water, MTV, Dec. 19, 2002 12

Lifestyles Of The Rich And Packin': High Profile Celebrities Seeking Gun Permits On the Rise, NEW YORK DAILY NEWS, Sept. 27, 2010 11

"Tim Sullivan" Dies, DAILY PEOPLE (New York City, N.Y.), Dec. 23, 1909 3

Madoff Son Of A Gun, NEW YORK DAILY POST, Dec. 27, 2009 11

A Protest Against National Disarmament, 17 FIELD & STREAM 556 (1912) 7

To Deprive Police of Clubs, NEW YORK TIMES, Jan. 14, 1909 4

Concealed Pistols, NEW YORK TIMES, Jan. 27, 1905 4

TABLE OF AUTHORITIES – Continued

Page

Bar Hidden Weapons on Sullivan's Plea, NEW YORK TIMES, May 11, 1911 6

Stronger Ban on Pistols, NEW YORK TIMES, Feb. 17, 1911...6

The New Pistol Law, NEW YORK TIMES, Sept. 1, 1911 7

Favor Sullivan's Bill, NEW YORK TIMES, Apr. 26, 1911 7

Dangerous Weapons Act, NEW YORK TIMES, Feb. 22, 1913 8

Pistol Law Amended, NEW YORK TIMES, May 23, 1913 9

Mulrooney Fights "Model" Pistol Bill, NEW YORK TIMES, March 1, 1933 9

Says An Ex-Convict Got Pistol Permits, NEW YORK TIMES, Nov. 10, 1920.....................................10

40 in Bronx Seek Gun Permits For Protection Against Addicts, NEW YORK TIMES, Sept. 26, 1969 11

JOURNAL OF THE FIRST SESSION OF THE SENATE (1820)...19

OTHER AUTHORITIES

JAY S. ALBANESE, ORGANIZED CRIME IN OUR TIMES (2011) 10

EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA (1996)...............................10

TABLE OF AUTHORITIES – Continued

Page

Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistoric Standards of Review*, 60 CLEV. ST. L. REV. 1 (2012) 15

Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 143 (2007) 2

DAVID CRITCHLEY, THE ORIGIN OF ORGANIZED CRIME IN AMERICA: THE NEW YORK CITY MAFIA, 1891-1931 (2009) 9

SID FEDER AND JOACHIM JOESTEN, THE LUCIANO STORY (1994) 9

1 WILLIAM HAWKINS, A TREATISE ON PLEAS OF THE CROWN (1716) 14

MYLES J. KELLEHER, SOCIAL PROBLEMS IN A FREE SOCIETY (2004) 7

THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION (1973) 10

GEORGE P. LEBRUN, IT'S TIME TO TELL (1962) 4, 5

FRANCOIS-XAVIER MARTIN, THE HISTORY OF NORTH CAROLINA (1829) 16

DAVID PIETRUSZA, ROTHSTEIN: THE LIFE, TIMES, AND MURDER OF THE CRIMINAL GENIUS WHO FIXED THE 1919 WORLD SERIES (2003) 3

THOMAS A. REPPETTO, AMERICAN MAFIA: A HISTORY OF ITS RISE TO POWER (2004) 9

TABLE OF AUTHORITIES – Continued

Page

Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) 21

Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. R. OF L. & POLITICS 191 (2006) 17, 19, 20, 22

RICHARD F. WELCH, KING OF THE BOWERY: BIG TIM SULLIVAN, TAMMANY HALL, AND NEW YORK CITY FROM THE GILDED AGE TO THE PROGRESSIVE ERA (2008)...3, 4

INTERESTS OF THE *AMICUS*

Amicus Academics for the Second Amendment ("A2A"), is a §501(c)(3) tax-exempt organization. Formed in 1992 by law school teachers, A2A's goal is to secure the right to keep and bear arms as a meaningful, individual right. A2A has filed *amicus* briefs in this Court in *McDonald v. City of Chicago, District of Columbia v. Heller, United States. v. Lopez*, and in the Fifth Circuit in *United States. v. Emerson*. It has also published a series of "*Open Letters*" signed by college and university professors in the New York Times, the National Review, the New Republic, and other print media. It here desires to document for the Court the origins of New York's Sullivan Act, and the historical context of the carrying restrictions at issue.[1]

ARGUMENT

Amicus wishes to offer for the Court's consideration an explanation of two historical events. The first concerns the origin of the New York permit system at issue here, which the Circuit opinion treats as the

[1] No counsel for a party authored this brief in whole or in part, or made a contribution to fund the preparation and submission of this brief. The NRA Civil Rights Defense Fund made a contribution to fund the preparation of this brief. This brief is filed with the written consent of the parties. *Amicus* complied with the conditions by providing ten days' advance notice to the parties.

result of "careful balancing of the interests involved," *viz.*, prevention of violence, preservation of self-defense and sporting uses. Slip op. at 39 & n.22. In reality, we suggest, its origins lie more in coincidence and guesswork than in reasoned balancing. The second set of historical events concerns the history of firearm regulation in early America. The Circuit opinion suggests that regulations of firearms carrying were widespread in this era; in so doing it relies upon isolated statutes that had nothing to do with carrying, or which regulated only one mode of carrying, or applied only to a few classes of arms. In this, we agree with historian Robert Churchill that "the assertion that 'gun control legislation' made a common appearance on colonial and early national statute books, if taken alone, offers a distorted understanding of the nature and extent of gun regulation in early America."[2]

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[2] Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 143 (2007). Prof. Churchill's exhaustive study of early American statutes concludes that they fell into three classes: (1) impressment of property in time of war; (2) disarmament of individuals outside the body politic (*i.e.*, those who refused a loyalty oath during the Revolution) and (3) very limited time, place and manner restrictions on shooting (as distinct from carrying).

I. THE HISTORY OF THE "SULLIVAN ACT"

A. "Big Tim" Sullivan, George LeBrun, and the Untold History of the Sullivan Act.

The history of New York's permit system is inseparable from that of its creator, the famed "Big Tim" Sullivan.[3] Sullivan was a product of a time when many men worked both sides of the law. In the West, the Earp brothers saw no contradiction between being reforming lawmen and being gunmen and brothel owners themselves. Big Tim Sullivan saw no conflict between being a prominent legislator, often a reformer, and being "the king of the underworld,"[4] receiving graft from every "saloonkeeper, gambler, thief, and pimp operating on the Lower East Side."[5]

Why Sullivan introduced the bill that carries his name remained unknown for half a century. His previous involvement with weapons issues had consisted of proposing to disarm the police of their nightsticks, with the New York Times suggesting that he wanted the police made defenseless against his

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[3] He was called "Big Tim" to distinguish him from another Tammany Hall leader, "Little Tim Sullivan." *"Tim Sullivan" Dies*, DAILY PEOPLE (New York City, N.Y.), Dec. 23, 1909, at 1.

[4] RICHARD F. WELCH, KING OF THE BOWERY: BIG TIM SULLIVAN, TAMMANY HALL, AND NEW YORK CITY FROM THE GILDED AGE TO THE PROGRESSIVE ERA 107 (2008).

[5] DAVID PIETRUSZA, ROTHSTEIN: THE LIFE, TIMES, AND MURDER OF THE CRIMINAL GENIUS WHO FIXED THE 1919 WORLD SERIES 54-55 (2003).

constituents.[6] Historians speculated that he might have wanted to use the permit requirement to disarm rivals while arming his own supporters, or that he might have wanted to show that, while he winked at consensual vice, he drew the line at gunplay and street crime.[7] We now know that the actual history of the statute is more complicated. Indeed, it was not revealed until 1962, when George P. LeBrun, New York's former Medical Examiner, published his autobiography, and revealed that he was the real author of the permit requirement.[8]

LeBrun related that Sullivan had wanted only to make concealed carrying of arms, then a misdemeanor, into a felony with a three-year penalty. Sullivan had a remarkable explanation for his personal interest. The public did not much care if gangsters shot each other,

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[6] *To Deprive Police of Clubs*, NEW YORK TIMES, Jan. 14, 1909, at 1. ("Senator Sullivan was asked whether it was not already a felony to carry concealed weapons. 'Yes,' said the Senator, but not for officers. It is those fellows I am after."

[7] It was also speculated that Sullivan sought to arm his Irish-American constituency while disarming newer immigrants. But Sullivan was actually a pioneer in diversity, seeking to incorporate Italian and Central European immigrants into Tammany Hall. RICHARD F. WELCH, *supra,* at 42-43. It was his rivals, the government reform groups, which sought to disarm the newer arrivals. Thus the New York Times editorialized that gun laws "would prove corrective and salutary in a city filled with immigrants and evil communications, floating from the shores of Italy and Austria-Hungary." *Concealed Pistols*, NEW YORK TIMES, Jan. 27, 1905, at 6.

[8] GEORGE P. LEBRUN, IT'S TIME TO TELL 105-07 (1962).

but every now and then they hit an innocent bystander, and their relatives pestered him to have the police do something.

> But even when gangsters kill each other I still have problems. If the police make an arrest, the friends and relations come knocking on my door for me to get a lawyer or arrange bail. And they're hardly out the door when the relatives of the victim come to me for a contribution to pay for his burial.[9]

LeBrun lobbied him for a broader statute, arguing that concealed carry restrictions would do nothing to prevent impulsive suicides and murders. Sullivan finally told LeBrun to draft what he wanted and Sullivan would get it passed.[10]

B. The Sullivan Act in the Legislature.

While LeBrun may have wanted a permit system, Sullivan remained focused on making concealed carry a felony. When, on the Senate floor, he was challenged to explain how burglars could be forced to get a gun permit, he ignored the question and replied, "I want to make it so the young thugs in my district will get three years for carrying dangerous weapons instead of getting a sentence in the electric chair a

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[9] *Id.* at 110-11.

[10] *Id.* at 106.

year from now."[11] Others appear to have taken the same view, seeing either the increased penalties, or the registration provisions, as the important features. As the New York Times described the committee hearings on the bill:

> The committee gave a hearing to-day on the Sullivan bill, which requires the licensing of dealers and users, and compels dealers to register all sales. G. P. Le Brun of the Coroner's office in New York said that the number of homicides in the city in 1910 was 50 per cent greater than in 1909. Dr. Albert F. Weston, Coroners physician, said that there would be a greater number of convictions in cases of murder by shooting if there was a proper registration law. He cited the case of the murder of Caesar Young, in which Nan Peterson had been accused, expressing the belief that the mystery would have been solved if the weapon had been registered.[12]

After its passage, Senator Pollock wrote "The bill had two objects. One object was to punish the unlawful possession of dangerous firearms. In addition, the bill served the equally important object of aiding the

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[11] *Bar Hidden Weapons on Sullivan's Plea*, NEW YORK TIMES, May 11, 1911, at 3.

[12] *Stronger Ban on Pistols*, NEW YORK TIMES, Feb. 17, 1911, at 3.

authorities in the identification of the owner of a firearm used in the commission of a crime."[13]

Sullivan had promised the Senate, "if you will give me this bill I will cut down the number of murders in New York City in one year by at least fifty. No man knows more about the situation with which this deals than I do, and you must take my word for it."[14]

Big Tim's practical knowledge of criminology proved deficient. "It didn't take long for those hopes to be dashed: within twelve months of the passage of the Sullivan Law, New York City's murder rate increased 18 percent."[15] In 1912, presidents of fourteen burglary insurance companies called for repeal of the Act, arguing that burglaries and robberies had increased by 40%.[16]

The permit provisions of the Sullivan Act[17] reflect hasty draftsmanship, down to a clearly noticeable typographical error.[18] It outlawed possession of a handgun, or having a handgun upon the person, in

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[13] *The New Pistol Law*, NEW YORK TIMES, Sept. 1, 1911, at 6.

[14] *Favor Sullivan's Bill*, NEW YORK TIMES, April 26, 1911, at 6.

[15] MYLES J. KELLEHER, SOCIAL PROBLEMS IN A FREE SOCIETY 188 (2004).

[16] *A Protest Against National Disarmament*, 17 FIELD & STREAM 556 (1912).

[17] *An Act to amend the penal law, in relation to the sale and carrying of dangerous weapons*, 1911 N.Y. LAWS Ch. 195, at 442.

[18] "or in such manner as may be prescribel [sic]. . . ."

any city, village, or town, "without a written license therefore," but did not state the license's form or content, or the application procedure, or provide any criteria for its issuance.

1913 amendments to the Act[19] gave some modest substance to the last. Some license issuances were made mandatory (to possess in the home or business, or for bank messengers to carry). Beyond this, permits were discretionary:

> In addition, it shall be lawful for any magistrate, upon proof before him that the person applying therefore is of good moral character and that proper cause exists for the issuance thereof, to issue to such person a license to have and carry concealed a weapon without regard to employment or place of possessing such weapon. . . .[20]

The 1913 amendment appears to have been given even less thought than was given the initial enactment. Its chief sponsor felt that its virtue lay in making possession permits more available to the law-abiding: "The Foley Bill amends a statutory absurdity which places the honest citizen at the mercy of the dishonest one,"[21] and the New York Times seems to

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[19] *An Act to amend the penal law generally, in relation to the carrying, use and sale of dangerous weapons*, 1913 N.Y. LAWS Ch. 608, at 1627.

[20] *Id.* at 1629.

[21] *Dangerous Weapons Act*, NEW YORK TIMES, Feb. 22, 1913, at 10.

have thought it made issuance of carry permits mandatory when the requirements were met.[22]

In short, the Sullivan Act's carry permit provisions do not appear to have been the product of careful analysis and balancing of needs. Rather, they originated in Tim Sullivan's desire to increase punishment for concealed carry, and his allowing a Medical Examiner, who wanted a permit system, to draft a bill for him. The criteria created by the 1913 amendment was a by-product of an attempt to increase the availability of possession permits.

C. The Sullivan Act, Favoritism, and Abuse.

The broad standards of the 1913 amendment invited abuse and favoritism. As early as the 1920s, Mafioso were successfully obtaining unrestricted concealed carry licenses.[23] In the 1930s, "Dutch" Schultz and other mobsters held permits.[24] Another glimpse

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[22] *Pistol Law Amended*, NEW YORK TIMES, May 23, 1913, at 9. ("It requires Magistrates to issue licenses for carrying concealed weapons to certain public officials and to persons of good moral character when they can show it is necessary for them to be armed.").

[23] DAVID CRITCHLEY, THE ORIGIN OF ORGANIZED CRIME IN AMERICA: THE NEW YORK CITY MAFIA, 1891-1931, at 285 n.81 (2009); THOMAS A. REPPETTO, AMERICAN MAFIA: A HISTORY OF ITS RISE TO POWER 105 (2004); SID FEDER AND JOACHIM JOESTEN, THE LUCIANO STORY 53-54 (1994).

[24] *Mulrooney Fights "Model" Pistol Bill*, NEW YORK TIMES, March 1, 1933, at 8.

into the process came in 1957. At Apalachin, New York, state police happened onto a meeting of American Mafioso – and in so doing, raised public awareness of organized crime.[25] Many of these crime bosses were carrying handguns – and had concealed carry permits issued by New York or New Jersey.[26]

A system which commits decision entirely to official discretion also invites corruption. In 1972, *The Knapp Commission Report on Police Corruption* reported that, according to applicants and police officers alike, it was common throughout the city to pay a $100 bribe to the precinct commander to obtain a pistol permit.[27] The solution was to centralize the pistol permit process. This substituted one problem for another. Permits had been difficult enough to obtain even when bribery gave the issuers a personal incentive. With that removed, licensing authorities had no reason at all to grant permits. In 1978, NYPD administration decided that they were short of officers to process applications. The solution was to slow down processing; applications now could only be filed by appointment. By March of 1979, the pistol

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[25] JAY S. ALBANESE, ORGANIZED CRIME IN OUR TIMES 141-42 (2011).

[26] EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 240-41 (1996).

[27] THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 188-89 (1973). Problems with corruption were reported as early as 1920, when a magistrate was found to have signed dozens of otherwise blank permits, which sold for $2 each. *Says An Ex-Convict Got Pistol Permits*, NEW YORK TIMES, Nov. 10, 1920, at 8.

licensing office was making appointments *a year* in advance.[28]

Of course, as George Orwell's *Animal Farm* explained, "Some animals are more equal than others." When 40 black and Puerto Rican women sought permits to protect their families against an outbreak of muggings, they were informed "It's the policy of this department not to give out permits for people who want to protect themselves."[29] A different policy applies to the rich and famous: New York City pistol permits have been issued to Donald Trump, Don Imus, Sean Hannity, Howard Stern, Robert De Niro, and others with clout,[30] none of whom likely reside in high-crime areas.

The record for customer-friendly service came, however, when Steven Tyler and Joe Perry of the band Aerosmith obtained pistol permits in New York City. While ordinary applicants were waiting a year for an appointment to submit their application, the head of the License Division, Benjamin Petrofsky, cut

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[28] *Federation of New York State Rifle and Pistol Clubs v. McGuire*, 101 Misc. 2d 104, 420 N.Y.S.2d 602 (1979).

[29] *40 in Bronx Seek Gun Permits For Protection Against Addicts*, NEW YORK TIMES, Sept. 26, 1969, at 31.

[30] *Lifestyles Of The Rich And Packin': High Profile Celebrities Seeking Gun Permits On the Rise,* NEW YORK DAILY NEWS, Sept. 27, 2010. Online at http://www.nydailynews.com/ny_local/2010/09/27/2010-09-27_celebrities_seeking_pistol_permits_on_the_rise_in_the_city_lifestyles_of_rich_n_.html; *Madoff Son Of A Gun*, NEW YORK DAILY POST, Dec. 27, 2009; online at http://www.nypost.com/p/news/local/madoff_son_of_gun_LDcUvEw9PXY0rS1oNFfl1J.

through the usual red tape for the musicians, by fingerprinting them at Madison Square Garden before one of Aerosmith's shows. Petrofsky received a limo ride and a ticket to the show.[31]

In short, the lack of any real criteria for issuance of carry permits has historically resulted in a system where the right to self-protection is based upon celebrity status and political clout, rather than upon need.

II. THE CIRCUIT COURT TREATMENT OF EARLY AMERICAN LAW RELATING TO FIREARMS USE AND CARRYING

The Circuit Court opinion invokes early American law to suggest that restrictions on carrying, at least as a generality, were common in the 18th and 19th centuries. The examples it cites, however, are isolated and often do not involve carrying; the examples that do restrict carrying came long after the Framing, and almost universally applied only to subsets of arms.

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[31] Jon Wiederhorn, *Janie's Got A Gun Permit? Aerosmith Flap Lands Cop In Hot Water*, *MTV,* Dec. 19, 2002, online at http://www.mtv.com/news/articles/1459226/janies-got-gun-permit.jhtml.

A. Founding Era Examples.

The Circuit opinion cites four examples to establish that "during the Founding era, for instance, many states prohibited the use of firearms on certain occasions and in certain locations." Slip op. at 32. Of the four, however:

> Pennsylvania's enactment dates to colonial days, and restrained New Year's merrymaking, banning setting off firecrackers and shooting guns "without reasonable cause," on December 31, and January 1, and 2. Act of Dec. 24, 1774, 1774 Pa. Stat. 410.
>
> New York's enactment banned shooting on those same three days. Act of Apr. 22, 1785, 1785 N.Y. Laws 83. These were essentially nuisance statutes.
>
> Tennessee's statute banned target shooting (to "shoot at a mark") inside town limits or near certain roads. Act of Nov. 16, 1821, 1821 Tenn. Acts 78-79. This was a shooting safety regulation.
>
> Virginia outlawed shooting at other people "with intent in doing so to maim, disfigure, disable, or kill such person. . . ." Act of Jan. 30, 1847, 1846-47 Va. Laws 67. This essentially outlawed aggravated assault.

None of these regulated the carrying of arms, but only their discharge in an annoying, negligent, or criminal manner.

The Circuit opinion then cites to three other early statutes, for which some background should be given. These appear to be (we use that term advisedly, for reasons outlined below) patterned after the English Statute of Northampton, 2 Edw. 3, c. 3 (1328), enacted in a time of chaos,[32] and which forbade going armed in courts, fairs, and "elsewhere." While seemingly broad, the English statute appears to have lain unenforced for three centuries.

Finally, in 1686, James II used it to prosecute the gadfly Sir John Knight. The Court of King's Bench noted the statute was "almost gone in desuetudinem," and interpreted it to bar only going "armed to *terrify* the King's subjects."[33]

The Circuit opinion suggests that North Carolina forbade going armed "in fairs, markets, nor in the

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[32] Among other events, Edward II had been overthrown by his queen and her lover Roger Mortimer in 1326. They (or mobs) then killed Edward's chief supporters. Edward II died in prison, probably murdered, in 1327. Edward III was under-aged, so Mortimer effectively ruled as his guardian. In 1330, Edward III assumed power and executed Mortimer.

[33] *Sir John Knight's Case*, 87 Eng. Rep. 75, 90 Eng. Rep. 300 (King's Bench, 1686) (Emphasis supplied). Thus famed British commentator William Hawkins, in his discussion of the law of affrays, made it clear "That no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People; from which it seems clearly to follow, That Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons. . . ." 1 WILLIAM HAWKINS, A TREATISE ON PLEAS OF THE CROWN, Ch. 63 §9 (1716) (Later editions use various numberings of chapters.).

presence of the King's Justices, or other ministers, nor in no part elsewhere," and that Massachusetts and Virginia enacted similar statutes. Slip op. at 32. The Circuit cites as authority Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistoric Standards of Review*, 60 CLEV. ST. L. REV. 1, 31-32 & n.166 (2012).

Mr. Charles appears to have made an understandable mistake, citing to a post-Independence American statutory compilation and assuming that this related to post-Independence American legislation. That is actually not the case.

The American colonies in 1776 faced a legal problem. Previously they had been able to rely upon British statutes; with Independence, that became impossible. North Carolina enacted a statute providing that that any previous British statute would continue in force thereafter in the new State,[34] and the legislature funded the compilation of those *British* statutes.[35] Indeed, the North Carolina compilation

[34] *See An Act to enforce such Parts of the Statute and Common Laws as have been heretofore in Force and Use here*, 1778 N.C. LAWS Ch. 36, 113. ("[A]ll such Statutes, and such Parts of the Common Law, as were heretofore in Force and Use within this Territory, and all the Acts of the late General Assemblies thereof, or so much of the said Statutes, Common Law, and Acts of Assembly, as are not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State. . . . are hereby declared to be in full Force within this State.").

[35] The author later wrote that history "began to engage the attention of the writer as early as the year 1791: at that period

(Continued on following page)

Mr. Charles cites is entitled A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA. It simply repeats the Statute of Northampton, *verbatim*.[36]

In the case of Massachusetts, the statute cited by the Circuit was indeed post-Independence. But it applied only to rioters, breakers of the peace and "such as shall ride or go *armed offensively*, *to the fear or terror* of the good citizens of this Commonwealth." (Emphasis supplied.) While this paralleled the Statute as it had been interpreted by King's Bench, it did not outlaw the conduct, but authorized requiring the violator to "find sureties for his keeping the Peace," imprisoning him only if he failed to do so.[37] Virginia likewise forbade coming before its Justices "with force and arms," or to "go nor ride armed . . . in *terror* of the Country." *An Act forbidding and punishing Affrays*, A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 33 (1786) (Emphasis supplied).

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the legislature of North Carolina afforded him some aid, in the preparation of a collection of the statutes of the parliament of England, then in force and use within that state." FRANCOIS-XAVIER MARTIN, THE HISTORY OF NORTH CAROLINA vi (1829).

[36] This answers the Circuit's wonder that "North Carolina referred to the 'King's Justices' after the colonies had won their independence." Slip op. at 33 n.20.

[37] *An Act for repealing an Act, made and passed in the year of our Lord one thousand Six Hundred and Ninety two*, 2 PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION TO THE SECOND SESSION OF THE GENERAL COURT Ch. 25, at 259 (1799).

Thus, of the three statutes cited, one was not an American enactment at all, and the other two *only applied to arms carrying that created public "terror."*

In short, the arms laws cited by the Circuit for the early Republic really cover only shooting in a criminal, nuisance, or unsafe manner, or carrying arms in ways that caused public terror. None sought to regulate peaceful carrying for self-defense or otherwise.

B. Early Restrictions on Concealed Carrying of Arms.

The Circuit opinion then turns to early bans on carrying of concealed weapons, slip op. at 33-34, which became popular in the early 19th century. These laws had two material features. First, they applied only to concealed carrying, and did not restrict open carrying. Second, there was no provision for issuance of permits; all citizens were forbidden to carry concealed and allowed to carry openly.

Kentucky was the first State to adopt such legislation, and its law was struck down as violative of the right to arms. *See Bliss v. Commonwealth*, 12 Ky. 90 (1822). (In 1850, its right to arms guarantee was changed to insert "but the General Assembly shall have the right to prevent persons from carrying concealed arms." Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. R. OF L. & POLITICS 191, 197 (2006).)

Outside of Kentucky, State courts upheld concealed carry bans, on the basis that they allowed open carry, which was equally as useful in self-defense: the statutes were treated as "time, place, and manner" restrictions. Thus *State v. Chandler*, 5 La. App. 489, 52 Am. Dec. 599 (1850) noted that the statute "interferes with no man's right to carry arms (to use its words) 'in full open view.'" Open carry, the court noted, "places men upon an equality," and "is guaranteed by the Constitution of the United States." 5 La. App. at 490. *State v. Reid*, 1 Ala. 612 (1840), upheld an Alabama ban on concealed carry, but added "A statute, which under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be borne so as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." 1 Ala. at 617-18.

In short, concealed carry prohibitions were seen as permissible precisely because they allowed open carry. They were, in modern terms, a time-place-manner restriction that allowed exercise of the right in one manner but not another.

C. Post Civil War Arms Limitations.

At this point we go farther and farther from the period of the Framing. The Circuit opinion cites four State statutes, spanning 1871 – 1881, which restricted the carrying of arms, noting that three were judicially upheld. Slip op. at 21. (The exception is Wyoming, which was a territory, and whose statute did not long

survive statehood and the adoption of its bill of rights).[38]

The remaining three enactments must be seen against the background of the State constitutions of the times. We will examine each in turn.

Arkansas. Arkansas' constitution guaranteed a right of citizens to keep and bear arms limited to "their common defense." Eugene Volokh, *supra*, at 193.[39] This was a provision which the First Senate had refused to adopt as a limit on the right of the people to keep and bear arms, voting it down when the limitation was proposed for addition to the Second Amendment,[40] and it enabled the State to argue that the "arms" protected were those useful for the militia, acting in collective defense.

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[38] Upon gaining Statehood in 1889, Wyoming adopted a guarantee that "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." Eugene Volokh, *supra*, at 204. Its 19th century restriction on carrying in towns is missing from the WYOMING COMPILED STATUTES of 1910, which barred carrying concealed, or "openly, with the intent, or avowed purpose of injuring his fellow man," §5899, or carrying "with intent to assault," §5824.

[39] The Circuit notes that the relevant State rulings viewed "arms" as military arms, which conflicts with the reading this Court has given to the term. Slip op. at 21 n.14. That the State constitutions at issue limited the right to "for the common defense" explains the difference.

[40] "On motion to amend article the fifth, by inserting the words 'for the common defense,' next to the words 'bear arms'; it passed in the negative." JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

The Arkansas statute barred the carry of dirks, bowie knifes, sword-canes, and "any pistol of any kind whatever." In *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556 (1876), the court upheld the statute by construing it to cover only "pocket pistols," the smallest class of pistols, which it found were "not such as is in ordinary use, and effective as a weapon of war, and useful and necessary for 'the common defense.'" 31 Ark. at 461. As so construed, the statute covered only one class of handguns and several classes of knives. Two years later the court reversed a conviction, where the jury was instructed on the statute's wording rather than its limiting construction, noting that "to prohibit the citizen from wearing or carrying a war arm . . . is an unwarranted restriction upon the constitutional right to keep and bear arms." *Wilson v. State*, 33 Ark. 557, 560 (1878).

Tennessee. Tennessee's State constitution likewise guaranteed its citizens a right to arms limited to "their common defense," adding that "the Legislature shall have the power, by law, to regulate the wearing of arms with a view to preventing crime." Eugene Volokh, *supra*, at 203. Its statute forbade carrying of "a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver."

In *Andrews v. State*, 50 Tenn. 165 (1871), the Tennessee Supreme Court upheld the statute via a narrowing construction:

> As to the pistol designated as a revolver, we hold this may or may not be such a weapon

> as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore hold this to be a matter to be settled by evidence as to what character of weapon is included in the designation "revolver." We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon-skill in the use of which will add to the efficiency of the soldier.
>
> . . .
>
> In a word, as we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them in the ordinary mode of using such arms and is inoperative.
>
> If the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or abroad, in such a manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to [be] sustained.

50 Tenn. at 186-88. *See generally* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 500-04 (1995).

Texas. The Texas constitutional guarantee protected the right to keep and bear arms, but appended

a broad exception as to carrying: "but the legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." Eugene Volokh, *supra*, at 203. The legislation at issue banned carrying of "any pistol, dirk, dagger, slung-shot, swordcane" or similar weapon.[41]

The statute was upheld in *English v. State*, 35 Tex. 473, 14 Am. Rep. 374 (1872), with the court ruling that (1) the Second Amendment and the State guarantee relate only to militia-suitable arms[42] and (2) the State guarantee expressly allowed regulation: "The Legislature may regulate it without taking it away – this has been done in the act under consideration." 35 Tex. at 478.

The arms carrying restrictions cited by the Circuit opinion thus were limited to those of three States, two of whose constitutional guarantees had a "common defense" provision which the Second Amendment (quite intentionally) lacked, while the third had an express exception allowing the legislature to regulate carrying (which the Second Amendment does not).

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[41] *See State v. Duke*, 42 Tex. 455 (1875). The slung-shot was a blackjack, a flexible club.

[42] This portion of *English* was retracted in *State v. Duke, supra*.

D. Examples of Statutes Forbidding Sale of Certain Arms.

Finally, the Circuit Opinion, slip op. at 35, notes that Georgia and Tennessee outlawed the sale of certain arms. The relevance of two examples relating to the sale of arms appears unclear, but in one case the law was stricken, and in the other only related to two classes of knives.

The Georgia 1837 statute barred the sale of pistols, but was stuck down, on Second Amendment grounds, by the Georgia Supreme Court. *Nunn v. State*, 1 Ga. 243 (1846).

The 1838 Tennessee statute was far narrower: it restricted only "any Bowie knife or knives, or any Arkansas tooth pick"[43] or similar arms. *An Act to Suppress the sale and use of Bowie Knifes and Arkansas Tooth Picks in this State*, 1837-1838 TENN. PUBLIC ACTS, Ch. 137, at 200-01. Section one of the statute forbade sale of these knives, section two forbade their concealed carry, and section three punished as a felony the drawing of one from concealment "for the purpose of sticking, cutting, awing, or intimidating any other person." The Circuit opinion notes that the statute was upheld, but the ruling involved, *Day v. State*, 37 Tenn. 495 (1857), upheld only section three, which outlawed drawing the weapon to attack or

[43] The Arkansas Tooth Pick was a long and sharply pointed dagger.

threaten someone; the language cited, referring to a "great" evil being met with a "strong" remedy, is easily understood in that context.

In short, of the two statutes cited, one was struck down as violative of the right to arms, and the other only covered concealed carrying of two types of knives.

CONCLUSION

The Circuit opinion's discussion of the New York law at issue here overstates the rationality of its origin, which lies more in coincidence and personality than in weighing of needs. It arose from Big Tim Sullivan's desire for a different piece of legislation, and his delegation of its drafting to George LeBrun. The present criteria are, in turn, a by-product of an attempt to broaden rather than limit the issuance of permits.

The Circuit opinion's discussion of early American firearm carry restrictions greatly overstates the case. The restrictions cited from the first four decades after the Framing are no more than restrictions on nuisance, unsafe, or criminal misuse. The restrictions from later periods involve only regulation of concealed, but not open, carrying, or were stuck down as unconstitutional, or related only to a few classes of arms. The concepts of regulating all manner of arms bearing, or of subjecting it to a discretionary permit

system, were unique to the Sullivan Act and are comparatively rare even today.

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