THE “SENSITIVE PLACES” DOCTRINE:
LOCATIONAL LIMITS
ON THE RIGHT TO BEAR ARMS

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INTRODUCTION

Where may the government prohibit the bearing of arms? In District of Columbia v. Heller, the U.S. Supreme Court offered a short answer: “in sensitive places such as schools and government buildings.” This Article examines the historical foundation and
the modern application of the sensitive places doctrine.

Heller’s terse “sensitive places” dicta was part of a list of three types of “presumptively lawful regulatory measures.” The Court promised that “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”

Since the 2008 Heller opinion, the Court has not elaborated on the meaning of “sensitive places.” Thus, lower courts have been required to find their own answers.

This Article is the first to analyze the full scope of the sensitive places doctrine. Part I examines English history, starting with a 1313 law that forbade bringing arms to Parliament. Protecting government deliberation from violent interference is the core of the sensitive places tradition.

Part II looks at colonial America and the Founding. Several colonial and early state laws safeguarded government deliberation by barring arms from courts or polling places.

Some scholars have argued that in England and Early America, arms carrying was prohibited everywhere. Parts I and II address that argument.

Part III covers the nineteenth century, when more states enacted laws for protection of government deliberation. A few states enacted laws against carrying arms at most public or private gatherings.

4. 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.

Id. at 626–27.

5. Id. at 635.

6. For application of the doctrine in a particular context, see Amy Hetzner, Comment, Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms, 95 MARQ. L. REV. 359 (2011) (recommending that laws prohibiting firearms possession within a thousand feet of a school be changed to instead prohibit only firearms discharge).
Part IV surveys the twentieth century and the pre-\textit{Heller} portion of the twenty-first.

Post-\textit{Heller} precedent is covered in part V, describing how courts have tried to decide what places are “like” schools and government buildings.

Finally, Part VI consolidates the rules of the “sensitive places” doctrine, based on text, history, tradition, and precedent.

I. England

A. Background

According to medieval historian Frank Barlow, “[i]t is not unlikely that every freeman had the duty, and right, to bear arms” in Anglo-Saxon times.\footnote{Frank Barlow, \textit{Edward the Confessor} 172 (1970).} Later, statutes would specify required arms. Most notably, the Statute of Winchester, enacted in 1285, required “every man between fifteen years and sixty” to possess particular arms.\footnote{\textit{(5)} It is likewise commanded that every man have in his house arms for keeping the peace in accordance with the ancient assize; namely that every man between fifteen years and sixty be assessed and sworn to arms according to the amount of his lands and, of his chattels; that is to say, for fifteen pounds of land, and, forty marks worth of chattels, a hauberker [a mail shirt], a helmet of iron, a sword, a knife and a horse; for ten pounds worth of land and, twenty marks worth of chattels, a haubergeon [a sleeveless hauberker], a helmet, a sword and a knife; for a hundred shillings worth of land, a doublet [a padded defensive jacket], a helmet of iron, a sword and a knife; for forty shillings worth of land and over, up to a hundred shillings worth, a sword, a bow, arrows and a knife; and he who has less than forty shillings worth of land shall be sworn to have scythes, gisarmes [a long pole with a two-sided blade], knives and other small weapons; he who has less than twenty marks in chattels, swords, knives and other small weapons. And all others who can do so shall have bows and arrows outside the forests and within them bows and bolts [i.e., crossbows and bolts for crossbows]. And that the view of arms be made twice a year. And in each hundred and liberty let two constables be chosen to make the view of arms}
person’s financial resources. The poorest had to at least have “swords, knives and other small weapons.” Richer people needed these, and also pole-arms (poles with a blade or spike at the end). As net worth increased further, all men of the specified ages needed metal armor.

The Statute of Winchester also formalized the ancient system of “hue and cry”: in order to stop crimes or apprehend fleeing felons, all men in an area had the duty to come forth with their arms, when summoned. The hue and cry was one of several arms-bearing duties of Englishmen. Another was militia service. Among the components of militia duty was practicing weekly with the long bow, and teaching boys how to use it. Additionally, for the security of towns, English subjects had to take turns on the daily “watch” and the nightly “ward.” Finally, males (including those as young as 15) could be summoned by a sheriff or similar official for law enforcement duties, such as helping to serve a writ or to suppress a riot; this system was known as the posse comitatus.

As soon as the English settlers crossed the Atlantic in 1606, a

Statute of Winchester, 13 Edward I, chs. 4–6 (1285) (paragraphing added).

9. Id.
10. Id.
11. Id.
12. Id.
13. JOHNSON ET AL., supra note 1, at 103–105, 111 (listing statutes).
14. Id. at 80–81 (listing treatises).
new, American arms culture began to emerge.\textsuperscript{16} By necessity, the English in America adopted much of the American Indian arms culture.\textsuperscript{17} As the decades passed, the new and distinctive Anglo-American synthesis became more and more different from the arms culture back in England.\textsuperscript{18} Eventually, the exceptional American arms culture helped produce the American Revolution and the Second Amendment.\textsuperscript{19}

Thus, historical practices in England cannot be directly applied to interpretation of the Second Amendment. The arms ethos of the American Revolution and the Early Republic was a conscious repudiation of what Americans saw as an insufficiently robust right in England. Nevertheless, the English arms culture of the middle ages was an ancestor of the later American one, and is therefore relevant to understanding the background of the American right.

B. Cicero

One thing the medieval English and the American Founders had in common was reverence for the great Roman orator and lawyer Cicero. Unlike most other Classical writers (e.g., Livy), Cicero was not lost in the West during the dark ages and then rediscovered during the middle ages. He was always well-known to educated people.

Until the nineteenth century, Latin was a standard part of secondary education. Countless pupils studied the following
speech by Cicero, in defense of Titus Annius Milo:

What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made—which we were not trained in, but which is ingrained in us—namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment.

The law very wisely, and in a manner silently, gives a man a right to defend himself...the man who had used a weapon with the object of defending himself would be decided not to have had his weapon about him with the object of killing a man.20

The Cicero speech is one of the foundational self-defense texts in Western political thought. Although many students recited Cicero’s Milo oration, Cicero himself was prevented from doing so, by the intimidation of friends of the man whom Milo had killed in self-defense.21 The full story of Cicero’s thwarted speech demonstrates why “sensitive places” rules may be necessary: misuse of arms may prevent the operation of courts and other institutions of a free government. As will be detailed, the origins of the sensitive places doctrine addressed the problem.

C. The Middle Ages

A 1313 statute provided “in all parliaments, treaties, and other assemblies which should be made in the realm of England for ever, every man shall come without all force and armour, well

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21. Id. at 390.
and peaceably.”

In other words, Parliament and similar assemblies should be conducted without arms present at the deliberations.

The statute also said that the English nobles and the common people all had the duty to defend civil peace against violent attackers: “straitly to defend force of armour, and all other force against our peace.”

The 1313 statute was consistent with the Statute of Winchester and other arms duties. To safeguard civil peace in general, and parliamentary operation in particular, armed and responsible people would indeed be necessary at times in English history.

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22. Whereas of late, before certain Persons deputed to treat upon sundry debates had between us and certain great men of our realm, amongst other things, it was accorded, That, in our next Parliament, after, provision shall be made by us and the common assent of the prelates, earls, and barons, that in all parliaments, treaties, and other assemblies which should be made in the realm of England for ever, every man shall come without all force and armour, well and peaceably, to the honour of us, and the peace of us and our realm; and now, in our next parliament, at Westminster, after the said treaties, the prelates, earls, barons, and the commonalty of our realm there assembled to take advice of this business, have said, That to us it belongeth, and our part is, through our royal seigniory, straitly to defend force of armour, and all other force against our peace, at all times when it shall please us; and to punish them which shall do contrary, according to our laws and usages of our realm; and hereunto they are bound to aid us, as their sovereign lord at all seasons when need shall be: we command you that you cause these things to be read afore you in the said bench, and there to be enrolled. Given at Westminster the 30th day of October.

7 Edw. 2, 170 (1313).

23. At the time, “arms” and “armour” were used interchangeably. Each word referred to offensive and defensive equipment—such as swords and chain mail.

24. Id.

25. For example, in 1780, a raucous crowd of at least fifty thousand assembled outside Parliament to demand a repeal of a statute that had reduced civil disabilities on Catholics. When Parliament refused, massive riots ensued. CHRISTOPHER HIBBERT, KING MOB: THE LONDON RIOTS OF 1780 (1958). After days of government failure to stop the rioting, looting, and killing, the riots were finally suppressed by armed neighborhood patrols. Id. at 117–19. After peace was restored, Parliamentary debate sharply criticized a government official who had
Edward II had been king when the parliamentary protection statute was enacted. In 1327, he was overthrown by an invasion led by his wife, Queen Isabella (a French Princess—"the she-wolf of France," according to her critics). Isabella and her consort Roger Mortimer took over the government, whose nominal monarch was King Edward III, son of Edward II and Isabella. The monarchy’s ability to enforce the law was close to non-existent.

The widespread problem was “the gentry . . . using armed force to defeat the course of justice.” Indeed, for decades there had been a problem of “magnates maintaining criminals.”

The House of “Commons’ complaints about armed noblemen” were congenial to Queen Isabella and Mortimer. Fearful of being overthrown, the Queen did not want armed men coming to Parliament or coming armed to meet the Queen. Isabella and Mortimer found it “politically necessary to check dissent against wanted to disarm the neighborhood patrols. Id. at 119; 21 PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803: COMPRISING THE PERIOD FROM THE ELEVENTH OF FEBRUARY 1780, TO THE TWENTY-FIFTH OF MARCH 1781, at 691–93 (June 19, 1780) (William Cobbett ed., 1814), https://books.google.com/books/about/Cobbett_s_Parliamentary_History_of_England.html?id=jZk9AAAAcAAJ.

The Recorder of London (the city attorney) issued an opinion affirming the legality of the armed patrols, which the Recorder said were based on “most clearly established . . . authority of judicial decisions and ancient acts of parliament.”


Verduyn, supra note 27, at 849.

Id.
the increasingly unpopular regime.”31

In 1328, the Statute of Northampton was propounded (nominally by Edward III). The preeminent purpose was to prohibit arms carrying around the king’s officials: “no man great nor small...be so hardy to come before the King’s justices, or other of the King’s ministers doing their office, with force and arms, nor bring no force in affray of the peace...”32 Straightforwardly, the statute outlawed coming “with force and arms” against the King’s officials, especially judges. The prohibition served several purposes: preventing powerful criminals from armed attacks on the functioning of courts; preventing criminal attacks on other government officials; and preventing armed overthrow of the Queen and her consort.

But the statute also went further. It prohibited “force in affray of the peace”—for example, a brawl by mutual consent in a tavern or street. The ban on affrays applied everywhere, not just in the presence of government officials.

The statute continued: “nor to go nor ride armed by night or by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere...”

Seven centuries later, scholars and court are still trying to discern the meaning of the three “nor” clauses. The first, “in fairs or markets” (at any hour) seems straightforward. Some towns had a fair or market periodically in part of the town. Some areas of large towns might have permanent fairs or markets.

31. Id. at 856.
32.

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

2 Edw. 3, c. 3 (1328).
The next “nor” (“in the presence of the justices or other ministers”) simply repeats the previously-stated provision for government officials.

Lastly, there is “nor in no part elsewhere.” Was this a comprehensive ban on arms carrying anywhere by anyone except the monarch’s servants?

Read literally, the “nor in no part elsewhere” clause made it illegal to “go armed” everywhere—such as by wearing a sword on one’s own land; shooting a bow at a cattle thief; taking an arm home after buying it from a merchant; or taking it to a craftsman for repair.

The principle of *noscitur a sociis* (it is known by its associates) would temper such an over-reading. When general language (“no part elsewhere”) follows a specific list, the general language is to be interpreted in the context of the preceding list. For example, a statute that says “a license is required to sell grapefruits, oranges, lemons, and other food” would be interpreted to apply to all citrus fruits, but not to chickens. 33 So under *noscitur a sociis*, the Statute of Northampton would be read to ban arms carrying in markets, in courts, and in places that are like markets and courts.

Based on the text alone, one might read the Statute of Northampton in two ways: First, it could be a carry ban in selected locations (e.g., around the king’s ministers, in fair and markets, and in similar locations). If so, Northampton would be one of the ancestors of the sensitive places doctrine.

Alternatively, if the final clause is interpreted as a comprehensive ban on carrying arms anywhere, then Northampton would be a negation of the right to bear arms. As such, it would be contrary to the text of the Second Amendment. More particularly, it would be contrary to the sensitive places doctrine; the sensitive places doctrine is an exception to the general right to bear arms. If there were no general right to bear arms, then the sensitive places doctrine would be superfluous.

What actually happened was something of a mixture. The ban on carrying around courts was enforced as written, and in that respect does contribute to the sensitive places lineage. In contrast,

33. *The formal rule appears to date from 1672. See Lambert’s Lessee v. Paine*, 7 U.S. (3 Cranch) 97, 110 (1805).
the known historical record is bereft of enforcement directed at “fairs or markets.” Nothing that lay ahead in Anglo-American law would make fairs or markets into sensitive places.

As for Northampton being a general prohibition on carrying, it was so interpreted at least sometimes, notably in London. But over the centuries, arms carrying became so common that any prohibitory interpretation had been de facto nullified by the English people and had ceased to have force as law—as the King’s Bench would acknowledge in 1686.

Edward III seized power from Queen Isabella in 1330. His applications of the 1328 statute were to protect judicial function, and to protect himself personally. As to the former, he issued a 1337 order, quoting the Statute of Northampton, ordering a county sheriff to take action against men who were planning on assaulting some jurors.34

As applied to London, the seat of government, Edward III read the Statute broadly. He repeatedly issued edicts against the carrying of arms anywhere in London. For example, one edict instructed hostelers to tell their guests that the guests must leave their arms at the hostel or inn, and not carry them around London.35 This indicates that carrying arms in town or while traveling was an ordinary activity and that the typical Englishman did not know that there was a ban on arms carrying in London.

The first known case under the Northampton statute comes from 1350, when a knight named Thomas Figet wore armor,

34. Cf. Calendar of the Close Rolls, Edward III, 1337-1339, at 104–05 (H.C. Maxwell-Lyte ed., 1900) (1337) (order to the Sheriff of Berks explaining that men had been plotting “to beat, wound and ill-treat jurors” and that the Sheriff should enforce the law that “no one, except the king’s serjeants and ministers, shall go armed or ride with armed power before the justices at the said day and places, nor do anything against the peace.”).

35. Memorials of London and London Life 192 (Henry Thomas Riley ed. & trans., 1868) (1334) (no carrying); id. at 268–69 (1351; no carrying, but earls and barons may carry swords except in the presence of the king or in a parliament meeting; mentioning Northampton); 272–73 (1353, instructions to hostelers). A document stating an exception for the peers of the realm (the very highest nobility) was cited by the U.S. Supreme Court in Heller, as an example of a non-militia usage of the term “bear arms.” See Heller, 554 U.S. at 588 n.10 (citing John Brydall, Privilegia Magnatum Apud Anglos: Or, the Privileges and Preheminences Belonging to Our English Peerage 14 (1704)).
concealed underneath clothing, in the king's palace and in Westminster Hall, the home of Parliament. He said that he was wearing the armor because earlier in the week he had been attacked by another knight. The earliest surviving account of the case is from a 1584 treatise that stated: “a man will not go armed overtly, even though it be for his defense, but it seems that a man can go armed under his private coat of plate, underneath his coat etc., because this cannot cause any fear among people.” 36

Later commentary on the case, by Edward Coke in the seventeenth century, reported that Figet had been thrown in prison without trial. 37 He petitioned for a writ of mainprise (similar to bail) and was denied. 38 Based on the denial, Coke wrote that there was no concealed carry exception. 39 There is no doubt that unauthorized wearing of arms or armor in the presence of Edward III himself was the core of what Edward III’s statute forbade.

Edward III was succeeded in 1377 by Richard II. He had the potential to become a good king, but after he nearly lost his crown in the Peasants Revolt of 1381, he grew paranoid, arbitrary, and despotic. Some scholars believe that he was mentally ill. But just because he was paranoid didn’t mean that he didn’t actually have enemies. He was overthrown by Henry IV in 1399 and executed the next year.

In 1388, a statute was enacted to prohibit servants and laborers from carrying swords and daggers, except when accompanying their masters. 40 This indicates that Northampton was not interpreted as a general ban on arms carrying. To the contrary, the 1388 statute seemed to assume that people over the rank of servants and laborers (that is, the middle and upper classes) did carry arms. Edged weapons carrying by someone in the lower class was forbidden, except when in the service of a

36. RICHARD CROMPTON, L’OFFICE ET AUTORITÉ DE JUSTICES DE PEACE 58 (1584). The passage is written in Law French (the language of English courts and lawyers at the time) and translated by David Kopel.
37. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 161 (Johnson & Warner eds., 1812).
38. Id.
39. Id.
40. 12 Richard II ch. 6 (1388).
higher class.

Near the end of Richard’s reign, he issued an order that reiterated the Statute of Northampton, with some minor wording changes. He noted that “the said Statute is not holden” and insisted that it “shall be fully holden and kept, and duly executed.”

For centuries, England had struggled to win control of Wales. Even in the fifteenth century, Wales was far from pacified to English rule. So a 1400 statute forbade Welshmen to wear armor in towns. In 1534, King Henry VIII issued a modernized version of Northampton, applicable to Wales. (English and Welsh statutes were often separate.) First, it prohibited not only arms in court, but also arms within two miles of a court. It additionally forbade arms (but without the two-mile buffer zone) in “any town, townes, village or any place within the distance of two miles from the same.

41. 20 Richard II ch. 1 (1396–97).
42. English King Edward I brought the Welsh to subjugation in 1282. The Welsh reclaimed self-government for a while in the Welsh Revolt of 1400–15, led by Owen Glendower. The Welsh disarming laws were little enforced after 1440, and anti-Welsh laws were formally repealed in the early seventeenth century as part of a general statutory cleanup. 21 James I c. 28, § 11 (1624).
43. 2 Henry IV ch. 12 (1400–01).
44. And be it also enacted by authority aforesaid, That no person or persons dwelling or resiaunt within Wales or the lordship marches of the same, of what estate, degree or condition so ever he or they be of, coming, resorting or repairing unto any sessions or court to be holden within Wales or any lordships marches of the same, shall bring or bear, or cause to be brought or borne to the same sessions or court, or to any place within the distance of two miles from the same sessions or court, nor to any town, church, fair, market or other congregation, except it be upon a hute or outcry made of any felony or robbery done or perpetrated; nor in the highways, in affray of the King’s peace, or the King’s liege people, any bill, long-bow, cross-bow, hand-gun, sword, staff, dagger, halbert, morespike, spear or any other manner of weapon, privy coat of armour offensive, upon pain of forfeiture of the same weapon, privy coat or armour, and to suffer imprisonment and make fine and ransom to the King’s highness by the discretion of the King’s commissioners of his marches for the time being, except it be by the commandment, license or assent of the said justices, steward or other officer of the commissioners or council of the marches for the time being.
45. Id.
church, fair, market or other congregation.” Henry’s law also banned “affray” “in the highways,” whether the affray was against “the King’s peace, or the King’s liege people.”

Throughout the sixteenth and seventeenth centuries, the monarchy engaged in sporadic but futile efforts to prevent people below a certain income level from owning crossbows and handguns. The usual motives for such bans were present, along with genuine concerns of the Tudor monarchs that these arms distracted people from practicing with long bows, which were considered essential to national defense by the militia. Under Henry VIII, Parliament prohibited riding on a highway with a loaded gun or crossbow. There was an exemption for people who met the minimum income requirements for owning such arms.

D. The Early Modern Period

An indictment or presentment for violation of the Statute of Northampton had to specify that the arms carrying was In quorandam de populo terror—to the terror of the people. For example, as one case charged: four men “do frequently ride armed with sword and pistols, and do commit reskews and break the peace and threaten the people to do them bodily injury, to the great obstruction of law and justice and to the evill example of others to perpetrate the like.”

Did the indictment rule mean that peaceable defensive carry was lawful? Or did it mean that the carrying of arms was inherently terrifying? Some modern authors suggest the latter.

46. Id.
47. Id.
48. JOHNSON ET AL., supra note 1, at 104–110.
49. Id.
50. 33 Henry VIII ch. 6 (1541).
51. Id.
52. 3 Coke Institutes, supra note 37, at 158.
54. E.g., PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS
To a modern reader, this might make intuitive sense, since today there are some people who find the mere sight of a firearm objectionable or terrifying. But this is not consistent with the English world. There, seeing armed people was an everyday occurrence, including the men keeping the daily watch and the nightly ward in towns, or going to or from mandatory archery practice. The sight of ordinary people carrying arms was certainly not terrifying in itself.

However, based on context, it would be sometimes be easy to discern that a particular arms carrier was not carrying as part of community service or militia practice. A person who walked into an inn or tavern to order a meal, while wearing a sword, was presumably not keeping watch and ward, and he obviously was not carrying the sword for archery practice. Was that sight terrifying? What if the arms or armor were concealed?

In 1613, King James I took the view that there was no concealed carry exception. He proclaimed “the bearing of Weapons covertly, and specially of short Dagges [small handguns], and Pistol . . . had ever beene . . . straitly forbidden.” He complained that the practice had “is suddenly growen very common.”

Michael Dalton’s 1618 manual for justices of the peace addressed the Statute of Northampton and Henry VIII’s law on loaded guns. Justices of the Peace should arrest “all such as shall go or ryde armed (offensively) in Fayres, Markets, or elsewhere; or shall weare or carry and Dagges or Pistols charged.. . .[Even]

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55. Hoplophobia (fear of arms) is a specific phobia, as are ranidaphobia (fear of frogs) or arachnophobia (fear of spiders). See Philip T. Ninan & Boadie W. Dunlop, Contemporary Diagnosis and Management of Anxiety Disorders 107 (2006) (hoplophobia). Considering certain things (e.g., guns, frogs, or spiders) to be disgusting is not a mental illness. The diagnosis of a phobia is appropriate only when the mental condition significantly harms an individual, such as by inducing the individual to commit crimes. See, e.g., American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013); Katie Mettler, Man Shopping for Coffee Creamer at Walmart Attacked by Vigilante for Carrying Gun he was Legally Permitted to Have, TAMPA BAY TRIB., Jan. 20, 2015 (unprovoked attack by middle-aged white man on older black man, who had handgun carry permit).

though those persons were so armed or weaponed for their defence; for they might have had the peace against other persons; and besides, it striketh a feare and terror into the Kings subjects.”

Dalton’s 1622 revised version of the treatise, however, was narrower. He deleted the language that defensive carry was not allowed. Instead, he wrote that if a group of people went to church wearing “privie” (concealed) armor “to the intent to defend themselves from some adversary, this seemeth not punishable” under the riot statutes, “for there is nothing openly done, in terrorem populi.”

Dalton reiterated the laws against some people carrying loaded firearms and against servants or laborers carrying swords or daggers. A person could be required to post surety (bond) for good behavior if he were wearing “weapons, more than usually he hath, or more than be meet for his degree.” Dalton’s 1623 manual for sheriffs included the Statute of Northampton in his list of anti-riot statutes. He described the Statute as applying to persons who “goe or ride armed offensively... in affray of the kings’ people.” Richard II’s law about servants with daggers and swords was now said to also include “other weapons.”

Thus, Dalton’s latter treatises seemed to view arms carrying by the middle and upper classes as lawful. However, a middle-class person who carried arms that were typical of the upper class might have to post bond for good behavior.

Edward Coke’s very influential 1640 treatise said that Thomas Figet had been convicted for wearing concealed armor in 1350. Coke listed the traditional government service exceptions to the statute (posse comitatus, etc.), and home defense. For the latter, Coke stated that it was permissible for an armed assembly to

57. Michael Dalton, The Countrey Justice 129 (1618) (“to the terror of the people”) (parenthetical in original, bracket added); see also id. at 30. The phrase “might have had the peace” means that the armed defenders could have brought a civil action requiring their potential assailants to post bond for good behavior—“surety of the peace.” American surety of the peace laws are discussed infra.

59. Id. at 31.
60. Id. at 169.
defend a friend’s house. Necessarily, the friends who were coming to a man’s house would have to carry their arms while they were on the way to the house.

In practice, the greatest exception to Northampton was that it was often flouted—a fact that would be important in the leading case interpreting the statute, from 1686, discussed in the next section. For example, in 1678–81, there were fears of a Catholic coup (“the Popish Plot”), and many people went armed with a “Protestant flail”—a pair of leaded short clubs connected by leather straps. When folded, it was only nine inches long, and easy to carry concealed.

E. Sir John Knight’s Case

The leading case involving the carrying of arms was decided in 1686. The King’s Bench explained that the Statute of Northampton had fallen into disuse. According to the court, the statute applied only to persons who carried arms with intent to terrify; it did not apply to carrying a gun to church for self-defense.

In 1686, political tensions were rising because King James II (grandson of James I) was trying to disarm the entire English population, except for his political supporters. Sir John Knight was an Anglican and a fierce opponent of the Catholic James II. According to the government’s charges, Knight violated the Statute of Northampton because he allegedly “did walk about the streets armed with guns, and that he went into church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King’s subjects.” Knight was prosecuted, but acquitted by a jury.

62. 3 Coke, Institutes, supra note 37, at 161 (“Figett” as Coke spelled it).
64. Sir John Knight’s Case, 87 Eng. Rep. 75, 76, 3 Mod. 117 (K.B. 1686).
65. Although much smaller than London, Bristol was one of the half-dozen largest English cities at the time.
Two different reporters wrote about the case. Knight’s attorney had pointed to the core purpose of the Statute of Northampton: “Winnington, pro defendente. This statute was made to prevent the people’s being oppressed by great men; but this is a private matter, and not within the statute.”

The Chief Justice of the King’s Bench stated that to “go armed to terrify the King’s subjects” was “a great offence at the common law, as if the King were not able or willing to protect his subjects” and that “the Act is but an affirmance of that law.”

The Chief Justice acknowledged that “this statute be almost gone in desuetudinem” (unenforceability due to long disuse) for “now there be a general connivance to gentlemen to ride armed for their security.” However, continued the court, “where the crime

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At the time, English judges did not issue written opinions, but instead delivered their opinions orally from the bench. Entrepreneurial reporters attended the courts, wrote down what the judges said, and then collected their reports and sold them. Eventually, many of these reports were collected into the anthology known as “English Reports.”


68. The King’s Bench was the highest criminal court, other than the House of Lords. It had jurisdiction over all criminal cases, and the most serious cases were usually brought there.


The court noted that the offense in the Statute of Northampton was based on what was already a crime under common law. 87 Eng. Rep. at 76. What was the pre-1238 law? “[B]efore the end of Henry III’s reign there were ordinances which commanded the arrest of suspicious persons who went about armed without lawful cause.” 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 583 (2d ed. 1898), https://oll.libertyfund.org/titles/pollock-the-history-of-english-law-before-the-time-of-edward-i-2-vols. Pollock and Maitland cited a pair of ordinances issued by Henry III in 1233. The first ordered the Sheriff of Herefordshire that if any armed clan came into his county, the sheriff should arrest them. If he could not, he should raise the hue and cry, and follow the clan from village to village.
shall appear to be *malo animo* it will come within the act.”

The Chief Justice apparently thought that Knight was up to no good, “but afterwards he was found, not guilty.” No judge could overturn a jury acquittal. Still, the Chief Judge did what he could. After Knight was acquitted, the Attorney General moved that Knight be required to post a bond for good behavior, and the King’s Bench upheld the bond.

The above is what the case reports say, and the reports were all that were available to Americans for understanding *Sir John Knight’s Case*. More recently, scholars have found contemporary diaries (one of them written in a secret code created by the author) that illuminate the backstory of the case. Knight had made many enemies by “suppressing Protestant Coventicles” (assemblies of Protestants who did not adhere to the Church of England). He also enthusiastically persecuted Catholics.

On one occasion, Knight helped break up a Catholic Mass. This brought down the wrath of the Irish Catholic community in Knight’s hometown of Bristol. According to the testimony, “two Irish men” lurked around Knight’s house for days, found him near the Bristol town hall and “did fall upon” him. They probably would have killed Knight if bystanders had not come to his aid. According to a poor woman who testified, the two Irish men later demanded that she reveal Knight’s location, and when she did not, they beat her. The news got back to Sir John Knight. “[T]hereupon,” he “retired to a house in the Countrey very neare the Town.” He “did one Lords day go to a Church in Britsol with his Sword and Gun when the two Irishmen were thought to looke

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72. Id. at 330.
73. Id. at 331.
75. 3 id. at 307–08 (entry of Nov. 27).
76. Id.
77. Id.
78. Id.
for him, and left his gun in the Church Porch with his man, to stand upon the Watch &c.”

With the above evidence, “It seemed to be doubted by the Court whether this came within the equity and true meaning of the Statute of Northampton. . .” The Chief Justice “seemed not be seveare upon Sir John.” Roger Morrice, an observer of the trial, was unsure whether the leniency was “because the matter would not beare it, Or for any reason of State or Composition. . .” The Chief Justice “fell foule upon the Attorney Generall,” and said “if there be any blinde side of the Kings business you will always lay your finger upon it.” The jury acquitted Knight.

Another political diary similarly reports of Knight “being tried by a jury of his own city, that knew him well, he was acquitted, not thinking he did it with any ill design.” All this is consistent with the case report that arms carrying was illegal only when *in malo animo*.

A few days after being acquitted, Knight appeared before the King’s Bench again. His bail for appearing for trial was lifted, but his surety for good behavior would be held until the end of the next term of court. The Attorney General’s bill for prosecuting Knight was “very high. . .and counted the higher because it had such ill success.” It took another court appearance, two months later, for Knight to get his bail money back. The court called Knight “a very dangerous man,” and said that he had encouraged grand juries in Bristol not to indict for murder. But in light of the acquittal, the bail bond was released.

The threats against Knight apparently continued. In

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79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 308.
86. 3 Entering Book, *supra* note 74, at 311 (entry of Dec. 4, 1686).
87. *Id.* at 312.
88. *Id.* at 349 (entry of Jan. 29, 1687).
November 1689, Knight asked to be excused from Parliament early, because of peril to his life. According to Knight, three members of Parliament had made threats against him. Another member had recently “thrust himself into” Knight’s coach that was leaving Parliament in the evening, and had accompanied Knight home, because he said Knight’s life was in danger.89

In sum, whatever Knight was really up to in Bristol, his defense at trial was that he was acting in self-defense. His gun toting was not in government service; to the contrary, he insisted that his carrying was a “private” matter. As the case reports explained, the Statute of Northampton was widely ignored, and it was interpreted to apply only to carrying in malo animo—not to carrying for lawful defense.

F. The 1689 Bill of Rights and Thereafter

The despotic King James II was overthrown in the Glorious Revolution in 1688. In January 1689, the English Bill of Rights was enacted. Among its provisions was: “The subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.”90

After Knight’s Case, arms-bearing for peaceable purposes was clearly lawful, but not for everyone in all circumstances. A 1695 statute forbade the carrying and possession of arms and ammunition by Irish Catholics in Ireland.91 The anti-Irish statute was compliant with the English Bill of Rights, which had recognized an arms right only for Protestants. A legal manual for constables said that constables should search for arms possessed by persons who are “dangerous” or “papists.”92

Further, the right to carry was only for individuals, and not groups. As one case put it, “Though a man may ride with arms, yet

89. 5 ENTRING BOOK, supra note 74, at 234–35.
90. 1 The Heads of Declaration of Lords and Commons, UK St (1688) ch. 2 s. 1). The Bill of Rights statute was enacted in January 1689. Under the calendar system that was used in England until 1752, the new year began on March 25 (the date of the Annunciation to the Virgin Mary). So the English who voted on the Bill of Rights considered January to be part of 1688. For simplicity, we cite the year at 1689, using the “New Style” calendar.
91. 7 William III ch. 5 (1695).
he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence.”

For peaceable individuals not subject to special disabilities (e.g., being Irish Catholic), the general rules were stated with the most detail in William Hawkins’s 1724 *A Treatise on the Pleas of the Crown*. He explained the application of the common law offense of affray, and the influence of the Statute of Northampton. An “affray” was “a publick Offense, to the Terror of the People.” So an assault perpetrated in private would not be an affray. Mere words could not be an affray.

Sect. 4. But granting that no bare Word, in the Judgement of Law, carry in them so much terror as to amount to an Affray; yet it seems certain, that in some Cases there may be an Affray where there is no actual violence; as where a Man arms himself with dangerous and unusual Weapons, in such a manner as will naturally cause a Terror to the People, which is said to have always been an Offence at Common Law, and is strictly prohibited by many Statutes: [quoting the Statute of Northampton, and then citing its reissuance by Richard II].

Sect. 8. That a Man cannot excuse the wearing of such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his person from his Assault; but it hath been resolved, That no one shall incur the Penalty of the said Statute for assembling his Neighbours and Friends in his own House, against those who threaten to do him any Violence therein, because a Man’s House is as his Castle.

Sect. 9. 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 whence it seems clearly to follow, that Persons of Quality are in no Danger of offending against this Statute by wearing common Weapons, or having


94. Hawkins’ cautious language about “Persons of Quality” was appropriate because, separate from the Statute of Northampton, there was a prohibition against servants and laborers carrying swords and daggers, except when in service of their masters. 12 Richard II ch. 6 (1388). So lower class people carrying these particular common arms was still illegal.
their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion to commit any Act of Violence or Disturbance of the Peace. And from the same Ground it also follows, That Persons armed with privy [concealed] Coats of Mail to the Intent to defend themselves against their Adversaries, are not within the Meaning of this Statute, because they do nothing in terrorem populi.95

In short, carrying “dangerous and unusual weapons” in public was illegal because “such Armour” was inherently terrifying, even if done with defensive intent. Imagine a person today carrying a flamethrower. Carrying “common weapons” was an offense only when done in a manner “apt to terrify.”

Four decades after Hawkins, Blackstone treated the topic more tersely:

The offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the king’s pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.96

Did Blackstone’s reference to the ancient Athenian law mean that arms carrying in town was per se unlawful, notwithstanding the rule announced in Knight’s Case?

Subsequent case law held that peaceable carry was lawful. According to an 1820 case, “A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business.”97 Likewise, a 1914 case held that the law allows one to peaceably walk down the road with a revolver.98 But the law did not allow “firing a revolver in a public place, with the result that

96. 4 Blackstone, supra note 53, *148–49.
97. Rex v. Dewhurst, 1 State Trials, N.S. 529, 601–02 (1820).
the public were frightened or terrorized.”

In sum, by the time of American independence, England’s locational restrictions appear to have ceased to exist as a matter of enforceable law, except for Parliament and courts. Whatever the old Statute of Northampton had said about fairs, markets, or other locations was only applicable to carrying for the purpose of terrorizing other people, and not to carrying for legitimate self-defense. There were still restrictions on arms carrying by the lower classes and by Irish Catholics, great suspicion about large armed assemblies, and a prohibition on carrying “dangerous and unusual” weapons, but none of these were locational restrictions.

II. Colonial and Founding Periods

American arms culture began to separate from its English ancestor as soon as the settlers of the Virginia Company embarked from England in 1606. Unlike the English who stayed behind, the Virginians carried with them the English-speaking-world’s first written guarantee of a right to arms. The 1606 Virginia Charter issued by King James I gave the Virginians the perpetual right to import arms and ammunition from Great Britain. The 1620

100. 7 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 3783, 3786 (Francis Newton Thorpe ed., 1909).

The king, binding his “Heirs and Successors,” gave “full Power and Authority” to the leaders of the Virginia company and “so many of our subjects as shall willingly accompany them,” for all of them to bring:

sufficient Shipping, and Furniture of Armour, Weapons, Ordinance, Powder, Victual, and other things necessary for the said Plantations and for their Use and Defence there; Provided always, that none of the said Persons be such, as shall hereafter be specially restrained by Us, our Heirs or Successors.

Id.

The English crown perpetually guaranteed the right of the Virginia company’s leaders and “their Associates . . . by their Deputies, Ministers, and Factors” [commercial agents] to import goods from England, Ireland, and other royal dominions. In particular, “the Goods, Chattels, Armour, Munition, and Furniture, needful to be used by them, for their said Apparel, Food, Defence or
New England Charter contained the same guarantee.\textsuperscript{101} The
geographical scope of these early charters covered all of what
would become the original thirteen American States.\textsuperscript{102}

The Virginia and New England Charters, as well as
subsequent charters, also guaranteed that Americans would enjoy
all rights of Englishmen.\textsuperscript{103} So the right to arms in the 1689
English Bill of Rights applied to them as well.

Post-independence, Americans were contemptuous of what
they considered to be the constricted nature of the English right to
arms. Madison said so in his speech introducing the Second
Amendment in Congress.\textsuperscript{104} The leading legal treatise in the Early

\textsuperscript{101} Id. at 1835.

\textsuperscript{102} Based on the boundaries of the territories in the Virginia and New
England charters, the 1606 Virginia Charter is one of the founding legal
documents of all thirteen original states, plus West Virginia and Kentucky (both
formerly part of Virginia) and Maine (formerly part of Massachusetts). The 1620
New England Charter is one of the founding legal documents of the New England
states (except Vermont), plus New York, New Jersey, and Pennsylvania. 1 id. at
\textsuperscript{iv-xiii}.

\textsuperscript{103} 7 id. at 3788 (Virginia, 1606); 3 id. at 1839 (New England, 1620) (slight
differences in phrasing and spelling).

Guarantees of the rights of Englishmen were common in other American colonial
charters. See 1 id. at 533 (Connecticut); 2 id. at 773 (Georgia); 3 id. at 1681
(Maryland); 3 id. at 1857 (Massachusetts Bay); 5 id. at 2747 (Carolina, later
divided into North and South Carolina); 6 id. at 3220 (Rhode Island).

\textsuperscript{104} Although speeches in the First Congress were not transcribed, Madison’s
notes for his speech introducing the amendments showed that he viewed the
English Bill of Rights as a good start, but too weak. He wrote that his
amendments “relate 1st. to private rights.” A Bill of Rights was “useful—not
essential.” There was a “fallacy on both sides—especy as to English Decln. of Rts.”
First, the English Bill of Rights was a “mere act of parlt.” In other words, because
it was a statute, it could be over-ridden, explicitly or implicitly, by any future
Parliament. Thus, the Bill of Rights constrained the king but not future
Parliaments.

Second, according to Madison, the scope of the English Bill of Rights was too
small; it omitted certain rights and protected others too narrowly. In particular,
there was “no freedom of press—Conscience.” There was no prohibition on “Gl.
Warrants” and no protection for “Habs. corpus.” Nor was there a guarantee of
“jury in Civil Causes” or a ban on “criml. attaunders.” Lastly, the Declaration
protected only “arms to Protestts.” James Madison, Notes for Speech in Congress
Republic was St. George Tucker’s 1803 American Blackstone. Tucker added many footnotes to Blackstone’s text, as well as a volume on the American Constitution, to describe when and how American law differed from British law. He denounced statutory infringements of the English right to arms, particularly the English game laws, which he thought had disarmed almost the entire population.105 Other leading authors of treatises on


105 Tucker was a militia colonel during the Revolutionary War, a Virginia Court of Appeals judge, a federal district judge, and professor of law at the College of William and Mary. Tucker’s Blackstone was not merely a reproduction of the famous English text. It contained numerous annotations and other material suggesting that the English legal tradition had developed in new directions in its transmission across the Atlantic, generally in the direction of greater individual liberty. As for arms:

The right of the people to keep and bear arms shall not be infringed. Amendments to C.U.S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government.


Whoever examines the forest and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England. The commentator himself [Blackstone] informs us, Vol. II, p. 412, “that the prevention of popular insurrections and resistance to government by disarming the bulk of the people, is a reason oftener meant than avowed by the makers of the forest and game laws.”

Id. n.41.

Tucker’s Blackstone also included a lengthy appendix on the new American Constitution. This appendix was the first scholarly treatise on American constitutional law; it has been frequently relied upon by the United States Supreme Court and scholars. Tucker’s primary treatment of the Second Amendment appeared in the appendix’s discussion of the Bill of Rights. Regarding England, he wrote:

In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the
American constitutional law, such as William Rawle\textsuperscript{106} and right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.

Appendix to Vol. 1, Part D, p. 300.

Tucker’s prominence and his proximity to the framing of the Bill of Rights have made him an important source for the original understanding of the Second Amendment. See, e.g., \textit{Heller}, 554 U.S. at 594–95, 606–07; Stephen P. Halbrook, \textit{St. George Tucker’s Second Amendment: Deconstructing the True Palladium of Liberty}, 3 TENN. J.L. & POLY 114 (2007).

Historian Saul Cornell argues that Tucker changed his mind about the Second Amendment. According to Cornell, Tucker’s 1791–92 lecture notes for the class he taught at William & Mary described the Second Amendment in a more militia-centric way than did Tucker’s 1803 book. Saul Cornell, \textit{St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings}, 47 WM. & MARY L. REV. 1123 (2006). Justice Stevens’s dissenting opinion in the \textit{Heller} decision cited Cornell’s critique of Tucker. \textit{Heller}, 554 U.S. at 666 n.32 (Stevens, J., dissenting) (citing Cornell’s article for the claim that Tucker once thought the Second Amendment was militia-only). Writing for the majority, Justice Scalia countered that the passage quoted by Cornell and Justice Stevens was about the meaning of the Militia Clauses and the Tenth Amendment, not the Second Amendment. \textit{Id.} at 606 n.19.

Indeed, subsequent scholarly study of Tucker’s lecture notes has revealed that the language quoted by Cornell, and derivatively by Justice Stevens, was from Tucker’s lecture on the federal militia powers granted by Article I. Cornell’s article omitted Tucker’s lecture notes on the Second Amendment itself; these notes were quite similar to Tucker’s treatment of the Second Amendment in his latter treatise. See David T. Hardy, \textit{The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights}, 103 NW. U. L. REV. COLLOQUIY 1527, 1533–34 (2009); See also Saul Cornell, \textit{Originalist Methodology: A Critical Comment}, 103 NW. U. L. REV. COLLOQUIY 1541 (2009) (responding to Hardy’s article in the same issue); Saul Cornell, Heller, \textit{New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”} 56 UCLA L. REV. 1095 (2009); David T. Hardy, \textit{Originalism and Its Tools: A Few Caveats}, 1 A KRON J. CONST. L. & POLY 40 (2010).

\textsuperscript{106} Rawle, a prominent Pennsylvania attorney, declined President George Washington’s offer to become the first Attorney General of the United States, but did serve as United States Attorney for Pennsylvania from 1792 to 1800. His analysis of the Second Amendment included a denunciation of English practice:

In most of the countries of Europe, this right does not seem to be denied, although it is allowed more or less sparingly, according to circumstances. In England, a country which boasts so much of its
Supreme Court Justice Joseph Story, agreed. They contrasted the robust American right with its feeble English counterpart. Americans certainly did not think that bringing guns to town was a problem; to the contrary, laws typically required that arms be brought to churches or to all public meetings. Nor were there freedom, the right was secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence “suitable to their conditions, and as allowed by law.” An arbitrary code for the preservation of game in that country has long disgraced them. A very small proportion of the people being permitted to kill it, though for their own subsistence, a gun or other instrument, used for that purpose by an unqualified person, may be seized or forfeited. Blackstone, in whom we regret that we cannot always trace the expanded principles of rational liberty, observes however, on this subject, that the prevention of popular insurrections and resistance to government by disarming the people, is oftener meant than avowed by makers of forest and game laws.

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 121-23 (1825).

§ 1891. A similar provision in favour of protestants (for to them it is confined) is to be found in the bill of rights of 1688, it being declared, “that the subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.” But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege [citing Tucker].

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747 (1833) (brackets added).

Tucker, Rawle, and Story were incorrect in their belief that English hunting control laws had disarmed almost the entire English population. It is true that in the late seventeenth century, the despotic Stuarts had attempted to disarm most of the population, under the pretext of preventing them from hunting. JOHNSON ET AL., supra note 1, at 125–28. Until well into the nineteenth century, hunting was generally allowed for only the upper class. But after the 1689 Bill of Rights, possession of guns was lawful for all Protestants (almost the whole population of England), since guns could be used for purposes other than hunting. Id. at 133–35; 2 WILLIAM BLACKSTONE, COMMENTARIES 412 n.2 (Edward Christian ed., 12th ed. 1793–95) (“everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game.”).

108. See, e.g., 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 173 (1808) (1632 Virginia statute providing that “ALL men that are
echoes of Henry VIII’s restrictions about loaded guns on the highways. Instead, statutes required arms carrying when traveling or away from home.\(^{109}\) Carrying firearms when going anywhere was normal in many parts of the United States, as St. George Tucker noted.\(^{110}\) As William Rawle wrote, arms carrying was lawful for individuals except under “circumstances giving just reason to fear that he purposes to make an unlawful use of them.”\(^{111}\)

As will be detailed in Section A, infra, a few jurisdictions in

fittinge to beare armes, shall bringe their pieces to the church”); id. at 263 (1632 Virginia statute providing that “masters of every family shall bring with them to church on Sundays one fixed and serviceable gun with sufficient powder and shott”); id. (1643 Virginia statute requiring that “masters of every family shall bring with them to church on Sundays one fixed and serviceable gun with sufficient powder and shott”); 2 id. at 126 (similar 1676 Virginia law); 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 94 (John Russell Bartlett ed., 1856) (“noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon.”); 19 (part 1) THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137–40 (Allen D. Candler ed., 1904) (1770 Georgia statute imposing fines on militiamen who went to church unarmed). See also JOHNSON ET AL., supra note 1, at 183–85 (Connecticut, Massachusetts Bay, Maryland, South Carolina).

109. 1 HENING, at 127 (1809) (1623 Virginia law providing “That no man go or send abroad without a sufficient partie will armed.”); id. at 173 (similar 1632 Virginia law); 2 id. at 126 (1676 Virginia law that “all people” be “required to goe armed” to church and court “for their greate security”). JOHNSON ET AL., supra note 1, at 183–85 (Massachusetts Bay, Plymouth, Rhode Island, Maryland).

110. “In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side.” 5 Tucker, Appendix, supra note 105, at 9, note B.

As Tucker pointed out, in English law there was a rebuttable presumption that a gathering of men was motivated by treason and insurrection if weapons were present. Tucker was skeptical that the simple fact of being armed “ought. . .of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself.” Id.

111.

This right ought not, however, in any government, to be abused to the disturbance of the public peace.

An assemblage of persons with arms, for an unlawful purpose, is an indictable offense, and even the carrying of arms abroad by an individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace.

Id. at 126.
the colonial or Founding periods did adopt analogues to the English laws against bringing arms to legislative proceedings or to court hearings. There were also laws against hunting on someone else’s land without permission (Section B). Boston had a unique law against bringing loaded guns into buildings (Section C). And, as Rawle had noted, carrying arms in a manner intended to terrify was illegal (Section D).

A. Legislatures and Elections

In general, Americans did not seem to mind people coming armed to attend or participate in legislative matters. The United States Congress had no rules against legislative armament, and through the mid-nineteenth century, it was common for Congressmen to be armed.112

Maryland was an exception. Statutes in 1647113 and 1650114 forbade arms carrying in either house of the legislature.

Delaware’s 1776 Constitution included an article to prevent armed intimidation of polling places: no-one could take arms to them.115 Further, militia musters could not be held on election

112. For example, after pro-slavery U.S. Rep. Preston Brooks (D-S.C.) assaulted and nearly killed anti-slavery Sen. Charles Sumner (R-Mass.) by beating him with a cane, Brooks threatened Rep. Calvin Chafee. Chafee responded by buying a revolver and putting it in his desk on the floor of the House. As the Springfield Republican newspaper observed, “After that, Dr. Chaffee’s southern friends were not only civil but cordial.” DAVID T. HARDY, DRED SCOTT: THE INSIDE STORY, Kindle loc. 605 (2019).

113. “[N]oe one shall come into the howse of Assembly (whilst the howse is sett) with any weapon upon perill of such fine or censure as the howse shall thinke fit.” 1647 Md. Laws 216.

114. “That none shall come into eyther of the houses whilst they are sett, with any gun or weapon upon perill of such fine or censure as the howses shall thinke fit.” “Orders made & agreed vppon by the Assembly for the better ordering of Both Howses.” 1650 Md. Laws 273.

115. 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,
days.\textsuperscript{116} Militias could not assemble within one mile of a polling place, starting 24 hours before the opening of the polls, and until 24 hours after the polls closed.\textsuperscript{117}

The above laws are, to the best of our knowledge, the only “sensitive places” types of laws from the colonial period and the Founding Era. The list is rather short.

B. Hunting on Private Land Without Permission

A few other laws on arms carrying are worth noting, although none fit into the sensitive places lineage. First, three states reinforced their general laws against trespassing by enacting specific statutes against hunting on someone else’s land without permission: Pennsylvania in 1721\textsuperscript{118} and 1760,\textsuperscript{119} New Jersey in

\begin{itemize}
\item 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 carrying 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.
\end{itemize}

\textit{Del. Const}, art. 28 (1776).

\textsuperscript{116} Id.

\textsuperscript{117} Id.

\textsuperscript{118} Be it enacted by the authority aforesaid, That if any person or persons shall presume, at any time after the sixteenth day of November, in this present year on thousand seven hundred and twenty-one, to carry any gun or hunt on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation, and shall thereof convicted, either upon view of any justice of the peace within this province, or by the oath or affirmation of any one or more witnesses, before any justice of the peace, he shall for every such offense forfeit the sum of ten shillings. And if any person whatsoever, who is not owner of fifty acres of land and otherwise qualified in the same manners as persons are or ought to be by the laws of this province for electing of members to serve in assembly, shall at any time, after the said Sixteenth day of November, carry any gun, or hunt in the woods or inclosed lands, without license or permission obtained from the owner or owners of such lands, and shall be thereof convicted in manner aforesaid, such offender shall forfeit and pay the sum of five shillings.

\textit{1721 Pa. Laws} 254, 256.

\textsuperscript{119}
If any person or persons shall presume to carry any gun, or hunt on any enclosed or improved lands of any of the inhabitants of this province, other than his own, unless he shall have license or permission from the owner of such lands, or shall presume to fire a gun on or near any of the king's highways, and shall be thereof convicted, either upon view of any justice of the peace within this province, or by the oath or affirmation of any one or more witnesses, before any justice of the peace, he shall, for every such offence, forfeit the sum of forty shillings.

JOHN W. PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TWENTY-FIRST DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE 534 (9th ed. 1862).
1741 and 1771, and Maryland in 1715, The 1721

120. That if any Person or Persons shall presume, at any Time after the Publication hereof, to carry any Gun, or hunt on the improved or inclosed Lands in any Plantation, other than his own unless he have Licence or Permission from the Owner of such Lands or Plantation. . . And if any Person whatsoever, who is not Owner of one Hundred Acres of Land, or otherwise qualified, in the same Manner as Persons are or ought to be electing Representatives to serve in General Assembly, shall at any Time after the Publication hereof, carry any Gun, or hunt in the Woods or uninclosed Lands, without License or Permission obtained from the Owner or Owners of such Lands . . . such Offender shall forfeit and pay the Sum of ten shillings.


121. 1. Be it enacted by the Senate and General Assembly of the state of New Jersey, That if any person or persons shall presume, at any time after the publication hereof, to carry any gun on any lands not his own, and for which the owner pays taxes, or is in his lawful possession, unless he hath license or permission in writing from the owner or owners, or legal possessor, every such person so offending, and convicted, thereof, either upon the view of any justice of the peace within this state, or by the oath or affirmation of one or more witnesses, before any justice of the peace of either of the counties, cities, or towns corporate of this state, in which the offender or offenders may be taken or reside, he, she, or they, shall, for every such offence, forfeit and pay to the owner of the soil, or his tenant in possession, the sum of five dollars with costs of suit; which forfeiture shall and may be sued for and recovered by the owner of the soil, or tenant in possession, before any justice of the peace in this state, for the use of such owner or tenant in possession.

2. And be it enacted, That if any person shall presume, at any time after the publication of this act, to hunt or watch for deer with a gun, or set in any dog or dogs to drive deer, or any other game, on any lands not his own, and for which the owner or possessor pays taxes, or is in his lawful possession, unless he hath license or permission in writing from such owner or owners or legal possessor; every such person so offending, and being convicted thereof in manner aforesaid, shall for every such offence, forfeit and pay to the owner of the soil, or tenant in possession, the sum of five dollars, with costs of suit; provided, that nothing herein contained shall be construed to extend to prevent any person carrying a gun upon the highway in this state.

3. And be it enacted, That if the person or persons offending against this act be non-residents of this state, he or they shall forfeit and pay for every such offence, fifteen dollars, and shall forfeit his or their gun or guns to any person or persons who shall inform and prosecute
Pennsylvania statute applied to all persons who hunted or carried a gun without permission on someone else's enclosed or improved lands; the statute also forbade poor people (those not eligible to vote) from hunting on unimproved land (“the woods”). The property requirement was repealed by the 1760 statute. The 1760 law also forbade firearms discharge while hunting near highways—a safety restriction that remains common in modern American law.

The 1741 New Jersey statute was similar to the 1720 Pennsylvania law: no hunting without permission by anyone on someone else’s improved or enclosed land; no hunting by persons not qualified to vote on unimproved and unenclosed private property. The 1771 New Jersey revision eliminated the discrimination against non-voters. Maryland's 1715 law forbade convicted criminals and vagrants from hunting on private property without permission, and also provided that the offender would only be fined after first receiving one free warning.

1771 N.J. laws 346.

And, to prevent the abusing, hurting or worrying of any stock of hogs, cattle or horses, with dogs, or otherwise, BE IT ENACTED, That if any person or persons whatsoever, that have been convicted of any of the crimes aforesaid, or other crimes, or that shall be of evil fame, or a vagrant, or dissolute liver, that shall shoot, kill or hunt, or be seen to carry a gun, upon any person’s land, whereon there shall be a seated plantation, without the owner's leave, having been once before warned, shall forfeit and pay one thousand pounds of tobacco...

1715 Md. Laws 90.

1721 Pa. Laws 254, 256.


1771 N.J. laws 346.

1715 Md. Laws 90.
C. Boston’s Fire Prevention Law

Boston in 1782 enacted a unique ordinance, expressly for fire protection. Loaded guns could not be brought into buildings in town.\(^{129}\) Strictly speaking, the law did not forbid bringing an unloaded gun into a building, and then loading it when inside. So occupants of homes or businesses remained free to keep loaded guns. However, the law did provide for seizure of loaded guns that “shall be found” in buildings.\(^{130}\)

Justice Breyer’s dissent in *Heller* discussed the Boston law:

Boston’s law in particular impacted the use of firearms in the home very much as the District’s law does today. Boston’s gunpowder law imposed a £10 fine upon “any Person” who “shall take into any Dwelling–House, Stable, Barn, Out-house, Warehouse, Store, Shop, or other Building, within the Town of Boston, any ... Fire–Arm, loaded with, or having Gun–Powder.” An Act in Addition to the several Acts already made for the prudent Storage of Gun–Powder within the Town of Boston, ch. XIII, 1783 Mass. Acts pp. 218–219. . . .

Moreover, the law would, as a practical matter, have prohibited the carrying of loaded firearms anywhere in the city, unless the carrier had no plans to enter any building or was willing to unload or discard his weapons before going inside. And Massachusetts residents must have believed this kind of law compatible with the provision in the

\[^{129}\] *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:*

\[...\]

*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, Co-horn [a small mortar], or Fire Arm, loaded with, or having Gun Powder in the same, or shall receive into any Dwelling House, Stable, Barn, Out House, Store, Ware House, 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 . . .*

\[^{130}\] *Id.*

2 Acts and Laws of the Commonwealth of Massachusetts 120 (1890).
Massachusetts Constitution that granted “[t]he people ... a right to keep and to bear arms for the common defence”—a provision that the majority says was interpreted as “secur[ing] an individual right to bear arms for defensive purposes.”\(^\text{131}\)

The *Heller* majority thought that Justice Breyer was making too much of the Boston law:

Justice BREYER has devoted most of his separate dissent to the handgun ban. He says that, even assuming the Second Amendment is a personal guarantee of the right to bear arms, the District’s prohibition is valid. . . . Of the laws he cites, only one offers even marginal support for his assertion. A 1783 Massachusetts law forbade the residents of Boston to “take into” or “receive into” “any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building” loaded firearms, and permitted the seizure of any loaded firearms that “shall be found” there. Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts p. 218. That statute’s text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters posed by the “depositing of loaded Arms” in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law’s application in that case). In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home.\(^\text{132}\)

Boston’s fire safety ordinance was not about “sensitive places,” since it applied to all buildings.

D. Laws Against Carrying Arms for the Purpose of Causing Terror

As discussed in Part I, the 1328 Statute of Northampton could be interpreted as banning all arms carrying in fairs or markets, or everywhere. But from 1686 onward, the authoritative interpretation of the little-enforced statute was that it only applied

\(^{131}\) Heller, 554 U.S. at 685–86 (Breyer, J., dissenting).

\(^{132}\) Id. at 631–32.
to arms carriers who deliberately terrorized the public, such as by carrying “dangerous and unusual” weapons. This is a restriction on the manner of bearing arms, and not on the place for bearing arms. Accordingly it sheds little light on the “sensitive places” doctrine.

The common law forbade carrying arms in a terrifying manner. For example, a 1736 Virginia legal manual said that a constable “may take away Arms from such who ride, or go, offensively armed, in Terror of the People” and may bring the person and the arms before a Justice of the Peace.\textsuperscript{133} 

The common law was sometimes reinforced by new statutes using some language from Northampton and other sources to outlaw carrying in a terrifying or “offensive” manner. A 1786 Virginia statute forbade persons to “go nor ride armed by night or by day, in fairs or markets, or in other places, in terror of the Country.”\textsuperscript{134} Similarly, a 1786 Massachusetts statute provided that Justices of the Peace should arrest “all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensive, to the fear or terour of the good citizens of this Commonwealth, or such others may utter any menaces or threatening speeches.”\textsuperscript{135} Upon conviction, such a person shall be

\begin{footnote}
\textsuperscript{133} George Webb, The Office and Authority of a Justice of Peace 92 (1736).
\textsuperscript{134} That no man, great nor small, of what condition soever he be, except the Ministers of Justice in executing the precepts of the Courts of Justice, or in executing of their office, and such as be in their company assisting them, be so hardy to come before the Justices of any Court, or other of their Ministers of Justice, doing their office, with force and arms, on pain, to forfeit their armour to the Commonwealth, and their bodies to prison, at the pleasure of a Court; nor go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country, upon pain of being arrested and committed to prison by any Justice on his own view, or proof by others, there to abide for so long a time as a Jury, to be sworn for that purpose by the said Justice, shall direct, and in like manner to forfeit his armour to the Commonwealth; but no person shall be imprisoned for such offence by a longer space of time than one month.
\end{footnote}

\textsuperscript{1786 Va. Acts 33.}

\textsuperscript{135} every Justice of the Peace, within the county for which he may be
required “to find sureties for his keeping the peace”—that is, to post a bond for good behavior.\textsuperscript{136} New Hampshire had passed a similar law in 1759.\textsuperscript{137} Laws that forbid carrying arms for the

commissioned, may cause to be staid and arrested, all affrayers, rioters, disturbers, or breakers of the peace, and such as shall or go armed offensively, to the fear or terror of the good citizens of this Commonwealth, or such others as may utter any menaces or threatening speeches, and upon view of such justice, confession of the delinquent, or other legal conviction of any such offence, shall require of the offender to find sureties for his keeping the peace, and being of the good behaviour; and in want thereof, to commit him to prison until he shall comply with such requisition.


A 1692 statute had been to the same effect. \textit{See} Acts and Laws Passed by the Great and General Court of Assembly of Their Majesties Province of the Massachusetts-Bay 18 (1692) (Justices of the Peace should arrest persons who “Ride, or go Armed offensively before any of Their Majesties Justices, or other Their Officers or Ministers doing their Office, or elsewhere, By Night or by Day, in Fear or Affray of Their Majesties Liege People . . .”). A 1694 statute was also to the same effect, along with other provisions about assaults and “hues and cries.”

[\textit{E}very justice of the peace, in the county where the offence is committed, may cause to be stayed and arrested all affrayers, rioters, disturbers or breakers of the peace, and such as shall ride, or go armed offensively before any their majesties' justices, or other their officers or ministers doing their office, or elsewhere, by night or by day, in fear or affray of their majesties' liege people, and such others as shall utter any menaces or threatening speeches; and upon . . . conviction . . . shall commit the offender to prison until he find sureties for the peace and good behavior, and seize and take away his armour or weapons and shall cause them to be apprized and to the king as forfeited; and may further punish the breach of the peace in any person that shall smite or strike another, by fine to the king, not exceeding twenty shillings, and bond with sureties for the peace; or bind the over to answer it at the next sessions of the peace as the nature or circumstance of the offence may be; and make inquiry of forcible entry and detainer, and cause the same to be removed; and make out hue and cries after runaway servants, thieves and other criminals.

1694 Mass. Laws 12, no. 6.

\textsuperscript{136} 2 Acts and Laws of the Commonwealth of Massachusetts, \textit{supra} note 129, at 652–53.

\textsuperscript{137} Acts and Laws of His Majesty's Province of New-Hampshire in New-
purpose of causing terror are compliant with the Second Amendment. Because they are laws aimed at the “manner” of bearing arms, they are not part of the sensitive places doctrine.

Historical review shows that during the colonial and Founding periods, a few jurisdictions had laws against carrying arms into centers of government deliberation, including polling places. Boston’s unusual law against carrying loaded guns into buildings was far outnumbered by statutes all over America that required bringing guns into churches, and sometimes to other public assemblies.

Of course misconduct with arms could be prohibited. This included hunting or gun carrying on someone else’s land without permission. The anti-trespassing laws do not pertain to the sensitive places doctrine, since landowners could allow anyone to hunt or carry on their land, with permission.

III. Nineteenth Century

During the nineteenth century, more states enacted laws against guns in polling places. Laws against misconduct with arms continued, with more statutes against armed trespass. Cases affirmed the right to bear arms and excluded terrifying misbehavior from the right.

For most of the century, there were few laws about arms at schools, and none of them attempted to make schools “gun-free.” In the latter part of the century, several former slave states enacted broad laws against guns at schools and most other public assemblies, and even in private social gatherings.

A. Polling Places and Courts

Reconstruction was a tumultuous time in the former slave states. Armed terrorist organizations, such as the Ku Klux Klan, tried to prevent blacks or white Republicans from voting.138

138. When the Klan or other terrorists took over an area, “almost universally the first thing done was to disarm the negroes and leave them defenceless.” ALBION W. TOUREGEE, THE INVISIBLE EMPIRE 424–25 (1880),
Several states enacted statutes against guns at polling places.

Louisiana in 1870 forbade arms carrying on election day when the polls were open. The ban apparently had no geographical limit, and thus was more of a “time” restriction than a “sensitive places” restriction. Voter registration only took place on certain days; on those days, there was a ban on arms carrying within a half-mile of registration sites. Maryland’s laws focused on two troublesome counties. An 1874 law banned arms carrying on election day in Kent County. An 1886 statute outlawed bearing arms within 300 yards of the polls on election day in Calvert County.

https://babel.hathitrust.org/cgi/pt?id=osu.32435018352559;view=1up;seq=467; See also Adam Winkler, Gunfight 136 (2011) (discussing white supremacist groups’ disarmament of the freedmen, the KKK being the “most infamous of these disarmament posses”).

139. That it shall be unlawful for any person to carry any gun, pistol, bowie knife or other dangerous weapon, concealed or unconcealed, on any day of election during the hours the polls are open, or on any day of registration or revision of registration, within a distance of one-half mile of any place of registration or revision of registration; any person violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction shall be punished by a fine of not less than one hundred dollars, and imprisonment in the parish jail not less than one month . . .


140. Id.

141. It shall not be lawful for any person in Kent county to carry, on the days of election, secretly or otherwise, any gun, pistol, dirk, dirk-knife, razor, billy or bludgeon; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and . . . shall be fined not less than five nor more than twenty dollars . . .

2 Public Local Laws of Maryland, Articles 11-24, at 1457 (King Bros, ed. 1888).

142. It shall not be lawful for any person in Calvert county to carry, on the days of election and primary election within three hundred yards of the polls, secretly or otherwise, any gun, pistol, dirk, dirk-knife, razor, billy or bludgeon; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof by the circuit court for Calvert county . . . shall be
Texas in 1873 outlawed carrying arms within a half-mile of a polling place during polling hours.\textsuperscript{143}

The Georgia Supreme Court in 1874 upheld a statute against carrying weapons into a court of justice.\textsuperscript{144} As the Georgia court acknowledged, state precedent plainly protected the right to open carry handguns. However, the court pointed out the equally important right of free access to the courts:

[T]he right to go into a court-house and peacefully and safely seek its privileges, is just as sacred as the right to carry arms, and if the temple of justice is turned into a barracks, and a visitor to it is compelled to mingle in a crowd of men loaded down with pistols and Bowie-knives, or bristling with guns and bayonets, his right of free access to the courts is just as much restricted as is the right to bear arms infringed by prohibiting the practice before courts of justice.\textsuperscript{145}

This was the first judicial analysis of what would later be called the “sensitive places” doctrine. The court’s reasoning was consistent with the full lesson to be drawn from the suppression of Cicero’s speech in defense of Milo.\textsuperscript{146} The reasoning was also consistent with the origins of the sensitive places laws in medieval England, which were greatly concerned about violent intimidation.

\textsuperscript{143} Rios & Unlawful Assemblies at Elections Violence Used Towards Electors: (1) It shall be unlawful for any person to carry any gun, pistol, bowie knife, or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within a distance of one half mile of any place of election. (2) Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than ten nor more than fifty dollars for each such offence. . .

1886 Md. Laws 315.

\textsuperscript{144} 2 A Digest of the Laws of Texas, Containing the Laws in Force, and the Repealed Laws on Which Rights Rest, from 1754 to 1874, Carefully Annotated 1317–18 (4th ed. 1874).

\textsuperscript{145} State v. Hill, 53 Ga. 472 (1874).

\textsuperscript{146} Id. at 477–78.
of the courts of justice.

B. Continuation of Earlier Rules Against Misconduct with Arms

The earliest American decision to cite the Statute of Northampton was the Tennessee Supreme Court’s 1833 *Simpson v. State*, affirming the legality of public arms carriage. The court rejected the rule from Hawkins’ English law treatise, which had said that the nonviolent carrying of arms could sometimes constitute an offence. The court held that such a rule was inconsistent with the American right to arms.147

In 1843, the North Carolina Supreme Court wrote that the common law, as reflected in the Statute of Northampton, was that “the carrying of a gun per se constitutes no offence. . . . He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.” Stating that the people of North Carolina did not routinely carry arms as part of their daily apparel, the court expressed its hope that Tarheel habits would never change. Even so, free citizens had the right to carry arms for “any lawful purpose—either of business or amusement.”148 “Business or amusement” was a legal term of art, to encompass all activity.149

Huntley’s conviction was upheld because the indictment had alleged and the prosecutor had proven Huntley’s terrifying conduct: he had publicly threatened “to beat, wound, kill and

148. *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422–23 (1843). The North Carolina Court cited *Sir John Knight’s Case* for the point that even though the North Carolina legislature had forbidden the application of English statutes in the state, the offense was still one at common law. *Huntley*, 25 N.C. (3 Ired.) at 421. For the pre-1328 common law, see supra note 70.
149. See *The Schooner Exchange v. Mcfaddon & Others*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) (“[T]he ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement . . . .”); *Johnson v. Tompkins*, 13 F. Cas. 840, No. 741 (Cir. Ct. E.D. Penn. 1833) (Supreme Court Justice Baldwin, acting as Circuit Judge) (“[A]ny traveller who comes into Pennsylvania upon a temporary excursion for business or amusement”); *Baxter v. Taber*, 4 Mass. 361, 367 (1808); (“[H]e may live with his family, and pursue his business, or amusements, at his pleasure, either on land or water . . . .”); *Respublica v. Richards*, 2 U.S. (2 Dall.) 224 (Penn. 1795) (same language as *Johnson v. Tompkins*).
murder” several persons, “to the terror of the people.” Successful prosecutions for illegal arms carrying alleged and proved the particular terrifying circumstances.

As for carrying arms on private property without permission, Texas enacted a statute in 1873. Oregon did the same for “enclosed premises or lands” in 1893.

C. Blue Laws

“Blue laws” against recreation on Sunday (the Christian sabbath day) became common in the latter decades of the century. The purpose was to inhibit secular activities, and thereby encourage religious observance. A Kentucky blue law forbade hunting on someone else’s land (apparently, even with the landowner’s permission) on the sabbath. North Carolina banned

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152.

It shall not be lawful for any person or persons to carry firearms on the enclosed premises or plantation of any citizen, without the consent of the owner or proprietor, other than in the lawful discharge of a civil or military duty, and any person or persons so offending shall be fined a sum not less than one nor more than ten dollars, or imprisonment in the county jail not less than ten days, or both, in the discretion of the court or jury before whom the trial is had.

153. 1893 Or. Laws 79 (“It shall be unlawful for any person other than an officer on lawful business, being armed with a gun, pistol, or other firearm, to go or trespass upon any enclosed premises or lands without the consent of the owner or possessor thereof.”).
154.

That no person shall, within this Commonwealth, on the Sabbath day, enter or go upon the land of another person to catch, shoot, or kill any birds, fowl, or animal of any kind; and any such person having in his possession a gun at the time, or after he enters upon the premises of another as aforesaid, shall, upon proof, be guilty of a violation of this act . . .

ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY, PASSED AT
Sunday hunting everywhere, and, as a prophylactic measure, forbade gun carrying outside one's property on Sundays.\textsuperscript{155}

Virginia in 1877 went even further. It forbade all arms carrying at places of worship where religious meetings were being conducted.\textsuperscript{156} Virginia also forbade all arms carrying outside of one's premises on Sunday “without good and sufficient cause therefor.”\textsuperscript{157}

D. Schools

Perhaps the first notable arms ban at an American university was at the University of Virginia in 1824. The students had driven Thomas Jefferson, founder of the University, to despair with their spoiled and violent behavior.\textsuperscript{158} They rioted and caroused, fired

\begin{verbatim}

155. [I]f any person or persons whomsoever shall be known to hunt in this State on the Sabbath with a dog or dogs, or shall be found off of their premises on the Sabbath, having with him or them a shot-gun, rifle or pistol, he or they shall be subject to indictment; and, upon conviction, shall pay a fine not to exceed fifty dollars at the discretion of the Court. . .


\ \ As of 2016, eleven eastern states still had blue laws against Sunday hunting. See Allie Humphreys, Note, Has Blue Overshadowed Green?: The Ecological Need to Eradicate Hunting Blue Laws, 40 WM. & MARY ENVTL. L. & POL'Y REV. 623 (2016).

156. If any person carrying any gun, pistol, bowie-knife, dagger, or other dangerous weapon, to any place of worship while a meeting for religious purposes is being held at such place, or without good and sufficient cause therefor, shall carry any such weapon on Sunday at any place other than his own premises, shall be fined not less than twenty dollars. If any offense under this section be committed at a place of religious worship, the offender may be arrested on the order of a conservator of the peace without warrant, and held until warrant can be obtained, but not exceeding three hours.


157. \textit{Id}.\textsuperscript{158}

[S]poiled, self-indulgent scions of Southern plantation owners or prosperous merchants[,] led a life of dissipation. . . . The students
\end{verbatim}
guns in the air, and shot at each other.\textsuperscript{159} Seven months after the university had opened, “Jefferson’s enemies, and they were legion, were ready to pounce and shutter the school they considered a godless playground of the rich.”\textsuperscript{160}

So in 1824, the Board of Visitors—which included Jefferson and James Madison—cracked down.\textsuperscript{161} They banned students (but not faculty or other employees) from keeping on school premises any alcohol, chewing tobacco, or weapon, and also forbade students from having servants, horses, or dogs.\textsuperscript{162} Because the ban was for students only, and not for faculty and staff, the 1824 discipline is not a precise fit in the “sensitive places” history.

To the north, the students at the College of New Jersey (today, Rutgers University) were apparently an easily distracted lot. In 1853, the state did not ban guns at school, nor did it attempt to

\begin{quote}
brandished guns freely, sometimes shooting in the air, sometimes at each other. They drank, gambled, rioted and vandalized property (even taking a hatchet to the front doors of the Rotunda).
The students’ behavior was a great humiliation to Thomas Jefferson, the founder of their school and then one of the best known men in America. . . . Jefferson’s enemies, and they were legion, were ready to pounce and shutter the school they considered a godless playground of the rich.
\end{quote}

Carlos Santos, \textit{Bad Boys: Tales of the University’s tumultuous early years}, \textit{Virginia} (Winter 2013), http://uvamagazine.org/articles/bad_boys.

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} Id.

\begin{quote}
No Student shall, within the precincts of the University, introduce, keep, or use any spirituous or vinous liquors, keep or use weapons or arms of any kind, or gun-powder, keep a servant, horse or dog, appear in school with a stick or any weapon, nor, while in school, be covered without permission of the Professor, nor use tobacco by snuffing or chewing, on pain of any of the minor punishments, at the discretion of the Faculty, or of the board of Censors approved by the Faculty.
\end{quote}

\textbf{Meeting Minutes of University of Virginia Board of Visitors, 4—5 Oct. 1824, 4 October 1824, codified at Enactments by the Rector and Visitors of the University of Virginia, for Constituting, Governing and Conducting that Institution (1825), https://babel.hathitrust.org/cgi/pt?id=hvd.hn36rv&view=1up;seq=13.}

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prohibit students from hunting. But the state did outlaw certain places of amusement within three miles of campus.\textsuperscript{163} The law forbade facilities for billiards, tennis, bowling, shuffleboard, faro, cock-fighting, and pistol shooting.\textsuperscript{164} An 1874 statute added a three-mile buffer around Drew University.\textsuperscript{165} This was undoubtedly a hardship on commercial operators of bowling alleys, tennis clubs, and pistol ranges in Drew’s home town of Madison, New Jersey, but the law imposed no restriction on the ability of Drew students (or anyone else) to keep and carry arms on campus and everywhere else.

Mississippi in 1878 banned students from carrying concealed weapons at any university, college, or school.\textsuperscript{166} The law did not

\begin{footnotesize}
\begin{enumerate}
\item[163.] \textit{Id.}
\item[164.] The opening or keeping of any room or place for playing at billiards, or A.B.C. or E.O. table or tables [predecessors of roulette], or at tennis, bowls, or shuffle board, or at faro-bank, or other bank of like kind, under any denomination whatever, or for playing at nine-pins, or any other number of pins, or for cock-fighting, or for pistol-shooting, either for money or without money, within three miles of the main building of the College of New Jersey, shall be and hereby are declared to be offences against this state; and the owner, tenant, keeper, or attendant, of such room or place, shall be prosecuted and proceeded against by indictment, and upon conviction shall be fined in a sum not exceeding two hundred dollars, or by imprisonment for a period not exceeding six months, or both, at the discretion of the court.
\item[165.] \textit{A Digest of the Laws of New Jersey: Containing all the Laws of General Application, now in force, from 1709 to 1855, inclusive, with the Rules and Decisions of the Courts} 316 (2d ed. 1855).
\item[166.] \textit{Revised Statutes of the State of New Jersey Passed 1864, at 160} (1874).
\end{enumerate}
\end{footnotesize}
apply to open carry, nor did it apply to faculty or staff. However, faculty or staff could be punished for knowingly allowing students to carry concealed.

None of the above laws provides support for Heller’s designation of “schools” as sensitive places where arms carrying may be banned. Students at the two New Jersey schools were allowed to carry on campus, although they were deprived of nearby handgun ranges. Students in Mississippi could carry arms as long as they did so openly. The riotous students at the University of Virginia were wholly disarmed, but the faculty and staff remained as well-armed as ever. Whatever one thinks about the collective punishment of the U. Va. students, the campus was not a place where arms were forbidden to responsible adults.

E. Bans on Carrying at Many Locations

In the half-century following the Civil War, the former slave states were the center of the gun control movement. Although the Equal Protection Clause of the Fourteenth Amendment forbade gun laws that expressly discriminated on race, the racial subtext of Southern gun control was obvious. This section

That any student of any university, college or school, who shall carry concealed, in whole or in part, any weapon of the kind or description in the first section of this Act described, or any teacher, instructor, or professor who shall, knowingly, suffer or permit any such weapon to be carried by any student or pupil, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not exceeding three hundred dollars . . .

1878 Miss. Laws 176.

167. Id.
168. Id.
170. The Ohio case State v. Nieto, 130 N.E. 663 (Ohio 1920), involving a Mexican employee of a railroad, upheld a complete ban on concealed carry, even in one’s own home. A dissenting judge wrote:

I desire to give some special attention to some of the authorities cited, supreme court decisions from Alabama, Georgia, Arkansas, Kentucky, and one or two inferior court decisions from New York, which are given in support of the doctrines upheld by this court. The
examines broad laws against carrying at public events, as enacted in four jurisdictions where slavery had recently been common.

Tennessee in 1869 outlawed carrying certain arms to polling places; in this regard, the statute was nothing novel in the American tradition. But the statute went further, and also applied to “any fair, race course, or other public assembly of the people.” Two years later, the Supreme Court of Tennessee expressed approval of such restrictions, albeit in dicta:

While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the ordinary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.

Therefore, a man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them, nor necessary in order to his familiarity with them, and his training and efficiency in their use.

Whether the 1869 Tennessee statute applied to long guns is uncertain. The forbidden arms were “any pistol, dirk, Bowie-knife, Arkansas toothpick, or weapon in form, shape, or size resembling

southern states have very largely furnished the precedents. It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions.

Id. at 669 (Wanamaker, J., dissenting).

That it shall not be lawful for any qualified voter or other person attending any election in this State, or for any person attending any fair, race course, or other public assembly of the people, to carry about his person, concealed or otherwise, any pistol, dirk, Bowie-knife, Arkansas toothpick, or weapon in form, shape, or size resembling a Bowie knife or Arkansas tooth-pick, or other deadly or dangerous weapon.


Id.

Id. 172.

a Bowie-knife or Arkansas tooth-pick, or other deadly or
dangerous weapon.” A long gun can certainly be a “deadly” or
“dangerous.” On the other hand, the specific items listed in the
statute were pistols and certain types of knives. If the legislature
had meant to include common items that can be deadly—such as
long guns, swords, most types of knives, or baseball bats—the
legislature likely would have said so.

The Kansas Supreme Court faced a similar issue in Parman v.
Lemmon, interpreting a statute forbidding minors from possessing
deadly weapons. At first, the Kansas court said that long guns
were included in the ban, since they could be deadly. Then the
court overturned its first opinion and made the dissent into the
opinion of the court: long guns were not included because they
had not been enumerated, and it would be unlikely for a
legislature that intended to affect something as common as long
guns to not say so directly.

An 1870 Texas statute did expressly apply to all firearms, not
just handguns. It went even further than the Tennessee law. It
covered election places, “any other place where people may be
assembled to muster or to perform any other public duty, or any
other public assembly,” churches, schools—and even private social

174. Public Statutes of the State of Tennessee, supra note 171, at 108.
175. Parman v. Lemmon, 244 P. 227 (Kan. 1925).
176. Id. at 230.
177. Id. at 232–33.
178. Id. at 233.
179.

That if any person shall go into any church or religious assembly, any
school room or other place where persons are assembled for
educational, literary or scientific purposes, or into a ball room, social
party or other social gathering composed of ladies and gentlemen, or
to any election precinct on the day or days of any election, where any
portion of the people of this State are collected to vote at any election,
or to any other place where people may be assembled to muster or to
perform any other public duty, or any other public assembly, and
shall have about his person a bowie-knife, dirk or butcher-knife, or
fire-arms, whether known as a six shooter, gun or pistol of any kind,
such person so offending shall be deemed guilty of a misdemeanor,
and on conviction thereof shall be fined in a sum not less than fifty
or more than five hundred dollars . . .

1870 Tex. Laws 63.

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events: “any church or religious assembly, any school room or other place where persons are assembled for educational, literary or scientific purposes, or into a ball room, social party or other social gathering composed of ladies and gentlemen.”

Missouri in 1874 did not go as far as Texas. It banned concealed carry at a variety of locations, while not restricting open carry. This was consistent with the Missouri Constitution’s right to arms provision, which made an express exception for concealed carry. The prohibited areas were polling places on

180. Id.
181. If any person shall carry concealed upon or about his person any deadly or dangerous weapon, or shall go into any church or place where people have assembled for religious worship, or into any school-room or place where people are assembled for educational, literary or social purposes, or to any election precinct on any election day, or into any court-room during the sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill, or meetings called under the militia law of this state, having upon or about his person any kind of fire-arms, bowie-knife, dirk, dagger, slung-shot, or other deadly weapon . . . he shall, upon conviction, be punished by a fine of not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail not less than five days or more six months, or by both such fine and imprisonment.

1879 Mo. Laws § 1274.
182. Under the 1875 Constitution: “That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.” Mo. Const. art. II, § 17.

The current provision is:

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those duly adjudged mentally infirm by a court of competent jurisdiction.
election day, court rooms “during the sitting of the court,” churches where people were “meeting for worship,” “any public assemblage,” and “any school-room or place where people are assembled for educational, literary or social purposes.”

An 1881 Missouri case, State v. Wilforth, came about when Wilforth violated the last-mentioned clause of the statute by concealed carrying at a church that was hosting a school exhibition “for literary purposes.” Wilforth appealed his conviction but did not file a brief on appeal.

At trial, the court had denied Wilforth’s requested jury instruction that the jury must acquit “if they believed defendant carried the pistol for the purpose of trade, or went into the house where the exhibition was going on having reasonable cause to believe that he would be in danger of bodily harm.” The Supreme Court upheld the trial court’s refusal to issue the instructions because “there was not a scintilla of evidence upon which to base them.”

Oklahoma’s 1890 statute applied to all forms of carry, whether open or concealed. The list of forbidden arms did not include long guns, for which there were separate rules. The areas covered were vast, and included private social events:

any church or religious assembly, any school room, or other place where persons are assembled for public worship, for amusement, or educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering, or to any election, or to any place where intoxicating liquors are sold, or

Mo. Const. art. I, § 23 (1945 Const., 2014 amend.).
183. Id.
184. 74 Mo. 528, 529 (1881).
185. Id. at 529–30.
186. Id. at 530.
187. The locational portion of the statute covered a “pistol, revolver, bowie knife, dirk, dagger, slung-shot, sword, cane, spear, metal knuckles, or any other kind of knife or instrument manufactured or sold for the purpose of defense.” General Statutes of Oklahoma: A Compilation of All the Laws of a General Nature Including the Session Laws of 1907, at 451 (1908). Carrying of long guns was covered by a separate section, allowing carrying only for hunting, killing animals, repair, public military drill, and travel. Id.
to any political convention, or to any other public assembly. . .188

While the Missouri statute merely regulated the manner of carrying, Texas, Oklahoma, and Tennessee had broad bans on carrying arms in many locations. The Texas statute included long guns, whereas application to long guns in Tennessee was unclear.

The Tennessee, Texas, and Oklahoma laws banned arms at a very wide variety of public and private gatherings. They nullified the Second Amendment whenever people exercised their First Amendment right to assemble. These were very broad prohibitions that extended far beyond sensitive places.

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188. It shall be unlawful for any person, except a peace officer, to carry into any church or religious assembly, any school room, or other place where persons are assembled for public worship, for amusement, or educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering, or to any election, or to any place where intoxicating liquors are sold, or to any political convention, or to any other public assembly, any of the weapons designated in sections one and two of this article.

*Id.* at 452.
IV. Twentieth Century

Arizona in 1901, and Montana in 1903 enacted statutes similar to the Oklahoma ban on arms at public and social events; the statutes covered all firearms.

Maryland in 1910 outlawed hunting on Sundays and election days. Being found “in the fields or woods with on a gun” was considered prima facie evidence of illegal hunting.

Tennessee strengthened its existing law against arms in

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189. If any person shall go into church or religious assembly, any school room, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into a ball room, social party or social gathering, or to any election precinct, on the day or days of any election, where any portion of the people of this territory are collected to vote at any election, or to any other place where people may be assembled to minister or to perform any other public duty, or to any other public assembly, and shall have or carry about his person a pistol or other firearm, dirk, dagger, slung-shot, sword-cane, spear, brass knuckles, bowie knife or any other kind of a knife manufactured and sold for the purposes of offense or defense, he shall be punished by a fine not less than fifty nor more than five hundred dollars, and shall forfeit to the county the weapon or weapons so found on his person.


190. Carrying concealed weapons in places of public resort. If any person shall go into any church or religious assembly, any school room or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus show, or public exhibition of any kind, or into a ball room, social party, or social gathering, or to any election precinct or any place of registration, on the day or days of any election or registration, where any portion of the people of the State are collected to register or vote at any election, or to any other place where people may be assembled to perform any public duty, or at any public assembly and shall have or carry concealed or partially concealed about his person a pistol or other firearm, dirk, dagger, slung shot, sword cane, knuckles, or bowie knife, he shall be punished by a fine of not less than fifty nor more than five hundred dollars.

1903 Mt. Laws 643.


192. Id.
polling places with a 1913 statute against election officers bringing guns to voting places or to places where returns were being tallied.\textsuperscript{193}

The alcohol prohibition era led to the first laws about guns in cars, since bootleg alcohol vendors sometimes carried guns when making deliveries. Missouri provided extra punishment for persons illegally transporting alcohol who did so while armed.\textsuperscript{194} An Iowa statute forbade carrying loaded long guns in automobiles, while expressly allowing loaded handguns.\textsuperscript{195} Massachusetts prohibited wearing handguns in automobiles or having them within reach.\textsuperscript{196}

\textsuperscript{193} 1913 Tenn. Priv. Acts 990 ("that no officer of election or Commissioner of Elections shall be in, at, or near any ballot box or voting precinct during any election or the canvassing of the returns armed with pistol, gun, or other deadly weapon.").

\textsuperscript{194} Persons or passengers guilty of a felony, when.— Any person, while in charge of, or a passenger thereon, who shall carry on his person, or in, on, or about, any wagon, buggy, automobile, boat, aeroplane, or other conveyance or vehicle whatsoever, in, or upon which any intoxicating liquor, including wine or beer, is carried, conveyed or transported in violation of any provision of the laws of this state, any revolver, gun or other firearm, or explosive, any bowie knife, or other knife having a blade of more than two and one-half inches in length, any sling shot, brass knucks, billy, club, or other dangerous weapon, article or thing, which could, or might, be used in inflicting bodily injury, or death upon another, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by the imprisonment in the state penitentiary for a term of not less than two years.

\textsuperscript{195} 1929 Iowa Acts 90 ("No person shall carry a gun or any firearms, except a pistol or revolver, in or on a motor vehicle unless the same be unloaded in both barrels and magazine, and taken down or contained in a case.").

\textsuperscript{196} Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, a pistol or revolver, loaded or unloaded, or possesses a machine gun as defined in section one hundred and twenty-one of chapter one hundred and forty... or whoever so carries any stiletto, dagger, dirk knife, slung shot,
More hunting laws were enacted. New Jersey in 1901 banned Sunday hunting. A 1904 statute outlawed hunting on private marsh or swamp land, if the owners had given notice, such as by posting signs. Delaware forbade gun carrying when training dogs outside of the hunting season. Mississippi prohibited hunting in wildlife sanctuaries, and deemed possession of guns or dogs thereon to be prima facie evidence of illegal hunting.

metallic knuckles or sawed off shotgun, or whoever, when arrested upon a warrant for an alleged crime or when arrested while committing a crime or a breach or disturbance of the public peace, is armed with, or has on his person, or has on his person or under his control in a vehicle, a billy or dangerous weapon other than those herein mentioned, shall be punished by imprisonment for not less than six months nor more than two and a half years in a jail.

197. 1901 N.J. Laws 265 ("It shall be unlawful to hunt with a hound or hounds, or with fire-arms or weapons of any kind, or to carry a gun in the woods or fields or on the waters on the Sabbath day, commonly called Sunday, under a penalty of twenty dollars for each offence.").

198. Any person trespassing upon any marsh, swamp or meadow grounds lying within the bounds of any meadow bank company, organized or to be organized under the provisions of the act "An act to enable the owners of the tide swamp and marshes to improve the same, and the owners of meadows already banked in and held by different persons to keep the same in good repair," passed November the twenty-ninth, one thousand seven hundred and eighty-eight, and the several supplements thereto, where the owners and possessors of the said marsh, swamp or meadow lands, lying within the bounds of such meadow bank company, have caused or permitted or suffered, or shall hereafter cause or permit or suffer the same to be subjected to the overflowing of the tide, carrying a gun, after public notice on the part of the owner, possessor, lessee or licensee of any such marsh, swamp or meadow grounds subjected to the overflowing of the tide, forbidding such trespassing, such notice being posted conspicuously adjacent to the highway binding on such lands or adjacent to any usual entrance-way to said land, shall be deemed and adjudged to be a disorderly person.

1904 N.J. Laws 178.
199. 1932 Del. Laws 771 ("That from and after the passage of this Unlawful to Act, it shall be unlawful for any person to carry a gun while training dog or dogs in closed game season.").

200. It shall be unlawful for any person to hunt with gun or dog on any
Michigan did the same for a particular wildlife refuge, while allowing for permits to hunt predatory game therein. North Carolina prohibited guns in wildlife refuges in the western part of the state.

1924 Miss. Laws 554.

It shall be unlawful for any person to hunt, trap, capture, kill or otherwise destroy any wild game animals, wild game or song birds, their young offspring or eggs in the district hereinbefore described, or to molest the homes, nests or houses of such wild game animals or wild game or song birds. A permit may be granted by the conservation commission to a person or persons to hunt carnivorous birds and animals on said premises. Nothing herein contained shall be construed to prohibit any person from keeping the animals or birds herein mentioned in captivity under a permit granted therefor by any law now in force or which may be hereinafter enacted. The state department of conservation is specifically charged with the supervision of the refuge hereby created and with the enforcement of the provisions of this act. It shall be prima facie evidence of hunting on said refuge for any person other than an officer charged with enforcing the provisions of this act to be found thereon with a loaded gun outside of his home or buildings owned or occupied by him.


SEC. 1. That it shall be unlawful for any person or persons to hunt, trap, capture, willfully disturb, or kill any animal or bird of any kind whatever, or take the eggs of any bird within the limits of any park or reservation for the protection, breeding, or keeping of any animals, game, or other birds, including buffalo, elk, deer, and such other animals or birds as may be kept in the aforesaid park or reservation, by any person or persons either in connection with the Government of the United States, or any department thereof, or held or owned by any private person or corporation.

SEC. 3. That any person who shall carry a pistol, revolver, or gun in any park or reservation such as is described in section one of this act, without having first obtained the written permission of the owner or manager of said park or reservation, shall be guilty of a misdemeanor, or shall be fined or imprisoned, in the discretion of the court, for each and every offense.
More broadly, Minnesota banned guns in state parks and in a zone a half-mile around their edges. Guns could be possessed therein only if they had been “sealed” by a park employee. The seal—presumably some sort of wax or other cap—would serve as proof that the gun owner had not fired the gun on park property. Wisconsin prohibited inholders of property within state parks from hunting there; the statute also required that their guns on park property be unloaded.

SEC. 4. That the provisions of this act shall apply only to that part of the State of North Carolina situated west of the main line of the Southern Railway running from Danville, Virginia, by Greensboro, Salisbury, Charlotte, and Atlanta, Georgia.


203. State Parks – No person shall pursue, hunt, take, catch, or kill any wild bird or animal of any kind within the limits of any territory set apart, designated, used or maintained as a state public park, or within one-half mile of the outer limits thereof or have any such bird or animal or any part thereof in his possession or under his control within said park or within one-half mile of said outer limits. No person shall have in his possession within any such park or within one-half mile of the outer limits thereof, any gun, revolver, or other firearm unless the same is unloaded, and except after the same has been sealed by the park commissioner or a deputy appointed by him, and except such gun or other firearm at all times during which it may be lawfully had in such park remains so sealed and unloaded. Upon application to the park commissioner or any deputy appointed by him, it is hereby made his duty to securely seal any gun or firearm in such manner that it cannot be loaded or discharged without breaking such seal. The provisions of this section shall apply to all persons including Indians.

1905 Minn. Laws 620.

204. No owner of lands embraced within any such wild life refuge, and no other person whatever, shall hunt or trap within the boundaries of any wild life refuge, state park, or state fish hatchery lands; nor have in his possession or under his control therein any gun or rifle, unless the same is unloaded and knocked down or enclosed within its carrying case; but nothing herein shall prohibit, prevent, or interfere with the state conservation commission, or its deputies, agents or employes, in the destruction of injurious animals.

1917 Wis. Sess. Laws 1234–44.

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The first federal firearms regulation to apply to national parks was created in 1936.\textsuperscript{205} It declared: “Firearms, explosives, traps, seines, and nets are prohibited within the parks and monuments, except upon written permission of the superintendent or custodian.”\textsuperscript{206} The prohibitions on “traps, seines, and nets” indicates that a major concern was poaching—a common activity during the Great Depression.

Lastly, in a statute that likely reflected well-established practice, Georgia forbade bringing weapons or alcohol into state penitentiaries without the warden’s knowledge.\textsuperscript{207}

Based on the above statutes, \textit{Heller}’s mention of “longstanding” laws against carrying guns in “schools” or “government buildings” has modest support in history and tradition. As of the 1930s, several states had broad laws against guns in schools. A larger number of states had laws against arms at polling places. But these were the minority approach. Widespread bans on arms in government buildings or schools came in the later part of the twentieth century.

In 1988, Congress outlawed carrying a firearm or other dangerous weapon in a “Federal facility.”\textsuperscript{208} This was defined as “a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.”\textsuperscript{209} A person may not be prosecuted unless the facility has posted signs, or the person independently knows that the prohibition exists.\textsuperscript{210} The arms ban includes adjacent parking lots that the federal government owns.
or leases, and which have been posted.\footnote{Id.}

Bans on guns in schools are, in most places, of similarly recent vintage. For most of the twentieth century, students brought guns to school, stored them in their lockers or automobiles, and then went hunting or target shooting after school.\footnote{See, e.g., John Lane, \textit{Permit Guns in School to Stop Massacres}, CHARLOTTE OBSERVER, Jan. 22, 2008, at 1e1A. Lane observes:}

\begin{quote}
I grew up in the 1940s and 1950s . . . [F]or one 'show and tell' I brought to school a Walther PPK pistol . . . . Later, when we were older, it was not uncommon for several of us to have shotguns in our vehicles while at school. Usually they were there because we had been in the woods at sun-up hunting. We didn't have time to take them home before school, so we left them in our trunks. . . . In researching this column, I attempted to find a ‘school shooting’ from that era. I came up empty.
\end{quote}

\footnote{Id.}

\footnote{Id.}

When Antonin Scalia was growing up in New York City in the 1950s, he carried a rifle on the subway on his way to school, for use as a member of his school’s rifle team.\footnote{Associated Press, Scalia Says Don’t Link Guns Only to Crime, SEATTLE TIMES, Feb. 27, 2006, http://seattletimes.nwsource.com/cgi-bin/PrintStory.pl?slug=scalia27&date=20060227 (reporting Scalia’s speech to an annual meeting of National Wild Turkey Federation).}

But in the late 1980s and early 1990s, violent crime was rising sharply.\footnote{See United States Crime Rates 1960 – 2017, DisasterCenter.com (compiling data from FBI Uniform Crime Reports), http://www.disastercenter.com/crime/uscrime.htm.}

\footnote{See, e.g., JEFFREY A. MIRON, \textit{Drug War Crimes: The Consequences of Prohibition} (2004).}

\footnote{See United States v. Lopez, 514 U.S. 549, 581 (1994) (“over 40 States”) (Kennedy, J., concurring).}

\footnote{E.g., IOWA CODE § 724.4B (“A person who has been specifically authorized by the school to go armed, carry, or transport a firearm on the school grounds, including for purposes of conducting an instructional program regarding firearms.”).}

\footnote{Id.}

\footnote{Id.}

\footnote{United States v. Lopez, 514 U.S. 549, 581 (1994) (“over 40 States”) (Kennedy, J., concurring).}

\footnote{E.g., IOWA CODE § 724.4B (“A person who has been specifically authorized by the school to go armed, carry, or transport a firearm on the school grounds, including for purposes of conducting an instructional program regarding firearms.”).}
All the state laws applied to K-12 public schools, and many of them also covered K-12 private schools. Some also applied to public institutions of higher education, and a few even to private higher education.

As more and more states have enacted “shall issue” laws for concealed carry handgun permits, states have adjusted their school laws for permit holders. For example, the permit-holder may be allowed to have a loaded gun inside a car on school property, but not to take the handgun out of the car.

Redundantly, Congress in 1990 enacted the federal Gun-Free School Zone Act (“GFSZA”). The law sharply restricted guns at K-12 schools and within a one-thousand-foot radius around the schools.

The thousand-foot radius is large enough to encompass much unsensitive land in any urban area. If there were no exceptions, the GFSZA would facially run afoul of the Second Amendment. However, the ban does not apply on private property. Nor does it cover transportation of guns that are locked in containers, or for hunting. Even in school buildings themselves, carrying is allowed under federal law if the carrier has a state-issued

218. See Hetzner, supra note 6, at 387–88 (listing statutes).
219. E.g., Del. Code Ann. tit. 11, § 1457 (covering private higher education).
221. See, e.g., Colo. Rev. Stats. § 18-12-214(3).

In 1995, the U.S. Supreme Court held the GFSZA unconstitutional as an exercise of Congress’s interstate commerce power, since guns in school zones had no meaningful connection to interstate commerce. See United States v. Lopez, 514 U.S. 549, 551 (1994). See also David B. Kopel & Glenn H. Reynolds, Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban Act, 30 Conn. L. Rev. 59, 68–70 (1997) (discussing interstate commerce in Lopez). In 1996, Congress re-enacted the law, this time limiting its application to guns which at some point after their manufacture had been moved in interstate commerce. 18 U.S.C. § 922(q)(1)(B), (C), (G), (I), (2)(A), (3)(A) (containing new language restricting the law’s application to a person with a “firearm that has moved in or that otherwise affects interstate or foreign commerce”).
223. Id. § 922(q)(2)(B)(i).
224. Id. § 922(q)(2)(B)(iii) & (vii).
V. Post-Heller Cases

This Part examines sensitive places cases decided after the Supreme Court’s 2008 decision in District of Columbia v. Heller.

A. Public Lands

1. Parking Lots in National Parks: United States v. Masciandaro

Sean Masciandaro illegally parked overnight in a national park parking lot, prompting questioning by a United States Park Police sergeant. During the questioning, Masciandaro revealed that he had a loaded 9mm semiautomatic handgun in the vehicle. Masciandaro was arrested and charged with violating 36 C.F.R. § 2.4(b), which prohibited “carrying or possessing a loaded weapon in a motor vehicle” on national park land.

Masciandaro argued for strict scrutiny, explaining that at the time of his arrest he was a law-abiding citizen with no criminal record and that he carried the handgun for self-defense.

The government argued that national parks—which are owned and managed by the federal government—are “sensitive places” and therefore restrictions within them are “presumptively lawful” under Heller. Specifically, the government stated that:

a large number of people, including children, congregate in National Parks for recreational, educational and expressive activities. Park land is not akin to a gun owner’s home and is far more analogous to other public spaces, such as schools, municipal parks, governmental buildings, and appurtenant

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225. Id. § 922(q)(2)(B)(ii). This exception applies if the license is issued “by the State in which the school zone is located or a political subdivision of the State.” This still leaves law-abiding citizens from out-of-state unfairly and unnecessarily burdened when the State does not offer licenses to out-of-state residents. See Royce de R. Barondes, Federalism Implications of Non-Recognition of Licensure Reciprocity Under the Gun-Free School Zones Act, 32 J.L. & Pol. 139 (2017).


227. Id. at 469–70.
parking lots, where courts have found firearms restrictions to be presumptively reasonable. Furthermore, as the district court noted, the locations within the National Parks where motor vehicles travel are even more sensitive, given that they are extensively regulated thoroughfares frequented by large numbers of strangers, including children.  

Masciandaro answered:

The George Washington Memorial Parkway, where [he] was charged with violation of the superseded [National Park Service] weapons regulation, is a public road and a major traffic thoroughfare in the Washington metropolitan area and is not a sensitive place. . . .

* * *

There is a patchwork of regulations that allow people to use and possess weapons on NPS land, including parkways and remote forests and parks across the United States. Those regulations reflect the [Department of Interior’s] determination that NPS land is not sensitive, as a general matter. Indeed, the very same NPS regulation [36 C.F.R. § 2.4] that prohibits possession of loaded weapons in motor vehicles indicates that it is lawful to hunt with weapons, use them for target practice, have them in residential dwellings, use them for research activities, and carry them for protection in “pack trains” or on trail rides, all on NPS land.

Additionally, “Masciandaro points out that the National Park Service itself ‘has explicitly distinguished between the sorts of ‘sensitive places’ mentioned in Heller (schools and government buildings) on one hand and national parks on the other’ when it explained that ‘nothing in [36 C.F.R. § 2.4] shall be construed to authorize concealed carry of firearms in any Federal facility or Federal court facility as defined in 18 U.S.C. § 930.’”

Without deciding whether a national park parking lot is a sensitive place, the Fourth Circuit pondered the appropriate

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228. Id. at 471.
229. Id. at 471–72 (citing 73 Fed. Reg. 74,966, 74,971 (Dec. 10, 2008)) (brackets in original).
230. Id. at 472 (citing 73 Fed. Reg. at 74,971) (brackets and emphasis in opinion).
method of analyzing sensitive place cases. Specifically, “whether
the ‘sensitive places’ doctrine limits the scope of the Second
Amendment or, instead, alters the analysis for its application to
such places.”231 In other words, does the Second Amendment not
apply at all in sensitive places? Or does the Second Amendment
still apply there, and restrictions therein are easier to justify?

As the court noted, 
Heller
said “the right secured by the
Second Amendment is not unlimited” and in the same paragraph
declared, “nothing in our opinion should be taken to cast doubt on
... laws forbidding the carrying of firearms in sensitive places such
as schools and government buildings.”232 “Because of the relation
between the first statement and the examples,” the 
Masciandaro
court observed, “one might conclude that a law prohibiting
firearms in a sensitive place would fall beyond the scope of the
Second Amendment and therefore would be subject to no further
analysis.”233

On the other hand, the 
Masciandaro
court continued, “the
Court added a footnote to its language, calling these regulatory
measures ‘presumptively lawful.’ The Court’s use of the word
‘presumptively’ suggests that the articulation of sensitive places
may not be a limitation on the scope of the Second Amendment,
but rather on the analysis to be conducted with respect to the
burden on that right.”234

The 
Masciandaro
court declined to decide the proper analysis

231. Id.
232. Id. (quoting 
Heller, 554 U.S. at 626).
233. Id. (emphasis in original).
234. Id. Several other circuit courts have wrestled with this issue. See David
B. Kopel & Joseph G.S. Greenlee, 
The Federal Circuits’ Second Amendment
Doctrines, 61 St. Louis L.J. 193, 221–26 (2017). The Seventh Circuit has
indicated that it views sensitive place restrictions as burdening the right but
being easier to justify:

when a state bans guns merely in particular places, such as public
schools, a person can preserve an undiminished right of self-defense
by not entering those places; since that’s a lesser burden, the state
doesn’t need to prove so strong a need. Similarly, the state can
prevail with less evidence when . . . guns are forbidden to a class of
persons who present a higher than average risk of misusing a gun.

Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012).
for sensitive place cases, or even whether a national park is sensitive, “because even if Daingerfield Island is not a sensitive place, as Masciandaro argues, 36 C.F.R. § 2.4(b) still passes constitutional muster under the intermediate scrutiny standard.”

Subsequent to Masciandaro’s arrest, in 2009 Congress enacted legislation to allow the possession and carrying of loaded firearms in the National Park System and the National Wildlife Refuge System—provided that the individual is legally allowed to own a firearm, and that the possession or carrying of the firearm is compliant with the laws of the host state. Thus, a lawful gun owner may carry in a national park with a concealed handgun carry permit if the state requires permits, or without a permit if the state does not require permits. Masciandaro had been convicted for violating the old regulation, which at the time of his offense was still in effect.

2. Buffer Zones Around Parks: People v. Chairez

In People v. Chairez, the Supreme Court of Illinois held that a law prohibiting individuals from carrying or possessing arms within 1,000 feet of a public park violates the Second Amendment. Specifically, the law made it a Class 3 felony to carry or possess

235. Id. at 473. The court determined that the prohibition in the national park was reasonable because “national parks patrons are prohibited from possessing loaded firearms, and only then within their motor vehicles.” Id. (emphasis in original). Emphasizing that “[l]oaded firearms are surely more dangerous than unloaded firearms, as they could fire accidentally or be fired before a potential victim has the opportunity to flee,” the court glossed over the fact that “the need to load a firearm impinges on the need for armed self-defense” by stating that “intermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective.” Id. at 474.

236. See Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub.L. No. 111–24, § 512(b), 123 Stat. 1734, 1765 (2009) (“The Secretary of the Interior shall not promulgate or enforce any regulation that prohibits an individual from possessing a firearm ... in any unit of the National Park System ... if ... the individual is not otherwise prohibited by law from possessing the firearm; and ... the possession of the firearm is in compliance with the law of the State in which the unit of the National Park System ... is located.”); 54 U.S.C. § 104906. See also 36 C.F.R. § 2.4 (regulation implementing new law).

237. 2018 IL 121417.
“in any vehicle or concealed on or about his person . . . any pistol, revolver, stun gun or taser or other firearm . . . within 1,000 feet of the real property comprising any school, public park, courthouse, public transportation facility, or residential property [of a public housing agency].”238

In February 2013, Julio Chairez was a passenger in a vehicle that was pulled over by police. Chairez fled the vehicle and threw his backpack over a fence. The backpack, which held a .25-caliber handgun, landed near the Virgil L. Gilman Nature Trail in Aurora, Illinois. Chairez was subsequently convicted of possessing a firearm within 1,000 feet of a public park.

The court applied the Second Amendment Two-Part Test that is used by most federal courts, and which had been adopted by the Supreme Court of Illinois in *Wilson v. County of Cook*.239 The court had previously held that “the second amendment protects the right to possess and use a firearm for self-defense outside the home” in *People v. Aguilar*.240 And in *People v. Mosley*, the court had struck down a law prohibiting the carrying of an uncased, loaded, and immediately accessible firearm on a public way.241 Thus, Chairez had the right to possess the firearm outside his home and on public property. The question was whether the public parks are “sensitive places”—and if so, whether the government can create a buffer zone around a sensitive place.

The State cited “various historical sources, chiefly the 1328 Statute of Northampton, to support its argument that possessing a firearm within a 1000 feet of a public park is not a protected right.”242 Chairez retorted that even if public parks are sensitive places, the thousand-foot exterior zone could not be. “Defendant argues that the preposition ‘in,’ which precedes ‘sensitive places’ in *Heller*’s statement, makes the list of presumptively lawful regulations limited to the actual sensitive place, not an exclusion

238. 720 Ill. Comp. Stat. 5/24-1(a)(4), (c)(1.5).
239. 2012 IL 112026.
240. 2013 IL 112116, ¶ 21.
241. 2015 IL 115872.
242. *Chairez*, 2018 IL at ¶ 27 (citation omitted).

268
zone around the particular place.”

Chairez also pointed to a recent opinion from the Seventh Circuit: “when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places.” Thus, the area surrounding a sensitive place cannot itself be treated as sensitive.

The court did not decide whether the buffer zone was a sensitive place. As the court noted, *Heller* had said that arms bans “in sensitive places” were “presumptively lawful.” Here, even if the buffer zone enjoyed a presumption of lawfulness, the presumption had been rebutted.

The court found that the law severely burdened the core of the right to bear arms, because it prohibited the carriage of weapons for self-defense and it affected the entire law-abiding population of Illinois. Consequently, the court applied an “elevated intermediate scrutiny” in which “the government bears the burden of showing a very strong public-interest justification and a close fit between the government’s means and its end, as well as proving that the public’s interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.”

To satisfy this burden, the State focused primarily on school violence and the 1,000-foot ban as it applies to schools. The State then tried to draw an analogy to public parks, since children frequent parks. The State did not, however, provide any evidence regarding parks. “[T]he State’s propositions are devoid of any useful statistics or empirically supported conclusions.” “Without specific data or other meaningful evidence,” the State was unable to support its “assertion that a 1000–foot firearm ban

243. Id. at ¶ 28.
244. Id. (quoting Moore, 702 F.3d at 940).
245. Id. at ¶ 30 (“We, however, need not address whether the 1000–foot firearm restriction falls outside of the ambit of the second amendment because we agree with the approach taken by other courts that assume some level of scrutiny must apply to *Heller*’s ‘presumptively lawful’ regulations.”).
246. Id. at ¶ 49.
247. Id. at ¶ 50 (internal quotations omitted).
248. Id. at ¶ 51.
249. Id. at ¶ 53.
around a public park protects children, as well as other vulnerable persons, from firearm violence.”


   GeorgiaCarry.Org challenged the federal regulation prohibiting loaded firearms and ammunition on U.S. Army Corps of Engineers property. Initially, they sought a preliminary injunction. The Eleventh Circuit answered that the case at this stage lacked historical evidence, the facts needed for a sensitive places analysis, and basic information needed to assess the public safety risks. Because “[t]he plaintiffs in this appeal swing

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250. *Id.* at ¶¶ 53-54.

251. 36 C.F.R. § 327.13.


254. *GeorgiaCarry.Org, Inc.*, 788 F.3d at 1327 (“none of the parties before this Court have provided any historical evidence to inform our analysis”).

255.

Second, the preliminary injunction record does a limited job fleshing out a variety of factual issues that may bear upon a Second Amendment analysis. Thus, for example, as to the issue of whether the Corps property constitutes what *Heller* called a ‘sensitive place,’ we are missing basic information. Among others, we do not know the size of the Allatoona Dam, a major feature of the water resource development project and (all parties agree) a potential national security concern. Nor do we know the size of the recreational area at issue in this case—that is, where the plaintiffs seek to carry their weapons in this as-applied challenge. Moreover, we have no way of telling how far the recreational area extends beyond the dam, whether the recreational area is separated from the dam itself by a fence or perimeter, or to what extent the dam is policed. All this preliminary injunction record reveals is that the dam itself is a national security concern and that the federal government (through the Corps) has opened a large parcel of nearby land for recreation.

*Id.* at 1327–28.

256.

In this case, the government’s stated and plainly legitimate objective is promoting public safety on Corps property. But we lack much of
for the fences” and “hang their hats on a single, sweeping argument: that the regulation completely destroys their Second Amendment rights,” the court denied the preliminary injunction on the limited record before it. 257

On remand, the Corps moved for summary judgment, and the district court granted it. The district court determined that land managed by the Corps is sensitive:

the existence of Defendant Army Corps’ ‘recreational facilities’ is merely a byproduct of the sensitive dam construction projects nearby. Indeed, those projects often are designed with the express purposes of protecting population centers from flooding, providing hydroelectric power, improving navigation, and providing nearby developed, as well as dispersed, recreation and

the basic information we would need to assess the risks found at Allatoona Lake. For example, we do not know how heavily trafficked the relevant area is at various times of the year, nor what types of activities the visitors engage in, nor how the visitors are distributed throughout the property. All we have before us is an affidavit from a single Corps Park Ranger that speaks in generalities about the presence of visitors and their potential sources of conflict. We also have no evidence about the dangers currently facing Allatoona visitors, including the frequency and nature of crimes committed or of altercations amongst visitors. And although we are told that the Corps has the authority to coordinate with local law enforcement to provide additional patrols during peak visitation periods, we do not know whether the Mobile District of the Corps has done so. In fact, other than a description of the general law enforcement limitations of Corps Park Rangers, we know almost nothing about the nature of the police presence at Allatoona Lake. In sum, we do not have before us any empirical data that might aid in assessing the fit between the challenged regulation and the government’s asserted objective. This slim preliminary injunction record does not provide nearly enough information to enable a court to fairly engage in a thorough constitutional analysis.

Id. at 1328–29 (footnote omitted).

257.

The regulation does not completely destroy the plaintiffs’ right to bear arms because its effect is cabined to a limited geographic area designed for recreation. Whatever else the regulation does, it does not destroy the plaintiffs’ Second Amendment right to keep and bear arms altogether. Thus, we affirm the district court’s order and remand for further proceedings consistent with this opinion.

Id. at 1320.
quality natural resources for the local populations.\textsuperscript{258}

Thus, “[t]hough Defendant Army Corps’ property is more expansive than just a ‘building,’ there is no reason to doubt that the Firearms Regulation, which restricts the use of firearms on military property nearby sensitive infrastructure projects, falls squarely into the existing ‘laws forbidding the carrying of firearms in sensitive places’ referenced in \textit{Heller}.\textsuperscript{259}


The firearms ban on Army Corps land was ruled unconstitutional by the United States District Court for the District of Idaho in \textit{Morris v. U.S. Army Corps of Engineers}.\textsuperscript{260} In \textit{Morris}, the plaintiffs alleged that 36 C.F.R. § 327.13 violated the Second Amendment by “(1) banning the possession of firearms in a tent, and (2) banning the carrying of firearms on Corps’ recreation sites.”\textsuperscript{261}

Notably, the court held that the Army Corps’ regulation went “beyond merely burdening the Second Amendment rights but ‘destroys’ those rights for law-abiding citizens”\textsuperscript{262}—the same argument the Eleventh Circuit had rejected in \textit{GeorgiaCarry.Org}.\textsuperscript{263}

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\textsuperscript{258} \textit{GeorgiaCarry.org, Inc.}, 212 F. Supp. 3d at 1361. The court also determined that there was no Founding Era tradition of carrying arms on Army Corps land—while acknowledging that the Corps was not entrusted with the management of any land in the Founding Era. \textit{Id.} at 1360–67. In the alternative, the court held that the ban satisfied intermediate scrutiny. \textit{Id.} at 1367–74.

\textsuperscript{259} \textit{Id.} at 1362. In a previous case, GeorgiaCarry.Org challenged a statute against carrying guns in “a place of worship, unless the governing body or authority of the place of worship permits the carrying of weapons or long guns by license holders.” Ga. Code Ann. § 16-11-127(b)(4) (2016). In upholding the law, the Eleventh Circuit expressly left unresolved the question of whether a church is a sensitive place: “In reaching this conclusion, we obviously need not, and do not, decide what level of scrutiny should be applied, nor do we decide whether a place of worship is a ‘sensitive place’ under \textit{Heller}.” GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012).

\textsuperscript{260} 60 F. Supp. 3d 1120 (D. Idaho 2014).

\textsuperscript{261} \textit{Id.} at 1122.

\textsuperscript{262} \textit{Id.} at 1123.

\textsuperscript{263} \textit{GeorgiaCarry.Org, Inc.}, 788 F.3d at 1320.
Nor was the District Court of Idaho persuaded by the sensitive places argument.264 “The Corps argues that its recreation sites are public venues where large numbers of people congregate, making it imperative that firearms be tightly regulated. The Corps also points out that the sites contain dams and power generation facilities that require heightened protection, especially given homeland security threats.”265 But the court pointed out that Heller “limited the ‘sensitive place’ analysis to facilities like ‘schools and government buildings.’ In contrast, the ban imposed by the Corps applies to outdoor parks.”266

Moreover, the sensitive places language from Heller “confirms the right of the Corps to regulate handguns on its property. But here the Corps is attempting to ban handguns, not regulate them.”267 Thus, “[w]hile the Corps retains the right to regulate the possession and carrying of handguns on Corps property, this regulation imposes an outright ban, and is therefore unconstitutional under any level of scrutiny.”268

The Army Corps appealed to the Ninth Circuit, but shortly before oral argument, the Army Corps asked that oral argument be cancelled because the Corps would be rewriting 36 C.F.R. § 327.13 to address the plaintiffs’ concerns.269 Ultimately, the Corps did not change the regulation, and instead issued a guidance “for considering written requests from individuals to carry firearms at U.S. Army Corps of Engineers water resources development projects.”270

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265. Morris, 60 F. Supp. 3d at 1124.
266. Id. at 1123–24.
267. Id. at 1123.
268. Id. at 1125. The same court later struck down the regulation as applied to other areas on Corps land. Morris v. U.S. Army Corps of Eng’rs, 60 F. Supp. 3d 1120 (D. Idaho 2014).

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B. Post Offices and their Parking Lots

1. United States v. Dorosan

A 1972 federal regulation bans guns in all post offices and all postal parking lots. The Fifth Circuit upheld the ban in a brief, unpublished decision. Clarence Paul Dorosan was a letter carrier for USPS. One day he called in sick, and a postal inspector discovered his unattended bag at the post office. The inspector searched Dorosan’s bag and found a magazine loaded with twelve rounds, and three empty shell casings. When Dorosan was confronted upon returning to work the following day, he admitted to also having a firearm in the glove compartment of his vehicle parked in the USPS parking lot. He was convicted of violating 39 C.F.R. § 232.1(l).

The Fifth Circuit upheld the conviction on three grounds. “First, the Postal Service owned the parking lot where Dorosan’s handgun was found, and its restrictions on guns stemmed from its constitutional authority as the property owner.” Second, “the Postal Service used the parking lot for loading mail and staging its mail trucks. . . . Given this usage of the parking lot by the Postal Service as a place of regular government business, it falls under the ‘sensitive places’ exception recognized by Heller.” Third, “the Postal Service was not obligated by federal law to provide parking for its employees, nor did the Postal Service require Dorosan to park in the lot for work. If Dorosan wanted to carry a gun in his car but abide by the ban, he ostensibly could have secured alternative parking arrangements off site.”

271. 39 C.F.R. § 232.1(l) (“no person while on postal property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on postal property, except for official purposes”).
274. Id. at 875.
275. Id.
276. Id. at 876.
2. Tab Bonidy is a concealed carry permitholder from a rural area outside of Avon, Colorado, where there is no delivery service and residents must pick up their mail from the post office. The Avon Post Office is a freestanding building with an employee parking lot, customer parking lot, and five free parking spots on West Beaver Creek Boulevard (except that parking on that street is prohibited when there are over two inches of snow). The post office lobby is always open, postal employees work a regular schedule, and security officers are never employed.277

Bonidy wanted to carry a firearm to retrieve his mail, or at least keep his firearm in the car when he went inside to collect his mail. Bonidy sought declaratory and injunctive relief, arguing that § 232.1(l) violates the Second Amendment.

Bonidy contended that the sensitive places language in *Heller* was dicta and should be disregarded. The Tenth Circuit disagreed: “First, we have previously held that we are ‘bound by Supreme Court dicta almost as firmly as by the Courts’ outright holdings, particularly when the dicta is recent and not enfeebled by later statements.’ . . . Second, this dicta squarely relates to the holdings itself, and therefore is assuredly not gratuitous. Third, this dicta was subsequently repeated largely verbatim and reendorsed by the Court several years later in [McDonald v. City of Chicago, 561 U.S. 742, 925 (2010)].”278

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277. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1123 (10th Cir. 2015).

278. *Id.* at 1125. Most circuits consider Supreme Court dicta binding to some extent. See *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (“We think that federal appellate courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement.”); *Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014) (“[W]e have an obligation to accord great deference to Supreme Court *dicta*”) (internal quotations omitted); *Oyebanji v. Gonzales*, 418 F.3d 260, 264–65 (3d Cir. 2005) (“[A]s a lower federal court, we are advised to follow the Supreme Court’s considered dicta.”) (internal quotation omitted); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) (“[W]ith inferior courts, like ourselves . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”) (internal quotations omitted); *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980) (“We are not bound by dicta, even of our own court . . . . Dicta of the Supreme Court are, of course, another matter.”) (citation omitted); *United States v. Marlow*, 278 F.3d 1125, 1123 (10th Cir. 2005).
Most importantly, “Since Heller and McDonald we have quoted that same sentence and considered ourselves bound by it. Thus, our own precedent causes us to conclude that the Second Amendment right to carry firearms does not apply to federal buildings, such as post offices. Therefore, we uphold the District Court’s ruling that 39 C.F.R. § 232.1(l) is constitutional as to the post office building itself.”

Moving next to the parking lot, the court determined that:

the parking lot should be considered as a single unit with the postal building itself to which it is attached and which it exclusively serves. There is, in fact, a drop-off box for the post office in the parking lot, meaning that postal transactions take place in the parking lot as well as in the building. Thus, the previously quoted language in Heller applies with the same force to the parking lot as to the building itself.

Because the parking lot presented a “closer question” than the post office building, the Tenth Circuit provided an “equal and alternative basis” for upholding the ban.

Assuming the right to

581, 588 n.7 (6th Cir. 2002) (“Appellate courts have noted that they are obligated to follow Supreme Court dicta, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.”); Reich v. Cont’l Cas. Co., 33 F.3d 754, 757 (7th Cir. 1994) (“In such a case the dictum provides the best, though not an infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it.”); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 557 (8th Cir. 1993) (“Federal courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement.”) (citation omitted); United States v. Montero-Camargo, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (“We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference. As we have frequently acknowledged, Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.”) (internal citation and quotations omitted); Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006) (“[T]here is dicta and then there is dicta, and then there is Supreme Court dicta.”); Sierra Club v. EPA, 322 F.3d 718, 724 (D.C. Cir. 2003) (“For this inferior Court . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”) (internal citation, quotations, and brackets omitted).

279. Bonidy, 790 F.3d at 1125.
280. Id.
281. Id.
bear arms applies beyond the home, the court upheld the parking lot ban under intermediate scrutiny:

As a government-owned business acting as a proprietor rather than as a sovereign, the USPS has broad discretion to govern its business operations according to the rules it deems appropriate. In light of that discretion, the contrast between the regulation challenged here and the bans struck down in *Heller* and *McDonald* is stark. Those bans regulated wholly private activity and applied directly to every citizen within the respective jurisdictions. By contrast, the regulation challenged here applies only to discrete parcels of land owned by the U.S. Postal Service, and affects private citizens only insofar as they are doing business with the USPS on USPS property. And the regulation is directly relevant to the USPS’s business objectives, which include providing a safe environment for its patrons and employees.\(^{282}\)

Judge Tymkovich concurred in part and dissented in part. He agreed with upholding the ban in the post office building, but he would have struck down the ban in the parking lot.\(^{283}\)

First, Judge Tymkovich pointed out that bans in schools and government buildings are merely presumptively lawful. “By explicitly listing those locations as examples of sensitive places, *Heller* placed a thumb on the scale in favor of considering them sensitive and thus presumptively regulable.” But “[t]hat thumb on the scale can certainly be overcome depending on the qualities of the particular school or government building.” In other words, the presumption is rebuttable:

I do not agree that the dicta necessarily means “the Second Amendment right to bear arms has not been extended to ‘government buildings.’” Maj. Op. at 1123. That overreads *Heller’s* dicta. While the list could certainly mean the right does not extend to schools or government buildings, it could just as easily (perhaps more easily) mean the right extends to those locations but that regulations in those locations presumptively survive scrutiny at step two of our two-prong

\(^{282}\) *Id.* at 1126–27.

\(^{283}\) *Id.* at 1129 (Tymkovich, J. concurring in part and dissenting in part). This was the holding of the district court. *Id.*; Bonidy v. U.S. Postal Serv., No. 10-CV-02408-RPM, 2013 WL 3448130 (D. Colo. July 9, 2013).
Second Amendment analysis. And the fact that the Heller Court provided its list of exceptions in the course of explaining that the Second Amendment right is subject to certain limitations, see Heller, 554 U.S. at 626, 128 S.Ct. 2783, suggests it describes presumptively permissible limitations on the right, not cases where the right is not burdened at all. To say the right has not been extended to government buildings is to imply no plaintiff could ever successfully challenge a restriction in any government buildings. That goes too far.284

As for the USPS parking lot, “no such thumb on the scale exists,” because Heller made no mention of such locations. “Thus, to be treated as sensitive and consequently presumptively regulable,” the locations on which Heller expressed no view “must stand or fall on their own.”285

A few illustrations explain this point. The White House lawn, although not a building, is just as sensitive as the White House itself. Consequently, the presumption of lawfulness for a regulation penalizing firearm possession there might approach the categorical. At the spectrum’s other end we might find a public park associated with no particular sensitive government interests—or a post office parking lot surrounding a run-of-the-mill post office. Perhaps such locations are “sensitive” in the sense that the government always has an interest in protecting its property or visitors. But without more concrete evidence of particular vulnerability, any presumption of lawfulness for a firearms regulation cannot control. One who demonstrates a real burden on his Second Amendment rights in a location that is insufficiently sensitive to justify that burden has rebutted any presumption of lawfulness that could tip the scales against him under our two-prong test.286

Thus, “the parking lot is insufficiently sensitive to qualify as presumptively regulable” and “the ease with which the government could alter this regulation to address its concerns while still respecting the Second Amendment rights of lawful

284.Bonidy, 790 F.3d at 1137 (Tymkovich, J., concurring in part and dissenting in part) (citations omitted).
285.Id. at 1136–37 (Tymkovich, J., concurring in part and dissenting in part).
286.Id. at 1137 (Tymkovich, J., concurring in part and dissenting in part).
Unlike the post office building, the parking lot is an open space, not a place where valuable transactions occur, and not an area of heightened concern for accidents. “There are surely non-building locations that are sufficiently sensitive to make regulating firearms there presumptively lawful. This parking lot is not one of them.”

The mere existence of a government building next to some open space was not sufficient to turn everything into a “sensitive place”:

To be sure, examining a location’s similarity to the enumerated locations of schools and government buildings may aid in determining whether a particular location is “sensitive.” But that means courts should look to how similar the location in question is with respect to its sensitivity, not just its proximity or lack thereof to a government building. For example, it would be odd if a government field otherwise low on the sensitivity scale could be transformed into a location where firearms could be forbidden with little justification by the erection of a public bathroom. Proximity to a government building, without more, cannot be sufficient to exempt a location from the Second Amendment.

Moreover, there was a substantially less-burdensome alternative. “[R]ather than a flat ban on gun storage, the regulation could allow discretionary issuance of permits to use the parking lot with the gun in a locked vehicle concealed in a glove compartment or console.”

C. Higher Education Buildings

At Virginia’s George Mason University, a regulation forbids the “[p]ossession or carrying of any weapon by any person, except

287. Id. at 1139 (Tymkovich, J., concurring in part and dissenting in part).
288. Id. at 1140 n.10 (Tymkovich, J., concurring in part and dissenting in part).
289. Id. at 1140 (Tymkovich, J., concurring in part and dissenting in part).
290. Id. at 1139 (Tymkovich, J., concurring in part and dissenting in part) (quotations and citations omitted). The majority replied that the suggested alternative was administratively impractical on a national basis. Id. at 1128.
a police officer, . . . on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events.”291 Rudolph DiGiacinto, although not a student or employee, regularly visited the campus and used its facilities, and wished to carry a firearm with him when doing so.

DiGiacinto alleged that the campus prohibition violated his right to carry a firearm.292 The court disagreed, ruling that GMU—a public education institution whose real estate and personal property is government owned—was a sensitive place:

It was stipulated at trial that GMU has 30,000 students enrolled ranging from age 16 to senior citizens, and that over 350 members of the incoming freshman class would be under the age of 18. Also approximately 50,000 elementary and high school students attend summer camps at GMU and approximately 130 children attend the child study center preschool there. All of these individuals use GMU’s buildings and attend events on campus. The fact that GMU is a school and that its buildings are owned by the government indicates that GMU is a “sensitive place.”

Moreover, “[t]he regulation does not impose a total ban of weapons on campus. Rather, the regulation is tailored, restricting weapons only in those places where people congregate and are most vulnerable—inside campus buildings and at campus events. Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation.”

292. DiGiacinto challenged the regulation under the Second Amendment and the Constitution of Virginia. The court held that “the protection of the right to bear arms expressed in Article I, § 13 of the Constitution of Virginia is co-extensive with the rights provided by the Second Amendment of the United States Constitution, concerning all issues in the instant case.” So the court “analyze[d] DiGiacinto’s state constitutional rights and his federal constitutional rights concurrently.” DiGiacinto v. Rector & Visitors of George Mason Univ., 281 Va. 127, 134 (2011).
293. Id. at 135–36.
294. Id. at 136–37.
D. Common Areas in a Public Apartment Building

Homes are not “sensitive places.” Under *Heller*, prohibiting arms possession in the home is categorically unconstitutional.295 Public housing residents in Wilmington, Delaware, were forbidden to possess arms in the common areas of public housing complexes—such as laundry rooms and meeting rooms.296 When some residents sued, a federal district court outlined the pro/con arguments on common areas being sensitive places.297 On the one hand, the common rooms were extensions of residences.298 *Heller* makes it very clear that guns may not be banned in residences.299 On the other hand, the common areas were “places where people congregate, as well as administrative offices in which government work may be said to be done.”300

The district court did not need to decide whether the common areas were “sensitive places.”301 If they were, there would be a presumption in favor of the legality of a gun ban.302 If they were not, the government would have the burden of proving the gun ban to be lawful.303 The court found that the common areas gun ban

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295. *Heller*, 554 U.S. at 629 (because “handguns are the most popular weapon chosen by Americans for self-defense in the home, [] a complete prohibition of their use is invalid.”). *See also* Jackson v. San Francisco, 746 F.3d 953 (9th Cir. 2014). The *Jackson* court explained that the storage law had nothing to do with any of *Heller*’s “presumptively lawful” gun controls:

In analyzing the scope of the Second Amendment, we begin with the list of “presumptively lawful” regulations provided by *Heller*. Section 4512 resembles none of them, because it regulates conduct at home, not in “sensitive places”; applies to all residents of San Francisco, not just “felons or the mentally ill”; has no impact on the “commercial sale of arms,” and it regulates handguns, which *Heller* itself established were not “dangerous and unusual.”

*Id.* at 962.


297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 535–36.

302. *Id.*

303. *Id.*

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had been proven lawful under intermediate scrutiny. “Public housing authorities . . . are generally afforded wide latitude in their ability to regulate what occurs on their property and determine the best policy for protecting the health, safety, and welfare of their residents.”

On appeal, the Third Circuit certified a question to the Delaware Supreme Court about the Delaware Constitution’s right to arms. The federal district court had ruled against the Delaware state constitution claim, but the Third Circuit wanted to hear from the Delaware Supreme Court.

The Delaware Supreme Court explained that arms rights under the Delaware Constitution are broader than the Second Amendment. Without addressing the *Heller* doctrine of sensitive places, the Delaware Court held that the ban violated the state constitution. The Third Circuit adopted the Delaware Court’s explication of the Delaware Constitution, and entered judgement against the arms ban.

E. Parking Lots of Premises with Liquor Licenses

Laws against carrying arms while drunk are common. Some states go further, and prohibit carrying arms in taverns, or even in restaurants that serve alcohol. Critics say that such laws prevent the workers in such places from having arms to defend themselves and others. The critics believe that restaurant or tavern bans should apply only to people who consume alcohol or become intoxicated therein. Baton Rouge, Louisiana had an unusually restrictive ordinance. Not only did it forbid possession of firearms on premises where alcoholic beverages were sold or consumed, parking lots adjacent to such premises were also

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304. *Id.*
305. art. I, § 20.
306. *Id.*
308. *Id.*
prohibited places.\textsuperscript{311} For example, if a shopping mall contained a restaurant that served beer, no one transporting a firearm could park anywhere in the mall’s lot.

Baton Rouge did not claim that parking lots were sensitive places. The district court applied strict scrutiny and held that the ordinance facially violated the Second Amendment.\textsuperscript{312}

\section*{F. Buffer Zones Around Residential Areas, Churches, Schools, and Liquor Stores}

When the Chicago city council banned all shooting ranges except ranges for government employees and professional security guards, the Seventh Circuit held the ban unconstitutional.\textsuperscript{313} In response, the council enacted legislation ordinance that allowed gun ranges in extremely restricted locations, comprising about two percent of the city.\textsuperscript{314} All of the locational restrictions were held unconstitutional.\textsuperscript{315} The restriction that involved the sensitive places rule was a ban on ranges within 500 feet of residences, schools, day-care facilities, places of worship, liquor retailers, children’s activities facilities, libraries, museums, or hospitals.\textsuperscript{316} Also, no two ranges could be closer than 100 feet from each other.\textsuperscript{317}

The federal district court upheld the distance laws under the sensitive places rule.\textsuperscript{318} To the district court, a sensitive places law was nearly immune to constitutional challenge.\textsuperscript{319}

A 2-1 panel of the Seventh Circuit reversed.\textsuperscript{320} The 500-foot ordinance “is not a limitation on where firearms may be carried,

\textsuperscript{311} Taylor v. City of Baton Rouge, 39 F. Supp. 3d 807 (M.D. La. 2014).
\textsuperscript{312} Id.
\textsuperscript{313} Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (“Ezell I”).
\textsuperscript{314} Ezell v. City of Chicago, 846 F.3d 888, 890 (7th Cir. 2017) (“Ezell II”) (“only 2.2% of the city’s total acreage is even theoretically available, and the commercial viability of any of these parcels is questionable—so much so that no shooting range yet exists.”).
\textsuperscript{315} Id.
\textsuperscript{316} Id.
\textsuperscript{317} Id. at 885.
\textsuperscript{318} Ezell v. City of Chicago, 70 F. Supp. 3d 871, 884–85 (N.D. Ill. 2014).
\textsuperscript{319} Id. at 895.
\textsuperscript{320} Ezell II, 846 F.3d 888.
so it doesn’t fall within the ambit” of Heller’s language about laws “forbidding the carrying of firearms in sensitive places.”

Moreover, any suggestion that firearms are categorically incompatible with residential areas—recall that residential districts are included in the City’s buffer-zone rule—is flatly inconsistent with Heller, which was explicit that possession of firearms in the home for self-defense is the core Second Amendment right.

Accordingly, the buffer zone ordinance enjoyed no presumption of lawfulness, and the City bore the burden of proving it constitutional under heightened scrutiny. The City’s justification for the distancing laws was that “firing ranges attract gun thieves, cause airborne lead contamination, and carry a risk of fire.” However, “The City has provided no evidentiary support for these claims, nor has it established that limiting shooting ranges to manufacturing districts and distancing them from the multiple and various uses listed in the buffer-zone rule has any connection to reducing these risks.”

Further, “The City’s own witnesses testified to the lack of evidentiary support for these assertions. They repeatedly admitted that they knew of no data or empirical evidence to support any of these claims. Indeed, “Patricia Scudiero, the City’s zoning administrator, conceded that neither she nor anyone else in her department made any effort to review how other cities zone firing ranges. She conducted no investigation, visited no firing ranges in other jurisdictions, consulted no expert, and essentially did no research at all.”

The City cited a study by the National Institute for Occupational Safety and Health “explaining that improperly ventilated shooting ranges can release lead-contaminated air into the surrounding environment. But the report goes on to describe

321. Id.
322. Id.
323. Id.
324. Id.
325. Id.
326. Id.
327. Id.
328. Id.

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appropriate filtering techniques that prevent this danger entirely. As for the concern about fire, the City provided no evidence to suggest that a properly constructed and responsibly operated commercial shooting range presents a greater risk of spontaneous combustion than other commercial uses.” 329 In fact, Chicago already had many safety regulations for gun ranges, which addressed environmental and fire issues. 330

“And if more were needed, the City concedes (as it must) that law enforcement and private-security ranges operate in commercial districts throughout Chicago near schools, churches, parks, and stores . . . . The City doesn’t even try to argue that commercial ranges create greater fire or environmental risks than law-enforcement ranges.” 331 Accordingly, the distancing requirements were struck down. 332

Dissenting in part, Judge Rovner would have upheld the distancing laws under the sensitive places rule. 333 She disagreed with the majority’s rule that Chicago’s evidentiary burden was just as high as it would be in a case restricting First Amendment rights. 334

VI. Applying the Doctrine

Synthesizing text, history, tradition, and precedent, this Part describes the methodology for analyzing sensitive places cases, discusses what rules can usefully be drawn from history, and offers suggestions for analysis of some particular types of places.

A. Structure of Judicial Review

*Sensitive places are places where restrictions on the right to arms are easier for the government to justify.* They are not places where the right to arms ceases to exist. Rather, restrictions in sensitive places enjoy a presumption of legality, and the

329. *Id.*
330. *Id.*
331. *Id.* at 896.
332. *Id.*
333. *Id.* at 902–03.
334. *Id.* at 903.
presumption is rebuttable. A “presumptively lawful” regulation can be rebutted. Consider an example from another “presumptively lawful” type of gun control: “conditions and qualifications on the commercial sale of arms.” A regulation requires that when the owner of a retail gun store goes home for the night, the guns must be locked up. This is an easy fit with the *Heller* dicta, and can speedily be held lawful.

But suppose that the anti-theft rule is that every gun in the store must be disassembled before the store closes at night. Or that the gun store may only be open for business five hours per week. Or that only persons with a college degree may work in a gun store. All of these would be “conditions and qualifications on the commercial sale of arms.” These laws are manifestly oppressive, extreme, and unreasonable. They should be subject to heightened scrutiny, and with heightened scrutiny applied, would be ruled unconstitutional.

The more unreasonable, oppressive, or excessive the regulation, the better the argument that the presumption has been overcome. In this argument, it also matters whether the regulation is “longstanding.”

*Laws that have been repealed are not “longstanding.”* A few scattered and eccentric laws, which were later repealed and were not replaced by a similar statute, do not make a particular gun control “longstanding.” Something that is “longstanding” has two characteristics: being “long” and being “standing.” If a law has been repealed, it is not “standing.”

*Location restrictions are not limited to sensitive places.* Without need for reliance on the sensitive places doctrine, locational restrictions may be upheld if the government carries its burden under heightened scrutiny. Without need for deciding that a particular location is “sensitive,” the government may prohibit gun carrying in certain locations by proving its case under intermediate scrutiny, strict scrutiny, or whatever other form of heightened scrutiny is appropriate.

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336. *See* 1 SHORTER OXFORD ENGLISH DICTIONARY 1625 (1993) (“adj. Of long standing; that has existed a long time, not recent.”).
B. History and Precedents

History and tradition will not provide direct answers to every question. Although the Heller dicta asserted that certain listed gun controls are “longstanding,” scholars have shown that some of them are not longstanding. For example, the 1968 federal Gun Control Act imposed a lifetime prohibition on the possession of any firearm (even long guns) for any felony (even statutory offenses with no mens rea). There is no historical support for such a wide-ranging ban.337 Instead, the only such restrictions that are even arguably “longstanding” are handgun bans for convicted violent felons.

While gun bans in certain government buildings and in polling places do have historical precedent, bans that apply to all government buildings do not.

Compared to arms bans in some “government buildings,” arms bans in “schools” have very weak historical lineage. The first broad bans on carrying at schools appear in a few states in the late nineteenth and early twentieth centuries. They are tainted by their obvious overbreadth—in that they also applied to mixed-sex private social gatherings anywhere in the state. Broad laws against guns in schools come mainly from the late twentieth century, and thus are too novel to be part of history and tradition.

Nevertheless, Heller did say “schools and government buildings.” As with the ban on felons, Heller’s dicta about “longstanding” laws was wrong, but the dicta are still there. Unless the Supreme Court offers further clarification, bans on arms carrying in schools and government buildings enjoy a presumption of constitutionality.

Extensions by analogy to schools and government buildings. It is difficult to create a rationale for extending the “sensitive places” doctrine to places that are not schools or government buildings. As discussed above, there are few “longstanding” restrictions on other locations.

Given the thin historical record, one can only guess about what factors make places “sensitive.” Some of the guesses are: places

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where most persons therein are minors (K-12 schools), places that concentrate adversarial conflict and can generate passionately angry emotions (courthouses, legislatures, polling places), or buildings containing people at acute personal risk of being targets of assassination (many government buildings).

The answer cannot be that the places are crowded. Sometimes they are, but no more so than a busy downtown sidewalk, and sidewalks are not sensitive places.

Rather than try to figure out analogies to “schools and government buildings,” the better judicial approach for other locations is simply to give the government the opportunity to prove its case under heightened scrutiny.

*Buffer zones are not sensitive places.* *Heller* allows for carry bans “in” sensitive places—not bans “around” or “near” sensitive places. Accordingly, buffer zones are not sensitive places.338

*The Second Amendment sensitive places doctrine has a First Amendment parallels.* For example, encouraging people to vote a particular way is a core First Amendment right in almost all public places. Yet states may prohibit electioneering activity at polling places.339 Newspaper censorship is generally forbidden, but student-written high school newspapers may be subject to some adult control.340

*Laws that broadly negate the right to arms are not legitimate precedents.* Laws that widely prohibit bearing arms are contrary to the text of the Second Amendment. Accordingly, they are not a legitimate part of the history and tradition of the right to bear arms. So no “sensitive places” precedent can be drawn from statutes that forbade bearing arms at all public assemblies or social gatherings. Although some of these laws were enacted long

338. See Hetzner, *supra* note 6, at 392 (“The Court’s decisions in *Heller* and *McDonald* used the preposition “in” when referring to schools, as opposed to using “around” or “near” (words that might have provided better constitutional protection to the 1000-foot perimeter established by the California and Illinois laws).”).


ago, none of them are longstanding, for every one of them has been repealed. Every state that had such a law has replaced it with laws allowing licensed concealed carry, or open carry, in public places, including places of public assembly or social intercourse.

The same point can be made about the 1328 Statute of Northampton. As authoritatively interpreted in 1686, the English statute allowed peaceable bearing of arms. American law courts took the same view. Even if Saul Cornell’s hyper-restrictive interpretation of the statute had been adopted in colonial America, that interpretation is textually foreclosed by the Second Amendment right to “bear arms.”

Laws about the manner of carrying are not part of the sensitive places doctrine. In the First Amendment’s familiar doctrine of “time, place, and manner” regulations, a “manner” regulation is different from a “place” regulation. Laws that ban concealed carry in certain locations, while allowing open carry in the same locations are “manner” laws, not “place” laws. To the extent that these laws allow open carry in certain locations, the laws indicate that those locations are not “sensitive.”

The rights of private property owners are not part of the sensitive places doctrine. Any private property owner can prohibit guns. The government is free to reinforce the property owners’ decisions by enacting relevant trespass laws—such as extra punishment for armed trespass when hunting on private land without permission. Private property in general is not part of the sensitive places doctrine. Rather, government assistance to property owners who want to exclude guns is simply an aspect of government support for property rights.

Similarly, the government may set orderly conditions for private property owners to exclude lawfully armed persons, such as by requiring private property that is open to the general public to have posted signs notifying gun carriers about the exclusion.

Today, government regulation of employer-employee or business-customer relations is common and is generally accepted as constitutional. Governments take many actions in favor of employees and customers. For example, twenty-five states prohibit employers from firing an employee for lawfully storing a
firearm in her car in a company parking lot. These laws are not directly part of the sensitive places doctrine, although they do indicate a legislative judgment that parking lots are not sensitive.

C. Considerations in Particular Cases

The government’s behavior can demonstrate the true importance of the alleged government interest. Passing a statute declaring some place to be a “gun free zone” does nothing to deter criminals from entering with guns and attacking the people inside. In contrast, when a building, such as a courthouse, is protected by metal detectors and guards, the government shows the seriousness of the government’s belief that the building is sensitive. This is what Colorado law requires for government office buildings that wish to ban licensed carry on the premises.

Screening and armed guards reduce the burden that is inflicted on citizens by locational arms bans. Disarmed, the citizen in a sensitive place cannot defend herself. But when there are metal detectors, the citizen is assured that criminals cannot bring in guns. When armed guards are present, the government takes the responsibility for having armed force at the ready to protect citizens.

Conversely, when the government provides no security at all—such as in a Post Office or its parking lot—the government’s behavior shows that the location is probably not sensitive; further, the disarmament burden inflicted on citizens is not mitigated by alternative protectors supplied by the government.

Not all schools are the same. Since “schools” in general are “sensitive places,” common sense indicates that a public elementary school is a “sensitive place.” But what about a private school of cosmetology, where all the students and teachers are adults? It would seem dubious that whatever makes many or most

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342 Colo. Rev. Stats. § 18-12-214(4) (requiring “security personnel” to use “electronic weapons screening devices” at all public entrances, and to store weapons for persons who enter the building).
schools “sensitive” would apply at the cosmetology school. Yet, the
District of Columbia’s version of its “gun free school zones” law
applies just as much to the private, adult, cosmetology school as to
the public elementary school.\footnote{See D.C. Code Ann. § 22-4502.1 (including any “vocational school”).}

A court should not give a presumption of constitutionality to a
gun ban as applied to the cosmetology school. Or if there is a
presumption, the presumption should be readily rebuttable.
Prohibiting a woman from possessing a handgun on her own
business premises is unreasonable.

\textit{Not all government buildings are the same.} Courthouses, the
White House, and Governors’ mansions easily fall into the
“sensitive places” category, at least for visitors. But an enclosed
rain shelter or restroom at a public park are not “sensitive places,”
even though they are “government buildings.”

\textit{Open areas, such as parking lots next to certain buildings, can be sensitive places, under certain conditions.} The White House
lawn should qualify as a sensitive place. The government controls
access to the lawn with the same kind of rigor (metal detectors and
armed guards) that is applied to the White House itself. Parking
lots, whether they are garages or just open paved areas, can be
part of their building’s sensitivity \textit{if} access to the lot is controlled
by the same kind of security that is used for the building itself.

A dirt parking lot at the trailhead of Bureau of Land
Management (“BLM”) wasteland property in Nevada is not a
sensitive place. Even if there is a one-man BLM office building
next to the parking lot, the parking lot is not sensitive.

As with “government buildings” themselves, the best approach
is to take into account the sensitivity of the parking area. Almost
always, the parking area will be less “sensitive” than the building
itself, but it may still be sensitive enough to fall within the
“sensitive places” rule.

\textit{Public parks are not sensitive places.} They are not buildings.
There is no practical means of preventing armed criminals from
entering. They are similar to the vast majority of land in the
United States, which is outdoors, not indoors.

\textit{Government exercise of monopoly power is relevant.} As courts
have pointed out, the burden of a gun ban in a sensitive place can be mitigated, in the sense that the citizen can simply choose not to visit the sensitive place. But the analysis shifts when the citizen must visit the sensitive place because of the government’s monopoly power.

By statute, the United States Postal Service is a monopoly. In order to access ordinary services for day-to-day life, a citizen may have to use the Postal Service. It is true that in recent years, the monopoly has become easier to evade; for example, people can send e-mail instead of postal mail. But that does not completely eliminate the impact of the monopoly in sometimes forcing citizens to use postal services. And in places like Avon, Colorado, with no home delivery, in forcing them to use post office buildings.

If the only way to register a copyright or patent were to physically enter a government building, the same point would apply to copyright or patent offices. Again, the government can show its seriousness, and mitigate the citizen’s burden, by employing metal detectors and armed guards at the Patent Office, or any other building where a government monopoly is being exercised.

VII. Conclusion

Despite Heller’s dicta, wide-ranging bans on bearing arms “in sensitive places such as schools and government buildings” have a weak foundation in history and tradition. Bans in particular government buildings, such as legislatures, polling places, and courthouses, have a stronger basis. Given the relatively thin historical record in support of the sensitive places doctrine, attempts to elaborate and extend the doctrine by analogy may be difficult. Often, the simpler approach will be to uphold a locational ban on bearing arms whenever the government carries its burden of proof under heightened scrutiny.