
The Racist Roots of Gun Control

The historical record provides compelling evidence that racism underlies gun control laws -- and not in any subtle way. Throughout much of American history, gun control was openly stated as a method for keeping blacks and Hispanics "in their place," and to quiet the racial fears of whites. This paper is intended to provide a brief summary of this unholy alliance of gun control and racism, and to suggest that gun control laws should be regarded as "suspect ideas," analogous to the "suspect classifications" theory of discrimination already part of the American legal system.

Racist arms laws predate the establishment of the United States. Starting in 1751, the French Black Code required Louisiana colonists to stop any blacks, and if necessary, beat "any black carrying any potential weapon, such as a cane." If a black refused to stop on demand, and was on horseback, the colonist was authorized to "shoot to kill." [1] Slave possession of firearms was a necessity at times in a frontier society, yet laws continued to be passed in an attempt to prohibit slaves or free blacks from possessing firearms, except under very restrictively controlled conditions. [2] Similarly, in the sixteenth century the colony of New Spain, terrified of black slave revolts, prohibited all blacks, free and slave, from carrying arms. [3]

In the Haitian Revolution of the 1790s, the slave population successfully threw off their French masters, but the Revolution degenerated into a race war, aggravating existing fears in the French Louisiana colony, and among whites in the slave states of the United States. When the first U. S. official arrived in New Orleans in 1803 to take charge of this new American possession, the planters sought to have the existing free black militia disarmed, and otherwise exclude "free blacks from positions in which they were required to bear arms," including such non-military functions as slave-catching crews. The New Orleans city government also stopped whites from teaching fencing to free blacks, and then, when free blacks sought to teach fencing, similarly prohibited their efforts as well. [4]

It is not surprising that the first North American English colonies, then the states of the new republic, remained in dread fear of armed blacks, for slave revolts against slave owners often degenerated into less selective forms of racial warfare. The perception that free blacks were sympathetic to the plight of their enslaved brothers, and the dangerous example that "a Negro could be free" also caused the slave states to pass laws designed to disarm all blacks, both slave and free. Unlike the gun control laws passed after the Civil War, these antebellum statutes were for blacks alone. In Maryland, these prohibitions went so far as to prohibit free blacks from owning dogs without a license, and authorizing any white to kill an unlicensed dog owned by a free black, for fear that blacks would use dogs as weapons. Mississippi went further, and prohibited any ownership of a dog by a black person. [5]

Understandably, restrictions on slave possession of arms go back a very long way. While arms restrictions on *free* blacks predate it, these restrictions increased dramatically after Nat Turner's Rebellion in 1831, a revolt that caused the South to become increasingly irrational in its fears. [6] Virginia's response to Turner's Rebellion prohibited free blacks "to keep or carry any firelock of any kind, any military weapon, or any powder or lead..." The existing laws under which free blacks were occasionally licensed to possess or carry arms was also repealed, making arms possession completely illegal for free blacks. [7] But even before this action by the Virginia Legislature, in the aftermath of Turner's Rebellion, the discovery that a free black family possessed lead shot for use as scale weights, without powder or weapon in which to fire it, was considered sufficient reason for a frenzied mob to discuss summary execution of the owner. [8] The analogy to the current hysteria where mere possession of ammunition in some states without a firearms license may lead to jail time, should be obvious.

One example of the increasing fear of armed blacks is the 1834 change to the Tennessee Constitution, where Article XI, 26 of the 1796 Tennessee Constitution was revised from: "That the freemen of this State have a right to keep and to bear arms for their common defence," [9] to: "That the free *white* men of this State have a right to keep and to bear arms for their common defence." [10] [emphasis added] It is not clear what motivated this change, other than Turner's bloody insurrection. The year before, the Tennessee Supreme Court had recognized the right to bear arms as an individual guarantee, but there is nothing in that decision that touches on the subject of race. [11]

Other decisions during the antebellum period were unambiguous about the importance of race. In State v. Huntly (1843), the North Carolina Supreme Court had recognized that there was a right to carry arms guaranteed under the North Carolina Constitution, as long as such arms were carried in a manner not likely to frighten people. [12] The following year, the North Carolina Supreme Court made one of those decisions whose full significance would not appear until after the Civil War and passage of the Fourteenth Amendment. An 1840 statute provided:

> That if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence therefor from the Court of Pleas and Quarter Sessions of his or her county, within one year preceding the wearing, keeping or carrying therefor, he or she shall be guilty of a misdemeanor, and may be indicted therefor. [13]

Elijah Newsom, "a free person of color," was indicted in Cumberland County in June of 1843 for carrying a shotgun without a license -- at the very time the North Carolina Supreme Court was deciding Huntly. Newsom was convicted by a jury; but the trial judge directed a not guilty verdict, and the state appealed to the North Carolina Supreme Court. Newsom's attorney argued that the statute requiring free blacks to obtain a license to "keep and bear arms" was in violation of both the Second Amendment to the U. S. Constitution, and the North Carolina Constitution's similar guarantee of a right to keep and bear arms. [14] The North Carolina Supreme Court refused to accept that the Second Amendment was a limitation on state laws, but had to deal with the problem of the state constitutional guarantees, which had been used in the Huntly decision, the year before.

The 17th article of the 1776 North Carolina Constitution declared:

> That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power. [15]

The Court asserted that: "We cannot see that the act of 1840 is in conflict with it... The defendant is not indicted for carrying arms in defence of the State, nor does the act of 1840 prohibit him from so doing." [16] But in Huntly, the Court had acknowledged that the restrictive language "for the defence of the State" did not preclude an individual right. [17] The Court then attempted to justify the necessity of this law:

> Its only object is to preserve the peace and safety of the community from being disturbed by an indiscriminate use, on ordinary occasions, by free men of color, of fire arms or other arms of an offensive character. Self preservation is the first law of nations, as it is of individuals. [18]

The North Carolina Supreme Court also sought to repudiate the idea that free blacks were protected by the North Carolina Constitution's Bill of Rights by pointing out that the Constitution excluded free blacks from voting, and therefore free blacks were not citizens. Unlike a number of other state constitutions with right to keep and bear arms provisions that limited this right only to citizens, [19] Article 17 guaranteed this right to the people -- and try as hard as they might, it was difficult to argue that a "free person of color," in the words of the Court, was not one of "the people."

It is one of the great ironies that, in much the same way that the North Carolina Supreme Court recognized a right to bear arms in 1843 -- then a year later declared that free blacks were not included -- the Georgia Supreme Court did likewise before the 1840s were out. The Georgia Supreme Court found in Nunn v. State (1846) that a statute prohibiting the sale of concealable handguns, sword-canes, and daggers violated the Second Amendment:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all of this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, reestablished by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta! And Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans, plead eloquently for this interpretation! [20]

Finally, after this paean to liberty -- in a state where much of the population remained enslaved, forbidden by law to possess arms of any sort -- the Court defined the valid limits of laws restricting the bearing of arms:

> We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self- defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void... [21]

"Citizen"? Within a single page, the Court had gone from "right of the whole people, old and young, men, women and boys" to the much more narrowly restrictive right of a "citizen." The motivation for this sudden narrowing of the right appeared two years later.

The decision Cooper and Worsham v. Savannah (1848) was not, principally, a right to keep and bear arms case. In 1839, the city of Savannah, Georgia, in an admitted effort "to prevent the increase of free persons of color in our city," had established a $100 per year tax on free blacks moving into Savannah from other parts of Georgia. Samuel Cooper and Hamilton Worsham, two "free persons of color," were convicted of failing to pay the tax, and were jailed. [22] On appeal, counsel for Cooper and Worsham argued that the ordinance establishing the tax was deficient in a number of technical areas; the assertion of most interest to us is, "In Georgia, free persons of color have constitutional rights..." Cooper and Worsham's counsel argued that these rights included writ of habeas corpus, right to own real estate, to be "subject to taxation," "[t]hey may sue and be sued," and cited a number of precedents under Georgia law in defense of their position. [23]

Justice Warner delivered the Court's opinion, most of which is irrelevant to the right to keep and bear arms, but one portion shows the fundamental relationship between citizenship, arms, and elections, and why gun control laws were an essential part of defining blacks as "non-citizens": "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." [24] The Georgia Supreme Court did agree that the ordinance jailing Cooper and Worsham for non-payment was illegal, and ordered their release, but the comments of the Court made it clear that their brave words in Nunn v. State (1846) about "the right of the people," really only meant white people.

While settled parts of the South were in great fear of armed blacks, on the frontier, the concerns about Indian attack often forced relaxation of these rules. The 1798 Kentucky Comprehensive Act allowed slaves and free blacks on frontier plantations "to keep and use guns, powder, shot, and weapons, offensive and defensive." Unlike whites, however, a license was required for free blacks or slaves to carry weapons. [25]

The need for blacks to carry arms for self-defense included not only the problem of Indian attack, and the normal criminal attacks that anyone might worry about, but he additional hazard that free blacks were in danger of being kidnapped and sold into slavery. [26] A number of states, including Ohio, Indiana, Illinois, Michigan, and Wisconsin, passed laws specifically to

prohibit kidnapping of free blacks, out of concern that the federal Fugitive Slave Laws would be used as cover for re-enslavement. [27]

The end of slavery in 1865 did not eliminate the problems of racist gun control laws; the various Black Codes adopted after the Civil War required blacks to obtain a license before carrying or possessing firearms or Bowie knives; these are sufficiently well-known that any reasonably complete history of the Reconstruction period mentions them. These restrictive gun laws played a part in the efforts of the Republicans to get the Fourteenth Amendment ratified, because it was difficult for night riders to generate the correct level of terror in a victim who was returning fire. [28] It does appear, however, that the requirement to treat blacks and whites equally before the law led to the adoption of restrictive firearms laws in the South that were equal in the letter of the law, but unequally enforced. It is clear that the vagrancy statutes adopted at roughly the same time, in 1866, were intended to be used against blacks, even though the language was race-neutral. [29]

The former states of the Confederacy, many of which had recognized the right to carry arms openly before the Civil War, developed a very sudden willingness to qualify that right. One especially absurd example, and one that includes strong evidence of the racist intentions behind gun control laws, is Texas.

In Cockrum v. State (1859), the Texas Supreme Court had recognized that there was a right to carry defensive arms, and that this right was protected under both the Second Amendment, and section 13 of the Texas Bill of Rights. The outer limit of the state's authority (in this case, attempting to discourage the carrying of Bowie knives), was that it could provide an enhanced penalty for manslaughters committed with Bowie knives. [30] Yet, by 1872, the Texas Supreme Court denied that there was any right to carry any weapon for self-defense under either the state or federal constitutions -- and made no attempt to explain or justify why the Cockrum decision was no longer valid. [31]

What caused the dramatic change? The following excerpt from that same decision -- so offensive that no one would dare make such an argument today -- sheds some light on the racism that apparently caused the sudden perspective change:

> The law under consideration has been attacked upon the ground that it was contrary to public policy, and deprived the people of the necessary means of self- defense; that it was an innovation upon the customs and habits of the people, to which they would not peaceably submit... We will not say to what extent the early customs and habits of the people of this state should be respected and accommodated, where they may come in conflict with the ideas of intelligent and well-meaning legislators. *A portion of our system of laws, as well as our public morality, is derived from a people the most peculiar perhaps of any other in the history and derivation of its own system. Spain, at different periods of the world, was dominated over by the Carthagenians, the Romans, the Vandals, the Snovi, the Allani, the Visigoths, and Arabs; and to this day there are found in the Spanish codes traces of the laws and customs of each of these nations blended together in a system by no means to be compared with the sound philosophy and pure morality of the common law.* [32] [emphasis added]

This particular decision is more open than most as to its motivations, but throughout the South during this period, the existing precedents that recognized a right to open carry under state constitutional provisions were being narrowed, or simply ignored. Nor was the reasoning that led to these changes lost on judges in the North. In 1920, the Ohio Supreme Court upheld the conviction of a Mexican for concealed carry of a handgun--while asleep in his own bed. Justice Wanamaker's scathing dissent criticized the precedents cited by the majority in defense of this absurdity:

> 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 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. [33]

While not relevant to the issue of racism, Justice Wanamaker's closing paragraphs capture well the biting wit and intelligence of this jurist, who was unfortunately, outnumbered on the bench:

> I hold that the laws of the state of Ohio should be so applied and so interpreted as to favor the law-abiding rather than the law-violating people. If this decision shall stand as the law of Ohio, a very large percentage of the good people of Ohio to-day are criminals, because they are daily committing criminal acts by having these weapons in their own homes for their own defense. The only safe course for them to pursue, instead of having the weapon concealed on or about their person, or under their pillow at night, is to hang the revolver on the wall and put below it a large placard with these words inscribed:
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> "The Ohio supreme court having decided that it is a crime to carry a concealed weapon on one's person in one's home, even in one's bed or bunk, this weapon is hung upon the wall that you may see it, and before you commit any burglary or assault, please, Mr. Burglar, hand me my gun." [34]

There are other examples of remarkable honesty from the state supreme courts on this subject, of which the finest is probably Florida Supreme Court Justice Buford's concurring opinion in Watson v. Stone (1941), in which a conviction for carrying a handgun without a permit was overturned, because the handgun was in the glove compartment of a car:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. [35]

Today is not 1893, and when proponents of restrictive gun control insist that their motivations are color-blind, there is a possibility that they are telling the truth. Nonetheless, there are some rather interesting questions that should be asked today. The most obvious question is, "Why should a police chief or sheriff have any discretion in issuing a concealed handgun permit?" Here in California, even the state legislature's research arm--hardly a nest of pro-gunners--has admitted that the vast majority of permits to carry concealed handguns in California are issued to white males. [36] Even if overt racism is not an issue, an official may simply have more empathy with an applicant of a similar cultural background, and consequently be more able to relate to the applicant's concerns. As my wife pointedly reminded a police official when we applied for concealed weapon permits, "If more police chiefs were women, a lot more women would get permits, and be able to defend themselves from rapists."

Gun control advocates today are not so foolish as to openly promote racist laws, and so the question might be asked what relevance the racist past of gun control laws has. One concern is that the motivations for disarming blacks in the past are really not so different from the motivations for disarming law-abiding citizens today. In the last century, the official rhetoric in support of such laws was that "they" were too violent, too untrustworthy, to be allowed weapons. Today, the same elitist rhetoric regards law-abiding Americans in the same way, as child-like creatures in need of guidance from the government. In the last century, while never openly admitted, one of the goals of disarming blacks was to make them more willing to accept various forms of economic oppression, including the sharecropping system, in which free blacks were reduced to an economic state not dramatically superior to the conditions of slavery.

In the seventeenth century, the aristocratic power structure of colonial Virginia found itself confronting a similar challenge from lower class whites. These poor whites resented how the men who controlled the government used that power to concentrate wealth into a small number of hands. These wealthy feeders at the government trough would have disarmed poor whites if they could, but the threat of both Indian and pirate attack made this impractical; for all white men "were armed and had to be armed..." Instead, blacks, who had occupied a poorly defined status between indentured servant and slave, were reduced to hereditary chattel slavery, so that poor whites could be economically advantaged, without the upper class having to give up its privileges. [37]

Today, the forces that push for gun control seem to be heavily (though not exclusively) allied with political factions that are committed to dramatic increases in taxation on the middle class. While it would be hyperbole to compare higher taxes on the middle class to the suffering and deprivation of sharecropping or slavery, the analogy of disarming those whom you wish to economically disadvantage, has a certain worrisome validity to it.

Another point to consider is that in the American legal system, certain classifications of governmental discrimination are considered constitutionally suspect, and these "suspect classifications" (usually considered to be race and religion) come to a court hearing under a strong presumption of invalidity. The reason for these "suspect classifications" is because of the long history of governmental discrimination based on these classifications, and because these classifications often impinge on fundamental rights. [38]

In much the same way, gun control has historically been a tool of racism, and associated with racist attitudes about black violence. Similarly, many gun control laws impinge on that most fundamental of rights: self-defense. Racism is so intimately tied to the history of gun control in America that we should regard gun control aimed at law-abiding people as a "suspect idea," and require that the courts use the same demanding standards when reviewing the constitutionality of a gun control law, that they would use with respect to a law that discriminated based on race.

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NOTES

1. Thomas N. Ingersoll, "Free Blacks in a Slave Society: New Orleans, 1718-1812", _William and Marry Quarterly_, 48:2 [April, 1991], 178-79.

2. Daniel H. Usner, Jr., _Indians, Settlers, & Slaves in a Frontier Exchange Economy: The Lower Mississippi Valley Before 1783_, (Chapel Hill, N.C.: University of North Carolina Press, 1992), 139, 165, 187.

3. Michael C. Meyer and William L. Sherman, _The Course of Mexican History_, 4th ed., (New York, Oxford University Press: 1991), 216.

4. Ingersoll, 192-200. Benjamin Quarles, _The Negro in the Making of America_, 3rd ed., (New York, Macmillan Publishing: 1987), 81.

5. Theodore Brantner Wilson, _The Black Codes of the South_ (University of Alabama Press: 1965), 26-30.

6. Stanley Elkins, _Slavery_, (Chicago, University of Chicago Press: 1968), 220.

7. Eric Foner, ed., _Nat Turner_, (Englewood Cliffs, N.J., Prentice-Hall: 1971), 115.

8. Harriet Jacobs [Linda Brant], _Incidents in the Life of a Slave Girl_, (Boston: 1861), in Henry Louis Gates, Jr., ed., _The Classic Slave Narratives_, (New York, Penguin Books: 1987), 395-396.

9. Francis Newton Thorpe, _The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America_, (Washington, Government Printing Office: 1909), reprinted (Grosse Pointe, Mich., Scholarly Press: n.d.), 6:3424.

10. Thorpe, 6:3428.

11. Simpson v. State, 5 Yerg. 356 (Tenn. 1833).

12. State v. Huntly, 3 Iredell 418, 422, 423 (N.C. 1843).

13. State v. Newsom, 5 Iredell 181, 27 N.C. 250 (1844).

14. State v. Newsom, 5 Iredell 181, 27 N.C. 250, 251 (1844).

15. Thorpe, 5:2788.

16. State v. Newsom, 5 Iredell 181, 27 N.C. 250, 254 (1844).

17. State v. Huntly, 3 Iredell 418, 422 (N.C. 1843).

18. State v. Newsom, 5 Iredell 181, 27 N.C. 250, 254 (1844).

19. Early state constitutions limiting the right to bear arms to citizens: Connecticut (1818), Kentucky (1792 & 1799), Maine (1819), Mississippi (1817), Pennsylvania (1790 -- but not the 1776 constitution), Republic of Texas (1838), State of Texas (1845).

20. Nunn v. State, 1 Ga. 243, 250, 251 (1846).

21. Nunn v. State, 1 Ga. 243, 250, 251 (1846).

22. Cooper and Worsham v. Savannah, 4 Ga. 68, 69 (1848).

23. Cooper and Worsham v. Savannah, 4 Ga. 68, 70, 71 (1848).

24. Cooper and Worsham v. Savannah, 4 Ga. 68, 72 (1848).

25. Juliet E. K. Walker, _Free Frank: A Black Pioneer on the Antebellum Frontier_, (Lexington, KY, University Press of Kentucky: 1983), 21. This is an inspiring biography of a slave who, through hard work moonlighting in the production of saltpeter (a basic ingredient of black powder) and land surveying, saved enough money to buy his wife, himself, and eventually all of his children and grandchildren out of slavery -- while fighting against oppressive laws and vigorous racism. Most impressive of all, is that he did it without ever learning to read or write.

26. Walker, 73.

27. Stephen Middleton, _The Black Laws in the Old Northwest: A Documentary History_, (Westport, Conn., Greenwood Press: 1993), 27-32, 227-240, 309-314, 353-357, 403-404.

28. Michael Les Benedict, _The Fruits of Victory: Alternatives to Restoring the Union_, 1865-1877, (New York, J.B. Lippincott Co.: 1975), 87. Francis L. Broderick, _Reconstruction and the

American Negro, 1865-1900_, (London, Macmillan Co.: 1969), 21. Dan T. Carter, _When The War Was Over: The Failure of Self-Reconstruction in the South, 1865- 1867_, (Baton Rouge, Louisiana State University Press: 1985), 219-221. Eric Foner, _Reconstruction_, (New York, Harper & Row: 1988), 258-259.

29. Foner, _Reconstruction_, 200-201.

30. Cockrum v. State, 24 Tex. 394, 401, 402, 403 (1859).

31. English v. State, 35 Tex. 473, 475 (1872).

32. English v. State, 35 Tex. 473, 479, 480 (1872).

33. State v. Nieto, 101 Ohio St. 409, 430, 130 N.E. 663 (1920).

34. State v. Nieto, 101 Ohio St. 409, 436, 130 N.E. 663 (1920).

35. Watson v. Stone, 4 So.2d 700, 703 (Fla. 1941).

36. Assembly Office of Research, _Smoking Gun: The Case For Concealed Weapon Permit Reform_, (Sacramento, State of California: 1986), 5.

37. Edmund S. Morgan, "Slavery and Freedom: The American Paradox," in Stanley N. Katz, John M. Murrin, and Douglas Greenberg, ed., _Colonial America: Essays in Politics and Social Development_, 4th ed., (New York: McGraw-Hill, Inc, 1993), 280.

38. Thomas G. Walker, "Suspect Classifications", _Oxford Companion to the Supreme Court of the United States_, (New York, Oxford University Press: 1992), 848.