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Our Non-Originalist Right to Bear Arms

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Our Non-Originalist Right to Bear Arms

ROBERT LEIDER^{*}

District of Columbia v. Heller was a landmark, if controversial, opinion. Discussion has centered on the merits of its self-described originalist approach. Supporters praise its efforts to return to a more originalist and textualist approach to constitutional questions, whereas critics challenge the accuracy of Heller's historical claims and criticize its departure from precedent.

This Article challenges much of the conventional wisdom about Heller, its use of originalism, and its relationship to nineteenth- and twentieth-century case law. This Article argues that, despite much of its rhetoric, Heller actually exemplified popular constitutionalism—not originalism—in the way it approached the most important practical question at issue in the case: determining the content of the right to bear arms. On that question, Heller—and not United States v. Miller—is largely consistent with the way, throughout most of American history, that both state and federal courts have adjudicated cases involving the right to bear arms. In particular, this Article argues that the dominant approach followed by nineteenth-century courts was neither “originalist” nor “textualist” about the right to bear arms. These courts did not look to how James Madison viewed the right in 1789 or how Americans in 1791 commonly understood the Second Amendment. Instead, they attempted to find compromise positions on the scope of the right to bear arms to accommodate a population divided between those believing in the right and those seeking stronger restrictions on weapons. To do this, the nineteenth-century courts shifted their understanding of the purpose of the right to bear arms over time, which, in turn, enabled them to reach conclusions about the content of the right that reflected the contemporaneous popular understanding of the right—and of the right's limits. In this revisionist account, Miller is the case that represented a break with the courts' historical approach because it arguably allowed access to common military weapons—an approach that did not readily allow courts to adjust the Second Amendment right to new circumstances as these military weapons became increasingly destructive. These difficulties prompted subsequent lower courts to adopt the “collective rights” interpretation of Miller—an interpretation that was too rigidly restrictive, and therefore, also difficult to adjust to reflect popular understandings. The Article concludes that Heller reflects a new compromise: expanding the individual self-defense rationale while diminishing the Second Amendment's military objectives. This new compromise recognizes an individual right to have self-defense weapons, while allowing greater

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control over military-style weapons—which aligns with how mainstream Americans today view the right. Although Heller radically reshaped the Second Amendment right to fit the twenty-first-century popular understanding of the right, its methodological approach is quite consistent with how most courts have approached Second Amendment questions—an approach that sounds more in popular constitutionalism than originalism.

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INTRODUCTION

Two debates are raging on the Second Amendment. First, commentators have dissected *District of Columbia v. Heller*¹ from every direction to determine whether it is “originalist” or not—and, if it is originalist, what kind. Original public meaning? Subjective intent of the Framers? New originalism? Old originalism? The second debate concerns what standard of review will (or should) apply to Second Amendment claims following *Heller*, which only determined that the review would not be rational basis.²

Like every debate on the Second Amendment, consensus on these questions proves elusive. With respect to the first question, Mark Tushnet accepts the characterization of *Heller* as “the most originalist opinion in recent Supreme Court history.”³ Randy Barnett calls Justice Scalia’s majority opinion “the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”⁴ Reva Siegel finds herself unable to concur in these assessments.

1. 554 U.S. 570 (2008).

2. *Id.* at 628 n.27.

3. Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 609 (2008).

4. Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

For her, *Heller* is a product of twentieth-century social movements.⁵ Saul Cornell states that Justice Scalia's majority opinion pitted original public meaning originalism against Justice Stevens's approach to look toward the Framers' intent.⁶ The critiques of *Heller* pour in from liberals⁷ and conservatives⁸ alike.

The second question is no less controversial. Commentators have called for, and federal courts have applied, virtually every recognizable standard of review.⁹ Unlike federal courts, state courts have nearly 200 years of experience adjudicating the right to bear arms. But analytical study into the state cases remains in its nascent stages.¹⁰

Adam Winkler, in *The Reasonable Right to Bear Arms*, notes that state courts distinguish between laws that purport to "regulate" the right to bear arms and those laws that result in the total destruction of the right.¹¹ With one exception,¹² courts have upheld laws that regulate the right but have struck down laws that prohibit exercise of the right entirely. Identifying the "regulation/prohibition" distinction is important when describing how courts have adjudicated claims under the Second Amendment and state analogues. But the "regulation/prohibition" framework leaves open a more basic question: What is the content of the right to keep and bear

5. Reva B. Siegel, *The Supreme Court, 2007 Term—Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192–93 (2008).

6. Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 625 (2008).

7. See, e.g., Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008).

8. See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32, 33 (classifying *Heller* as "faux originalism").

9. See Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1 (2009); Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S. CAL. L. REV. 547 (2009). See generally Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court To Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL'Y 489 (2012) (collecting cases and commentary); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551 (2009).

10. See, e.g., CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS (1994); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011) (arguing, incorrectly in my view, that *McDonald* rejected the near-unanimous reasonableness review of state courts for gun control laws under the Second Amendment); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177 (1982); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359; David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113 (2010) (surveying analytical approaches of state courts); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585 (2012).

11. Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 601–02 (2006) [hereinafter Winkler, *Reasonable*]; see also Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 717 (2007) [hereinafter Winkler, *Scrutinizing*].

12. See *infra* text accompanying notes 107–09.

arms? Without the answer to this question, it is impossible to evaluate whether a law is a mere “regulation” or a total “prohibition.”¹³

Analytically, a “right” can be divided into four components.¹⁴ There is the *subject* of the right—that is, who holds the right.¹⁵ Second, the *object* of the right consists of the persons or entities against whom the right is held. Third, we can ask, “Why do we have the right?”—that is, what is the *purpose* of the right. Finally, we have to define the *content* of the right. This Article is about how courts have shaped the *content* of the right to bear arms around contemporaneous public opinion, and how courts adjust their understanding of the *purpose* of the right when shaping and reshaping the content. In so doing, this Article synthesizes the originalism/popular constitutionalism debate with the nascent literature on state court review.

In analyzing Second Amendment questions about the content of the right, courts usually have not asked what the Framers intended when they drafted the Second Amendment, nor have they asked what Americans in 1791 understood the Second Amendment to mean. Instead, courts define the content of the right to keep and bear arms by looking to *contemporaneous notions of reasonableness*. The right, then, gets applied against jurisdictions that have strayed too far from the

13. A number of contemporary cases ask not just if the right is “prohibited” entirely, but whether the challenged regulation “frustrates” the purposes of the right. *See, e.g.*, *City of Tucson v. Rineer*, 971 P.2d 207, 214 (Ariz. Ct. App. 1998) (prohibition of firearm in a city park “neither frustrates nor impairs” right to bear arms); *Dano v. Collins*, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990) (holding that the ban on concealed weapons did not frustrate the right to bear arms because individuals could carry their weapons openly); *Benjamin v. Bailey*, 662 A.2d 1226, 1235 (Conn. 1995) (upholding Connecticut’s assault weapons ban under “frustrates” standard); *State v. Comeau*, 448 N.W.2d 595 (Neb. 1989); *State v. Kessler*, 614 P.2d 94, 99 (Or. 1980) (observing that courts generally ask whether “a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution” and listing prohibitions on concealed weapons and bans on possession of firearms by felons as examples of permissible regulations); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988) (holding that a requirement to obtain a license to carry a handgun, which was only issued after proving the applicant’s need to a judicial officer who had discretion to issue or not issue the license, frustrated the exercise of the right to bear a handgun for self-defense, and so was unconstitutional); *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785 (invalidating prohibition of concealed weapons in a person’s place of business on the grounds that the restriction would frustrate the right to bear arms for self-defense); *see also supra* note 10 (collecting literature discussing the “frustrates” framework). I treat the “frustrates” and “total prohibition” language as roughly synonymous. The question is rarely whether the challenged regulation “prohibits” exercising the right to keep and bear arms so thoroughly that people have no right to possess or carry any type of arm. With the exception of felons and related classes, American laws have not disarmed people entirely. Instead, the question courts generally ask is whether the law at issue totally prohibits a core component of the right, such as the ability to possess protected classes of arms or, in many jurisdictions, the ability to carry a firearm in public for self-defense. My thanks to Michael O’Shea for alerting me to this issue and for collecting the cases that use the “frustrates” test.

14. *See* DAVID RODIN, *WAR AND SELF-DEFENSE* 36 (2002).

15. In the case of the Second Amendment, the commentators generally debate whether the right belongs to individuals generally, to only those individuals in a “well-regulated militia,” or to state governments. *See infra* text accompanying note 344.

then-commonly accepted scope of the right. In other words, if a jurisdiction restricts the right to keep and bear arms beyond the contemporaneous popularly accepted limit, courts will strike the law down as a “prohibition” of the right. In contrast, laws within the popularly accepted mainstream are upheld as mere “regulations”—even if the laws are prohibitory in character (e.g., a complete ban on felons possessing guns¹⁶). Thus, when we ask how future courts will apply *Heller* to novel Second Amendment claims, we should ask not what the Framers understood the right to be, but how the contemporaneous population views the right to bear arms.¹⁷

This Article begins by examining the development of this doctrine in the nineteenth century. Since the nineteenth century, the population, legislature, and courts have engaged in a dialectic on the content of the right to keep and bear arms under the Second Amendment and state analogues.¹⁸ Restrictions on weapons are almost always passed by legislatures in response to specific societal problems that prompt concerted calls for legislation.¹⁹ Courts, then, get forced to mediate between diverse social movements. In mediating these disputes, courts are very sensitive to popular sentiments regarding the role of weapons in society.

While *Heller* employed originalism in determining the *subjects* of the Second Amendment right, *Heller* is best understood as a continuation of this nineteenth-century interpretive methodology when defining the *content* of the right to bear arms. The nineteenth century witnessed two phases in Second Amendment jurisprudence, one in the antebellum period and one following Reconstruction. In each time period, the courts refashioned the right to keep and bear arms in a way that respected the popular conception of the right as an individual right while giving legislatures adequate authority to resolve contemporaneous social problems involving weapons. Courts accomplish this by shifting their theory about the *purpose* of the right to bear arms over time. When courts shift their theory about

16. See, e.g., *People v. Swint*, 572 N.W.2d 666, 671 (Mich. Ct. App. 1997) (felon-in-possession statute a “reasonable regulation” of the right to bear arms).

17. I say “novel” because courts (whether state or federal) have to contend with *stare decisis*. As I argue below, courts will retheorize the purpose (and therefore the content) of the right to bear arms when *stare decisis* becomes too much of an impediment to fashioning the right around contemporary public meaning. Until that happens, however, a jurisdiction’s jurisprudence on the right to bear arms is generally a mixture of the contemporary public understanding of the right and holdover rules from earlier generations’ understanding of the right. And even when the right gets refashioned, a few holdover rules remain, although often in greatly altered form (for example, the post-Civil War rule in many states allowing individuals to carry pistols openly in the hand for individual self-defense when the contemporary jurisprudence largely had stopped recognizing a general right to carry handguns for personal self-defense).

18. As I describe below, nineteenth-century courts viewed the Second Amendment and state analogues as codifying the same preexisting right to bear arms. The former bound the federal government, while the latter bound the states. Thus, state courts’ analyses did not change significantly even if their constitutional provisions had slightly different wording from the Second Amendment or from the right-to-bear-arms provisions in sister states.

19. I describe three examples below, including antebellum Southern concerns with dueling, post-Civil War difficulties with handguns, and the use of submachine guns during Prohibition.

the purpose of the right to bear arms, they are able to adjust concomitantly the *content* of the right to bear arms so that the content of the right reflects contemporaneous notions of reasonableness. *Heller*, for example, changed the right to be primarily about private self-defense in the home in order to justify prohibitions on individuals having military arms that comport with *today's* understanding of a reasonable right to bear arms. Although *Heller* radically reshaped the Second Amendment right to fit the twenty-first-century popular understanding of the right, its popular constitutional project is deeply rooted in our nation's historical Second Amendment jurisprudence.²⁰

This Article has four parts. In Part I, I describe how the antebellum state courts resolved challenges to early state laws regulating weapons, especially initial prohibitions against the carrying of concealed weapons. Although many state courts gave a superficial history of the right to bear arms, the content of the right took on a dimension that, like *Heller*, looked more populist than historical. Nearly every state court recognized a right to bear arms for personal purposes under the Second Amendment and state analogues. This even included states, such as Tennessee and North Carolina, where the state constitution did not seem to protect a right to bear arms for private purposes at all (e.g., the right only extended “for their common defence”²¹ or “for defence of the state”²²). The broad scope of the right to bear arms was encapsulated in Chief Justice Taney's comment, in *Dred Scott*, that free blacks could not be citizens for, if they were, they would have a right “to keep and carry arms wherever they went.”²³

Although state courts approved a very broad right to bear arms for personal purposes, they also came under significant pressure to recognize the power of the legislature to regulate the right. Southern states were enacting laws against the carrying of concealed weapons in order to stop dueling and other honor-related killings. The Kentucky Court of Appeals, the first state court to hear a challenge to a law alleged to violate the right to bear arms, took an absolutist approach, denying any power of the legislature to regulate concealed weapons.²⁴ The court saw no difference between a “regulation” and a “prohibition” of the right to bear arms.²⁵ The Kentucky court's holding is a distinct outlier in American jurisprudence and was quickly repudiated by every other state court to consider the scope of the right. The foundation of the “regulation/prohibition” distinction came in this repudiation: courts gave state legislatures power to regulate weapons provided they did not abridge the right entirely, as defined by how the contemporaneous population then understood the right. And the antebellum right, consistent with popular sentiment, included the right to have arms in public for private self-defense. Courts permitted states to prohibit concealed weapons, but made it clear that prohibitions on unconcealed weapons would not be allowed. Some of these early cases began to

20. On the role of popular opinion in shaping the Supreme Court's jurisprudence, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

21. TENN. CONST. of 1796, art. XI, § 26.

22. N.C. CONST. of 1776, Declaration of Rights, § XVII.

23. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

24. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

25. *Id.* at 92.

restrict the “arms” that were protected by the Second Amendment and state analogues—generally excluding small weapons designed to be concealed—but a few antebellum courts went further and protected only military-type weapons. Courts sustained more pervasive regulation of select groups (e.g., prohibitions on free blacks carrying arms) only under the theory that the regulated group did not possess full constitutional rights.

In Part II, I explain how post-Civil War²⁶ courts adopted a different theory of the purpose of the right to bear arms in order to approve more severe regulations on handguns. Contemporaneous legislatures, especially in Southern states, faced two problems. First, while the Fourteenth Amendment made former slaves and free blacks full citizens of the United States, the Southern white community did not want black citizens to carry arms. Legislatures and courts could not rely on the previous justification that all blacks, including those who were free, were noncitizens beyond the full protection of the Bill of Rights. Second, the prohibitions on concealed weapons proved inadequate to accomplish contemporaneous crime-control objectives. There was widespread defiance of the prohibition, and juries largely refused to convict white violators. The crime control problem was exacerbated by the increasing deadliness of modern weapons, especially concealable revolvers, which were ubiquitous following the Civil War. While antebellum concealed weapon bans targeted Bowie knives, daggers, and similar edged weapons, Reconstruction-era laws targeted handguns. This targeting took several forms. First, virtually every new state and territory adopted laws on concealed weapons; the only states that lacked concealed weapons laws were some of the older Northern states. Second, many Southern states began to prohibit *all* carrying of handguns, regardless of whether the weapon was concealed. Generally, only travelers and peace officers were exempt. Third, a few jurisdictions—most notably Tennessee—enacted near-total prohibitions on the sale of handguns. Fourth, states began to restrict the places weapons could be carried, often banning weapons in courts, bars, polling places, and public gatherings.

Courts responded to these legislative concerns by largely upholding these laws. The power of states to prohibit concealed weapons became completely entrenched—so much so that, by 1897, the U.S. Supreme Court considered concealed weapons to be a historically understood exception to the right to bear arms rather than a regulation of it.²⁷ But state courts also redefined the right to keep and bear arms in order to uphold near-total prohibitions against the carrying of pistols. Instead of emphasizing the right to bear arms for private purposes, state courts viewed the right primarily in a “civic republican” lens.²⁸ They held that the right to bear arms primarily existed for defense of the community, not for private self-defense. Accordingly, the weapons that were protected were individual *military* weapons (i.e., “ordinary military equipment”), not weapons primarily

26. I am looking primarily in the time period of 1870–1900.

27. *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897).

28. On civic republicanism and the Second Amendment, see, for example, Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

carried for personal self-defense. Under this view, military rifles and carbines received the most constitutional protection, whereas handguns received almost none.

In Part III, I articulate a revisionist account of why the lower federal courts adopted the collective rights view of the Second Amendment after *United States v. Miller*.²⁹ My argument is that the lower federal courts' adoption of the collective rights view was a failure of courts to refashion the right to keep and bear arms in view of changing conceptions of the right. The "collective rights view" of the Second Amendment—the idea that the right to keep and bear arms is contingent on service in an organized state militia—was first adopted by the Kansas Supreme Court in 1905.³⁰ But it became the predominant view in the federal courts from 1935 until *Heller*.

Although the Supreme Court had considered Second Amendment claims several times before *Miller*, the Court always found ways to dispose of those claims on narrow grounds and thereby avoid any broad pronouncement on the scope of the Second Amendment.³¹ *Miller* squarely raised the question of the Second Amendment's scope: relying on the 1905 Kansas Supreme Court case, the government's primary argument was that the Second Amendment only protected a collective right.³² At issue was the constitutionality of the National Firearms Act, which regulated "gangster"-style weapons, including machine guns and sawed-off shotguns.³³ *Miller* had been indicted for transporting a sawed-off shotgun. Despite the fact that the government squarely raised the question in *Miller*, the Supreme Court assiduously refused—again—to make any broad pronouncements concerning the scope of the Second Amendment. Instead, the Court, following most nineteenth-century courts, held that only ordinary military weapons were protected.

While *Miller* cleanly disposed of a sawed-off shotgun case, it placed the lower federal courts in a difficult position. The military was transitioning toward automatic weapons, which were widely considered inappropriate for civilian use. But *Miller* seemed to entrench the nineteenth-century case law holding that "arms" included only "ordinary military equipment."³⁴ This left lower courts unable to adapt the Second Amendment to prevailing popular opinion regarding the scope of the right. Weapons considered appropriate for civilian possession, such as hunting rifles and handguns for individual self-defense, did not seemingly come within

29. 307 U.S. 174 (1939).

30. See *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 244 (1983). I note below that at least one of the opinions in *State v. Buzzard*, 4 Ark. 18 (1842), may have held this view of the Second Amendment in the antebellum period, see *infra* text accompanying notes 190–95, but it was not a view that gained the acceptance of any court until *Blaksley*.

31. For example, in *Presser v. Illinois*, 116 U.S. 252 (1886), the Court held that the right to keep and bear arms was not infringed by a law that prohibited citizens (other than on-duty militia) from parading as an armed group in public.

32. Brief for the United States at 15, *Miller*, 307 U.S. 174 (1939) (No. 696).

33. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–72 (2012)).

34. *Miller*, 307 U.S. at 178.

Miller's scope of "ordinary military equipment." Conversely, military-style weapons, now considered inappropriate for civilian possession, received the highest constitutional protection. Unwilling to accept this, lower federal courts widely adopted the "collective rights view" of the Second Amendment.³⁵ Because the practical effect of the collective rights view is that no one can ever raise a successful Second Amendment challenge, adopting the collective rights view allowed the lower federal courts to withdraw from adjudicating Second Amendment claims and thereby removed them from the *Miller* conundrum.

Heller marked a revival of the nineteenth-century project of protecting the right of the people to keep and bear arms while recognizing the power of the legislature to deal with contemporaneous social problems. The only ostensibly originalist portion of *Heller* was when the Court correctly held that the Second Amendment right was not exercisable solely by active-duty militiamen in the performance of their official duties.³⁶ *Heller*'s originalism ended with defining the proper subjects of the right. Fleshing out the *content* of the right was a triumph of popular constitutionalism. The Court protected *Heller*'s handgun because "handguns are [currently] the most popular weapon chosen by Americans for self-defense in the home"—not because the Framers viewed handguns as constitutionally protected weapons.³⁷ In contrast, the Court, in dicta, approved the constitutionality of complete prohibitions on weapons like the M16 rifle (which is the quintessential personal weapon of today's militiamen) on an ahistorical reading of the common-law prohibition against *carrying* (not possessing) "dangerous and unusual weapons."³⁸ Moreover, the Court's list of presumptively lawful regulatory measures, such as the "longstanding" prohibition on all felons from having guns (a prohibition that was so "longstanding" that Justice Alito, the *Heller* Court's youngest member, was eighteen years old when it was passed), reads more like *today's* understanding of the right to bear arms than it does the Framers'.³⁹ But in codifying the contemporaneous popular understanding of the right to bear arms, the Supreme Court has simply continued a conversation that began in the early eighteenth hundreds.

I. ANTEBELLUM PERIOD

Fashioning the right to keep and bear arms around the popular conception of the right began with the earliest court decisions on the right to keep and bear arms under the Second Amendment and state analogues. Although these decisions predate modern incorporation of the Bill of Rights, some state courts still applied the Second Amendment to state laws.⁴⁰ Others treated the Second Amendment and state analogues as generally coextensive because the federal and state constitutional provisions codified the *same preexisting right* to bear arms.⁴¹ The only difference

35. See *infra* Part III.C.

36. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

37. *Id.* at 629.

38. See *id.* at 627.

39. *Id.* at 626–27.

40. See, e.g., *Nunn v. State*, 1 Ga. 243, 250 (1846).

41. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) ("[The right to bear

between federal and state constitutional guarantees was that the former bound the federal government whereas the latter bound state governments.

These decisions are remarkable for several reasons. Very few of the cases engaged in any sort of “originalist” analysis: no one asked what James Madison thought in drafting the provision or looked to the ratifying conventions. Most cases focused on the English Bill of Rights—sometimes exclusively—as supplying the purpose for the right to bear arms, which was to resist political oppression.⁴² The American right to bear arms was then treated as a broader version of the English privilege since, unlike the English version, the Second Amendment neither limited arms according to a person’s social status nor did it contain the restriction “as allowed by law.”⁴³

Despite this political purpose, most antebellum state courts *additionally* recognized a very broad right to carry arms for private self-defense. Although these courts largely sustained prohibitions on concealed weapons as a permissible regulation of the right to bear arms, they also made clear that the right to carry weapons openly for private self-defense could not be infringed. This was true even when state courts construed state constitutional provisions that seemed to offer no protection for private self-defense. In an era when many men carried weapons, lawfully or not, the courts interpreted differently worded state constitutional rights to arms so they converged around popular beliefs about the scope of the right.

Finally, despite recognizing a very broad right to keep and bear arms, these courts took seriously the legislature’s efforts at controlling crime with dangerous weapons. There was substantial popular outcry against the public carrying of weapons. Upholding the prohibitions on concealed weapons while striking down prohibitions on openly carried weapons was an attempt to mediate between a population torn between recognizing the right to carry weapons for private purposes while demanding legislative solutions to dueling and other honor-related killings.

A. Antebellum State Laws

Antebellum state laws governing dangerous weapons generally fell into six categories. These laws (1) increased penalties for using weapons in crimes, especially when dueling; (2) regulated the discharge of firearms; (3) regulated arms for those enrolled in the militia; (4) prohibited prisoners from possessing weapons; (5) prohibited individuals from carrying concealed weapons; and (6) prohibited slaves, free blacks, and Indians from possessing or receiving weapons without a license. The first four of these categories did not seem to raise any constitutional

arms for a lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed”); *State v. Buzzard*, 4 Ark. 18, 26–27 (1842) (opinion of Ringo, C.J.); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 157 (1840) (holding that the Second Amendment and Tennessee rights to bear arms have the same purpose).

42. *See, e.g., State v. Reid*, 1 Ala. 612, 615 (1840); *Aymette*, 21 Tenn. (2 Hum.) at 156–57 (giving the English history but giving virtually no American history on the adoption of the Second Amendment).

43. *Aymette*, 21 Tenn. (2 Hum.) at 156–58; *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1891, at 747 (1833).

concerns about violating the right to keep and bear arms. The main antebellum judicial battles were fought over concealed weapons bans and, to a lesser degree, laws against slaves and free blacks having arms.

1. Antebellum Laws Triggering No Significant Judicial Scrutiny

Four types of weapons regulations did not seem to raise any significant scrutiny under the Second Amendment or state analogues. I will quickly note these in passing before moving to the concealed weapons laws, which received considerably more judicial scrutiny.

First, states passed laws increasing penalties for crimes when weapons were involved. Most commonly, states enacted comprehensive statutes designed to prohibit dueling.⁴⁴ These laws often declared a killing during a duel to be murder—not manslaughter—and subjected duelers to various disabilities such as prohibiting them from holding office.⁴⁵ Some of these laws remain on the books.⁴⁶ Other early laws also increased the penalties for non-dueling offenses (e.g., robbery) when armed.⁴⁷ Targeting the possession or use of weapons in conjunction with criminal offenses generally was not thought to raise any sort of Second Amendment issue.⁴⁸

44. *See, e.g.*, Act of Apr. 7, 1810, 1809–1811 Ill. Laws 25 (adopting the Virginia anti-dueling code); Act of Dec. 18, 1813, 1813 Ind. Laws 2d Sess. 442; Act of May 4, 1805, ch. 50, § 25, 1804 La. Acts 1st Sess. 416, 434; Act of Mar. 18, 1796, ch. 600, § 56, 1795 N.J. Laws 2d Sitting 92, 107; Act of Nov. 5, 1816, ch. 1, 1816 N.Y. Laws 3; Act of Apr. 22, 1794, ch. 238, § 10, 1793 Pa. Laws 546, 551; Act of Jan. 26, 1810, ch. 10, 1809 Va. Acts 9; *see also infra* note 45.

45. Act of Oct. 23, 1820, § 1, 1818–1820 Ark. Acts. 110, 110 (dueling causing death within three months declared murder); Offenses Against the Public Peace and Tranquility, § 7, 1816 Ga. Laws 178, 180 (removing from office any justice or other officer having knowledge of a duel and failing to arrest the participants); Act of Mar. 15, 1805, ch. 77, § 6, 1805 Mass. Acts. Jan. Sess. 643, 644–645 (prohibiting duelers from holding office for twenty years); Act of Jan. 30, 1802, 1801 Miss. Laws July & Oct. Extra. Sess. 156, 170; Act of Feb. 20, 1809, ch. 124, § 25, 8 Ohio Laws 534, 542–43 (lifetime ban on holding office or being a juror, and dueler to be stripped half naked and placed on view); Act of Jan. 15, 1805, ch. 1, 1804 Ohio Acts 1, 10 (“forever disfranchised”). Some of the comprehensive dueling codes cited *supra* note 44 also contain prohibitions on holding office.

46. *See, e.g.*, COLO. REV. STAT. ANN. § 18-13-104(2) (West 2013) (making dueling a class 4 felony); IDAHO CODE ANN. § 19-303 (2004) (giving jurisdiction if person dies in state from a duel out of state); KY. CONST. §§ 228, 239 (requiring officers and attorneys to swear that they have not participated in a duel and prohibiting those who have dueled from taking office); MICH. COMP. LAW ANN. § 750.319 (West 2004) (classifying dueling as first-degree murder); MISS. CODE ANN. § 97-39-3 (West 2011) (disenfranchising duelers and prohibiting them from holding office).

47. *See, e.g.*, An Act for Regulating New-Gate Prison, in Granby, and for Regulating and Governing the Same: And for the Punishment of Certain Atrocious Crimes and Felonies, 1790 Conn. Acts 392, 393 (May Sess.) (aggravated robbery); Act of Dec. 22, 1802, ch. 53, § 15, 1802 Ky. Acts 107, 115 (armed robbery); Act of Oct. 1, 1804, ch. 1, § 6, 1804 La. Acts Ind. Territory 3, 6. (burglary while armed); Act of Mar. 15, 1805 § 5, 1805 Mass. Acts. Jan. Sess. at 284 (assault while armed); Act of Feb. 28, 1799, 1799 Miss. Laws 41, 46 (aggravating penalty for burglary).

48. *See, e.g.*, United States v. Sheldon, 5 Blume Sup. Ct. Trans. 337, 346, 1829 WL

Second, states regulated the discharge of firearms within city limits and the storage of gunpowder to prevent fires.⁴⁹ Many of these statutes continued a practice of regulating firearm discharges that existed even in colonial times.⁵⁰ I have found no early court cases alleging any constitutional infirmities in these statutes, although modern incarnations of these statutes seem to be more controversial today.⁵¹

Third, both the federal government and the states passed militia regulations. These laws required able-bodied white male citizens between certain ages, often eighteen to forty-five, to own muskets and to report for militia duty.⁵² Interestingly, I have not found early court cases or newspaper articles alleging that laws regulating weapons held by citizens *qua* militiamen violated the Second Amendment. No one seemed to recognize any libertarian right of militiamen to bring personal weapons into military service according to the militiamen's individual discretion. The lack of any concern that militia regulations could impair the right to bear arms is important: proponents of the collective rights view have the burden to articulate what the *right* to bear arms is, as opposed to a militiaman's *duty* to bear arms. Imposing fairly detailed affirmative obligations on the type of weapons with which citizens must report to militia duty seemed to trigger no constitutional concern whatever.⁵³

3021 (Mich. 1829) (“[T]he grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose.”). I found one case where the contrary was argued. In *Cockrum v. State*, 24 Tex. 394, 401–03 (1859), the Supreme Court of Texas held that a Texas law, which punished manslaughter as murder when committed with a Bowie knife, was not a prohibition on the right to bear arms. Instead, the law regulated an abuse of that right. Only if penalties deterred the lawful exercise of the right completely would there be a constitutional difficulty.

49. See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 510–12, 515–16 (2004).

50. *Id.* at 502.

51. See *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (striking down a ban on shooting ranges inside city limits).

52. See Cornell & DeDino, *supra* note 49, at 508–10; Winkler, *Scrutinizing*, *supra* note 11, at 709 n.148 (collecting examples of these laws).

53. That mandatory gun ownership triggered no constitutional concerns is important. A recent article by Joseph Blocher argues that the Second Amendment, as understood by *Heller*, grants a right not to bear arms. See Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 *STAN. L. REV.* 1 (2012). Blocher asserts that *Heller* redefined the Second Amendment to be about personal safety, unmooring it from its militia-related objective. Given that personal safety is sometimes enhanced by not having weapons present, the Second Amendment should be read to imply a negative right, just like the First Amendment recognizes a right not to speak. But as Blocher himself notes, this reading of the Second Amendment is completely ahistorical. See *id.* at 40–41 (trying to reconcile his view with the Militia Act of 1792). Blocher errs when he argues that the personal safety rationale of the Second Amendment *supplants*—rather than *supplements*—the militia objective. As I will describe below, antebellum state courts generally recognized a broad right to carry militia-type weapons for personal self-defense. Having weapons available for personal purposes did not alter the duty to bear arms when called for militia service. The government has always had the power to force people to bear arms.

Fourth, laws were enacted against transferring weapons to prisoners to prevent escapes.⁵⁴ While *Heller* in dicta approved “longstanding” laws prohibiting felons and the mentally ill from possessing firearms,⁵⁵ laws prohibiting prisoners from receiving weapons were the only “status” bans applied against citizens that I have discovered.⁵⁶ Some of these laws went further by more broadly prohibiting conveying weapons into the jails to allow an escape, whether transferred to the prisoner or not. Like the discharge statutes, I have found no court cases that raise any constitutional question about banning prisoners from having weapons or bringing weapons into the jails. In 1842, the Arkansas Supreme Court in *State v. Buzzard* said that the practice had long gone unquestioned.⁵⁷ State courts did not adjudicate cases involving total prohibitions on the right to bear arms in narrowly defined areas (e.g., polling places, bars, and courthouses) until after the Civil War.⁵⁸ Nor have I found any contemporaneous newspaper accounts suggesting that laws restricting weapons to prisoners implicate the right to bear arms.

Thus, although the antebellum right to bear arms included possessing arms for personal purposes, there seem to be several categories of weapons regulations that received virtually no scrutiny. Given the lack of discussion, it seems that these laws were not understood to raise any serious constitutional questions.

2. Antebellum Laws Triggering State Court Review

Two sets of laws did trigger state court review under the Second Amendment and state analogues. These were, first, prohibitions on carrying weapons in public and, second, laws that required licenses for free blacks and slaves.

In 1813, states began regulating the public carrying of weapons.⁵⁹ Kentucky passed the first prohibition of concealed weapons in 1813, and Louisiana followed later that year. These laws spread throughout the South and West, with Indiana,

54. Act of Feb. 25, 1824, ch. 282, § 11, 1824 Me. Laws 1000, 1006 (prohibiting conveying weapon to a prisoner or possessing weapon in a prison with a purpose to facilitate an escape); Act of June 21, 1811, ch. 32, § 8, 1811 Mass. Acts. May Sess. 418, 422 (prohibiting conveying a weapon to a prisoner with the intent of facilitating escape); Act of June 19, 1812, § 8, 1812 N.H. Laws June Sess. 18, 21–22 (prohibiting conveying a weapon to a prisoner or possessing a weapon in a prison with a purpose to facilitate an escape); Act of Nov. 9, 1808, ch. 78, § 9, 1808 Vt. Acts & Laws 107, 112.

55. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

56. *See State v. Buzzard*, 4 Ark. 18, 21 (1842) (opinion of Ringo, C.J.) (“Persons accused of crime, upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned.”); C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695 (2009).

57. *Buzzard*, 4 Ark. at 21.

58. *See infra* note 277 and accompanying text.

59. Tennessee, which was at the forefront of gun control throughout the eighteen hundreds, did have an 1801 statute authorizing justices of the peace to require sureties of any person who (1) violated the common-law prohibition against going armed to the terror of the people or (2) privately carried any “dirk, large knife, pistol, or any other dangerous weapon” privately to the terror of the people. Act of Nov. 13, 1801, ch. 22, § 6, 1801 Tenn. Pub. Acts 259, 260–61.

Tennessee, Arkansas, Georgia, Virginia, Alabama, Florida, and Ohio adopting similar laws.⁶⁰

Early concealed weapons prohibitions had a fair degree of uniformity. They generally enumerated several weapons that were of particular concern, including dirks or daggers, Bowie knives, swords concealed in canes, and pistols or some subset of pistols (e.g., “pocket pistols”).⁶¹ Many of these laws, therefore, did not explicitly regulate muskets, rifles, or shotguns, though most states enacted catchall provisions at the end of the enumerated list that applied to other dangerous or deadly weapons.⁶² The first three concealed weapons statutes, in Kentucky, Louisiana, and Indiana, were punishable by a stiff fine,⁶³ but later statutes, while keeping the fines, also added short jail terms—typically no more than three or six months.⁶⁴ Only one state—Georgia—went further and prohibited openly carried weapons as well, a fact that would be constitutionally significant when the statute was challenged.⁶⁵ In addition to the ban on carrying concealed weapons, Georgia and Tennessee passed laws that prohibited the sale of Bowie knives and most pistols, respectively.⁶⁶

The original concealed weapons laws had few exceptions. Some of the early statutes did not apply to travelers,⁶⁷ and this exception still exists in a number of states.⁶⁸ Most statutes contained no privilege for law enforcement officers.⁶⁹

60. Act of Feb. 1, 1839, No. 77, 1838 Ala. Acts 67; ARK. REV. STAT. div. VIII, ch. 44 (1838); Act of Jan. 28, 1835, ch. 860, 1835 Fla. Laws 318; Act of Dec. 25, 1837, 1837 Ga. Laws 90; Act of Jan. 14, 1820, ch. 23, 1819 Ind. Laws 39; Act of Feb. 3, 1813, ch. 89, 1812 Ky. Acts 101; Act of Mar. 25, 1813, 1813 La. Acts 172; Act of Mar. 18, 1859, 1859 Ohio Laws 56; Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Pub. Acts 15; Act of Feb. 2, 1838, ch. 101, 1838 Va. Acts 76.

61. See the Kentucky, Louisiana, Indiana, Alabama, Georgia, Virginia, Ohio, and Arkansas laws cited *supra* note 60; see also Act of Jan. 27, 1838, ch. 137, 1837–1838 Tenn. Pub. Acts 200 (fighting knives only).

62. Louisiana’s law included “deadly weapons,” Indiana’s “unlawful weapons,” Florida’s “all arms,” Alabama’s fighting knives and firearms, Virginia’s weapons “of like kind” to pistols and fighting knives, and Ohio’s encompassed all dangerous weapons.

63. Kentucky’s law had a minimum \$100 fine. Louisiana’s law allowed fines of \$20–\$50. And Indiana’s law allowed a fine of up to \$100.

64. For example, Florida (\$50–\$500, one to six months’ imprisonment); Virginia (\$50–\$500, one to six months’ imprisonment); Tennessee (\$200–\$500, three to six months’ imprisonment); Ohio (\$200 or thirty days on first offense; second offense, up to \$500 or three months in jail or both). See laws cited *supra* note 60.

65. Act of Dec. 25, 1837, 1837 Ga. Laws 90; see also *Nunn v. State*, 1 Ga. 243 (1846).

66. Act of Dec. 25, 1837 § 1, 1837 Ga. Laws at 90; Act of Jan. 27, 1838 § 1, 1837–1838 Tenn. Pub. Acts at 200–01.

67. Specifically, Kentucky’s statute, Tennessee’s 1821 statute (but not its 1838 Bowie knife statute), and Indiana’s statute did not apply to travelers. Neither did Alabama’s 1841 version of the statute. See *Of Miscellaneous Offenses*, ch. 7, § 4, 1840 Ala. Acts 148, 148–49.

68. See ARK. CODE ANN. § 5-73-120(c)(4) (2005); COLO. REV. STAT. ANN. § 18-12-105(2)(b) (2013); MISS. CODE ANN. § 97-37-9(b) (West 2011); TEXAS PENAL CODE § 46.15(b)(2) (West 2011).

69. Alabama’s, Kentucky’s, Indiana’s, Louisiana’s, Tennessee’s, and Virginia’s statutes had no law enforcement exception, for example.

Indeed, the first challenge to a concealed weapon ban in Alabama involved a local sheriff who was prosecuted for carrying his pistol concealed.⁷⁰ A few statutes, however, did exempt peace officers, but only while in the performance of their official duties.⁷¹ None of the statutes privileged militiamen, even in the performance of their duties.⁷² An Alabama concealed weapon ban and an Ohio statute allowed juries to acquit if they thought the person had reasonable cause to fear an attack.⁷³

Laws that regulated free blacks and slaves having guns constituted a second category of laws that antebellum state courts scrutinized to see if they were compatible with the right to bear arms. These laws generally made it illegal for free blacks or slaves to have guns without a license. Licenses were issued for limited times either from the slave's owner or the justice of the peace.⁷⁴ The prohibitions generally extended both to public carrying and to possession in the home. The laws did not contain extensive guidance on issuing licenses, except to state the term of the license and the person authorized to issue it.

*B. Antebellum Courts and the "Regulation/Prohibition" Distinction:
Fashioning a Broad Right for Private Self-Defense While Allowing States to
Regulate Concealed Weapons*

The antebellum right to bear arms was fought primarily over the early concealed weapons statutes. Much like today's courts, antebellum state courts found themselves caught between a divided population. On the one hand, the carrying of guns and knives was ubiquitous throughout the South and West. Many within the population thought that they had a right to carry weapons for personal protection. On the other hand, the public clamored for legislative solutions to high crime rates. The presence of guns and knives was widely thought to make ordinary arguments more deadly, as the conflicted parties resorted to weapons to solve their disputes.⁷⁵

70. *State v. Reid*, 1 Ala. 612 (1840).

71. Georgia's statute had an early exemption. Act of Dec. 25, 1837 § 4, 1837 Ga. Laws at 90. Law enforcement officers have been granted increasing power to carry concealed weapons over time, as exemptions gradually expanded to allow the carrying of weapons off-duty in the officer's state or jurisdiction. Current federal law allows most current and retired law enforcement officers to carry concealed pistols throughout the country. 18 U.S.C. §§ 926B, 926C (2012).

72. Maryland had a proposal to ban all carrying of weapons, excepting militiamen. *See* MISS. FREE TRADER & NATCHEZ GAZETTE, Feb. 17, 1837 (citing NAT'L INTELLIGENCER).

73. Of Miscellaneous Offenses § 4, 1840 Ala. Acts at 148–49; Act of Mar. 18, 1859, 1859 Ohio Laws 56.

74. Act of Feb. 7, 1827, ch. 50, § 8, 1827 Del. Laws 120, 125–26; Act of Jan. 4, 1807, ch. 81, § 2, 1806 Md. Laws (requiring annual license issued on certificate of good conduct); Act of June 18, 1822, § 10, 1822 Miss. Laws 5th Sess. Adjourned 179, 181–82; Act of Mar. 30, 1799, 1799 Miss. Laws 112 (requiring a license for both slaves and free blacks); Act of Jan. 11, 1841, ch. 30, 1840–1841 N.C. Laws 61; Act of May 10, 1740, No. 695, § 23, 1731–1743 S.C. Pub. Laws 163, 168–69; *cf.* Act of Dec. 20, 1800, 1800 S.C. Acts 44, 46 (generally prohibiting nonwhites from carrying a weapon when in militia service, but providing some exceptions).

75. *See, e.g.,* FREDERICK LAW OLMSTED, A JOURNEY IN THE BACK COUNTRY 414–15 (1860).

My argument in this Subpart is that the courts' approval of the concealed weapon statutes was a compromise solution that incorporated the popular conception of the right to bear arms as well as the public's demand for legislative solutions to stop people from carrying weapons. Antebellum courts mostly did not look to originalism or the Framing era to supply the scope of the right to bear arms. As *Heller* correctly recognized, personal self-defense did not lead to the right's codification.⁷⁶ Instead, after giving some discussion of the English Bill of Rights, antebellum state courts found a broad right to possess and carry arms for private self-defense, both inside and outside the home.

1. The Popular Dimensions of the Antebellum Gun Control Struggle

Much like today, the antebellum judiciary faced a divided populace on the role of weapons in society. There is a contemporary perception that the promiscuous carrying of weapons was socially acceptable in the eighteenth century in a way that it is not today; in actuality, nineteenth-century America struggled with the practice. In 1837, a grand jury in Baltimore said that “[t]he wearing of deadly weapons . . . is an intolerable nuisance, unnecessary in the present state of any civilized community, dangerous in its tendencies, prencious [sic] in its consequences and destructive alike of good morals and the public peace.”⁷⁷ A grand jury in Philadelphia reached a similar conclusion that same year. It “denounce[d] the habit of carrying deadly weapons as a dastardly and brutal practice” and issued a recommendation that the Pennsylvania General Assembly prohibit the practice.⁷⁸

The grand juries' positions are easy to understand. Nineteenth-century newspapers were filled with stories about slight personal offenses escalating into deadly conflicts. The *National Intelligencer* and *Baltimore American* reported that a “resort [to deadly weapons] in individual affrays appears to be now a matter of almost daily occurrence, especially in the West and Southwest.”⁷⁹ The newspaper then reported two examples.

In the first, Robert Binford, a candidate for the U.S. House of Representatives in Kentucky, went to the house of Judge James, a state senator. Binford accused James of saying something negative about Binford's recent election, which James denied. But James was unarmed and rushed back into his house. Binford followed with his pistol, but he was unable to get into the house and a bystander convinced Binford to go home. Two days later, the two met at a local tavern. When James asked if Binford was there to assassinate him, Binford responded, “What I came for, I came for.”⁸⁰ Both drew pistols and fired. James killed Binford, which a court ruled was justifiable. Binford's shot hit an innocent bystander in the head, killing him.

76. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

77. *Wearing Deadly Weapons*, DAILY COM. BULL. & MO. LITERARY REG. (St. Louis), Apr. 10, 1837.

78. DAILY HERALD & GAZETTE (Cleveland), May 2, 1837.

79. DAILY NAT'L INTELLIGENCER (Washington, D.C.), Nov. 29, 1837 (citing the BALT. AM.).

80. *Id.* (citing the LOUISVILLE ADVERTISER, Nov. 22, 1837).

The newspaper account of the second killing lacks the dramatic details of the first. It appears that a man in Mississippi got into a fight with some members of another family, one of whom shot and stabbed him. There was no indication of whether this attack was ruled murder or justifiable homicide, though from the sparse details given, it seems hard to imagine it was the latter.⁸¹

One can find many other accounts of the indiscriminate use of weapons, especially in the South. The University of Virginia, for example, had a “small rebellion” in September of 1836.⁸² The student military company and the faculty were locked in a battle over whether the military company had to request faculty permission to drill with muskets on campus. At the end of October, after the military company made an application for permission, the university imposed its customary three conditions: the members had to wear the university uniform, muskets could not be discharged on the University Lawn, and muskets were only to be carried when performing military exercises.⁸³ The military company refused to accept these conditions, claiming that it was a state military company independent of the university and with authority to drill.⁸⁴

With the military company’s right to drill unsettled, the faculty demanded that the company return its weapons to the armory.⁸⁵ In response, the military company refused to disband and indicated that it would continue drilling until the faculty relented. The company backed its refusal with two hours of shooting on the University Lawn, which only escalated the situation. The faculty searched the dormitories for weapons and those involved in the shooting incident. The company, in turn, responded with a full-scale riot, which caused the professors to arm themselves in self-defense. Eventually, the sheriff, backed with a military unit, restored order to the university, and a grand jury was summoned.⁸⁶

The riot was celebrated annually at the University of Virginia, but in 1840, the celebration had tragic results. Professor Davis, who objected to celebrating the anniversary, attempted to break up the demonstration. While attempting to remove the mask of a celebrating student, the student shot and killed the professor.⁸⁷ This senseless death caused the *South Carolina Temperance Advocate*, a Columbia, South Carolina-based newspaper, to implore nearby students to stop carrying weapons—which suggests that the paper thought that local students were frequently armed.⁸⁸

The *Pennsylvania Inquirer and National Gazette* also thought that southern students were armed. The newspaper stated, “It is charged against some of the medical students of the South, that a few years ago, the wearing of concealed

81. *Id.* (citing the LOUISVILLE J., Nov. 23, 1837).

82. 2 PHILIP ALEXANDER BRUCE, HISTORY OF THE UNIVERSITY OF VIRGINIA, 1819–1919, at 302 (1920).

83. *Id.* at 303.

84. *Id.*

85. *Id.* at 303–04.

86. *Id.* at 304–06.

87. *Id.* at 309–10; see also *Beware of Carrying Deadly Weapons*, 2 S.C. TEMPERANCE ADVOC. 90, 90 (1840).

88. *Beware of Carrying Deadly Weapons*, *supra* note 87, at 90.

weapons was by no means rare among them.”⁸⁹ The paper then noted that even members of Congress carried weapons at the Capitol.

When contemporaneous newspapers railed against individuals carrying weapons, they mostly railed against the *entire* practice of publicly going armed with pistols and knives. The ire was not directed solely against weapons carried in a concealed manner. The *National Intelligencer*, for example, described the “murderous practice” as the *carrying* of a weapon, not the carrying of the weapon concealed.⁹⁰ A Cleveland paper, five years later, agreed with that assessment.⁹¹ Likewise, the Baltimore and Philadelphia grand juries also complained about the wearing of deadly weapons, rather than merely their concealment.

When concealed weapons were singled out—which they often were—news articles assumed that individuals would not go armed with unconcealed weapons. In other words, if people stopped carrying concealed weapons, they would not be armed at all. Thus, in 1842, the *Pennsylvania Inquirer and National Gazette* lamented that an assault and battery had turned fatal due to the presence of a concealed weapon. But the article made clear that the problem was the accessibility of the deadly weapon, not the fact of concealment: “Had [the perpetrator] been without a deadly weapon, his offence, it is probable, would have amounted to nothing more than a mere assault and battery.”⁹² The article then criticized the “young men from the South and West—who carry deadly weapons” because, the paper argued, “a man who mingles in society with deadly weapons about him [may have murder in his heart].”⁹³ An 1837 Missouri newspaper article likewise equated “this fatal habit of carrying weapon[s] clandestinely” with having a weapon “ready at hand.”⁹⁴

The fact that contemporaneous sentiment within many quarters opposed all public carrying of weapons is important in trying to determine the purpose of concealed weapons laws at that time. Two rationales have been offered—both of which have some basis in the sentiments of the time. Under one view, the purpose of the concealed weapons ban was an attempt to stop individuals from carrying handguns and knives entirely. The Louisiana Supreme Court commented in a late nineteenth-century case that “[t]he manifest object of the statute was to prevent the carrying of dangerous weapons—to stamp out a practice that has been and is fruitful of bloodshed, misery, and death—and yet so to prohibit the carrying as not to infringe the constitutional right to keep and bear arms.”⁹⁵ Although this decision dated from 1885, as the newspaper accounts above indicate, this was also an accurate description of the predominant antebellum sentiment.

89. *Concealed Weapons: The Cases of Colt and Alexander*, PA. INQUIRER & NAT'L GAZETTE (Phila.), Dec. 21, 1842.

90. DAILY NAT'L INTELLIGENCER, *supra* note 79.

91. *Carrying Deadly Weapons*, CLEVELAND DAILY HERALD, Aug. 14, 1843.

92. *Concealed Weapons: The Cases of Colt and Alexander*, *supra* note 89.

93. *Id.*

94. DAILY NAT'L INTELLIGENCER (D.C.), Aug. 7, 1837 (quoting the ST. LOUIS BULL.).

95. *State v. Bias*, 37 La. Ann. 259, 260 (1885). Perhaps, though, this reflected the views of Louisiana in 1885 more than the antebellum period. The Louisiana Supreme Court adopted the second theory in *State v. Chandler*, 5 La. Ann. 489 (1850).

The second theory was that *concealing* a weapon especially threatened public safety because one party could take the other by surprise. A lot of court cases cited this rationale, including some contemporaneous cases.⁹⁶ The newspaper story describing the University of Virginia shooting both decried the practice of going armed generally *and* the practice of using a hidden weapon upon “an unsuspecting opponent, who is ignorant that he is contending with an armed man.”⁹⁷ But the predominant grievance seems to be against the carrying of an accessible weapon, rather than the concealing of it.

While the public’s precise view on the right to bear arms is difficult to gauge, it seems fairly clear that many thought the right encompassed the public carrying of weapons apart from militia service. Every state law enacted before 1840 (except Virginia’s) that prohibited concealed weapons was attacked as unconstitutional in state courts before the Civil War.⁹⁸ The only exception, Virginia, had no state analogue of the Second Amendment to apply until 1971.⁹⁹ Defiance of the concealed weapons laws, often on constitutional grounds, was widespread. The Kentucky governor—agreeing with the state’s highest court¹⁰⁰ that the Kentucky concealed weapons statute was unconstitutional—quite openly defied the law by taking concealed pistols to church; the butt of one gun stuck out of his pants pocket during the service.¹⁰¹ Alabama’s constitutional challenge involved a local sheriff, who apparently thought he had a right to carry a concealed pistol.¹⁰² The then-Republic of Texas legislature delayed adopting its concealed weapons statute until legislators were satisfied that the act would not violate the right to bear arms contained within Texas’s constitution.¹⁰³ And there is the fact that weapons were so widely carried. Although this fact does not necessarily imply that weapon carriers thought they had a constitutional right to do so, combined with the other evidence, it does suggest that the popular understanding of the right to bear arms extended

96. See, e.g., *Dano v. Collins*, 802 P.2d 1021, 1023 (Ariz. Ct. App. 1990); *Sutton v. State*, 12 Fla. 135, 136 (1867); *Stockdale v. State*, 32 Ga. 225, 227–28 (1861); *State v. Button*, 37 P.3d 23, 25 (Idaho Ct. App. 2001); *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986).

97. *Beware of Carrying Deadly Weapons*, *supra* note 87; see also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1522–23 (2009) (quoting and explaining an 1820 Richmond grand jury that inveighed against carrying weapons secretly).

98. *State v. Reid*, 1 Ala. 612 (1840); *State v. Buzzard*, 4 Ark. 18 (1842); *Nunn v. State*, 1 Ga. 243 (1846); *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822); *State v. Chandler*, 5 La. Ann. 489 (1850); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840); cf. *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833) (refusing to allow prosecution for going armed to the terror of the people, a common-law offense that the Tennessee legislature tried to recognize in 1801).

99. Virginia’s constitutional provision was passed in 1971. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 215 (2006) (citing VA. CONST. art. I, § 13 (right added to preexisting 1776 provision extolling the popular militia)).

100. *Bliss*, 12 Ky. (2 Litt.) 90.

101. LOUISVILLE PUB. ADVERTISER, Sept. 10, 1825.

102. *Reid*, 1 Ala. 612.

103. TELEGRAPH & TEX. REG. (Hous.), Jan. 23, 1839, at 3.

beyond militia service. State courts, thus, adjudicated right-to-bear-arms claims against a backdrop of a public divided between a faction believing in the right to carry personal weapons publicly and another faction demanding that weapon carrying cease entirely because of the social externalities.

2. The Compromise of State Courts

State supreme courts responded to the divided public by compromising on the scope of the right to bear arms. Unlike the First Amendment, which did not receive significant judicial interpretation until the twentieth century, the Second Amendment and state analogues were heavily litigated in the nineteenth century. During the antebellum period, there were approximately two dozen cases that offered some guidance on the scope of the right to bear arms under the Second Amendment and state analogues.¹⁰⁴

Most courts recognized a robust right to carry arms in public—often regardless of the precise way in which the state analogue of the right to bear arms was worded—but nevertheless recognized the state’s police power to regulate the right for public safety. This was the origin of the “regulation/prohibition” distinction that Winkler identifies.¹⁰⁵ But the content of the right to bear arms, to which the regulation/prohibition distinction applied, was framed around contemporaneous understandings of the right to bear arms. The compromise position recognized a right to carry weapons in public—but not to conceal the weapons. The right to bear arms was then enforced against outlying jurisdictions that adopted unusually extreme legislation—just like how *Heller* and *McDonald* struck down unusually restrictive complete handgun bans.¹⁰⁶

The compromise position of accommodating contemporaneous understandings of the right to bear arms—both in terms of the right and its limitations—developed

104. This number comes from a search on Westlaw using all reported cases of “bear arms” in state courts and excluding those cases dealing solely with military service. The cases found track what other researchers have discovered in compiling the early cases. See CRAMER, *supra* note 10; see also O’Shea, *supra* note 10, at 623–37 (analyzing the antebellum cases and categorizing them by the scope of the right protected).

105. See Winkler, *Reasonable*, *supra* note 11; Winkler, *Scrutinizing*, *supra* note 11.

106. See *Nunn v. State*, 1 Ga. 243 (1846) (striking down prohibition on unconcealed weapons); see also *Reid*, 1 Ala. at 615 (allowing ban on concealed weapons because persons could carry arms openly); *State v. Chandler*, 5 La. Ann. 489 (1850); *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833) (not allowing common-law prosecution for going armed to the terror of the people for fear that someone’s unease at seeing a weapon would vitiate the right to bear arms). *Heller* and *McDonald*, likewise, only struck down complete bans on handguns that affected the District of Columbia, the City of Chicago, and a few Chicago suburbs. See, e.g., *Quilici v. Vill. of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (sustaining handgun ban of a Chicago suburb); Brief for the National Rifle Association and the NRA Civil Rights Defense Fund as Amici Curiae in Support of Respondent at 28, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (noting that, of major cities, only the District of Columbia and Chicago had handgun bans and that San Francisco’s ban had been struck down by state courts on state preemption grounds); Robert VerBruggen, *Self-Defense vs. Municipal Gun Bans*, REASON, June 2005, at 40 (discussing Chicago suburbs). Most states have preemption laws that forbid municipalities from banning or regulating handguns.

fairly quickly. Two early state courts that took absolutist positions found their doctrines quickly abandoned.

*Bliss v. Commonwealth*¹⁰⁷ was the first case litigated on the right to bear arms. Bliss was charged with having a sword concealed in a cane and was fined \$100. The Kentucky Court of Appeals reversed in a 2–1 decision. Kentucky defended the law on the grounds that a prohibition on concealed weapons merely regulated the manner of bearing arms and was not a complete destruction of the right.¹⁰⁸ Over an unpublished dissent, the majority rejected this argument. While the court acknowledged that a prohibition on concealed weapons was not “an entire destruction of the right of the citizens to bear arms in defense of themselves and the state,” the court held that “whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.”¹⁰⁹ And the court defined the right to bear arms as the same liberty to wear weapons that existed at the time of the Kentucky Constitution’s adoption.

The Tennessee Supreme Court likewise took an absolutist position in *Simpson v. State*.¹¹⁰ In that case, the defendant was charged with an affray, but since he had not engaged in actual fighting, the court examined whether to recognize the common-law offense of going armed with dangerous or unusual weapons to the terror of the people.¹¹¹ Unlike *Heller*, which saw the common-law prohibition as an early source of authority to ban military-style rifles,¹¹² the Tennessee Supreme Court declared that the Tennessee Constitution’s guarantee of “a right [of freemen] to keep and to bear arms for their common defence” precluded recognizing that common-law offense.¹¹³ The right to bear arms, the court stated, exists “without any qualification whatever as to their kind or nature.”¹¹⁴ Since the court defined the right to bear arms to mean that “the people may carry arms,” the court refused to consider the possibility that publicly carrying weapons could be prohibited solely because some people might be frightened by exercising the right.¹¹⁵

Neither doctrine would last long. Kentucky’s 1849 constitutional convention added to its right-to-bear-arms provision that “the general assembly may pass laws to prevent persons from carrying concealed arms.”¹¹⁶ Similar constitutional provisions to repudiate *Bliss*’s doctrine would be adopted throughout the South and West, most of which are retained in state constitutions today.¹¹⁷ No court dared to

107. 12 Ky. (2 Litt.) 90 (1822).

108. *Id.* at 91.

109. *Id.* at 91–92.

110. 13 Tenn. (5 Yer.) 356 (1833).

111. *Id.* at 358–60; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *149 (discussing the offense).

112. *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008).

113. *Simpson*, 13 Tenn. (5 Yer.) at 360 (quoting TENN. CONST. of 1796, art. XI, § 26).

114. *Id.*

115. *Id.*

116. KY. CONST. of 1850, art. XIII, § 25.

117. Constitutional provisions repudiating the doctrine in *Bliss* would be adopted in Colorado, Florida, Georgia, Idaho, Illinois, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Utah. *See* Volokh, *supra* note 99, at 193–204 (compiling the historical state constitutional provisions).

strike down a prohibition only on the carrying of concealed weapons until the Wisconsin Supreme Court partially invalidated its concealed weapons statute in 2003.¹¹⁸ In Tennessee, the dicta in *Simpson* was repudiated by *Aymette*,¹¹⁹ a case that I will discuss below.¹²⁰

Against this absolutist approach, states developed a “regulation/prohibition” doctrine incorporating contemporaneous notions of the right to carry arms publicly. *State v. Reid* was the first attempt by a court to flesh this out.¹²¹ As I noted above, *Reid* involved a sheriff who was charged with carrying a concealed pistol after being threatened and believing that his life was in danger.¹²² The Alabama Supreme Court sustained the act as a mere regulation of the right to bear arms. The court gave some discussion of the history of the right to bear arms, noting that the provision derived from the English Bill of Rights, which was designed to give the people the means of resisting illegal and arbitrary executive power.¹²³

Although the purpose of the right was to resist executive power, the court still accepted a very broad right to carry arms for private defense. The Alabama Constitution provided that a citizen had the “right to bear arms in defence of

118. *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785. Although the Wisconsin Supreme Court took the nearly unprecedented step of partially invalidating a concealed weapons statute, it limited its holding mostly to concealed weapons inside a person’s home or business. *See State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (upholding the facial validity of the concealed weapons statute). The court placed a very high bar before someone could assert a right to carry a concealed weapon publicly. *See State v. Fisher*, 2006 WI 44, ¶ 18, 290 Wis. 2d 121, 714 N.W.2d 495, 499–500. The Delaware Supreme Court followed *Hamdan* in *Griffin v. State*, 47 A.3d 487 (Del. 2012), at least with respect to the carrying of a concealed weapon in a person’s home. The Ohio Court of Appeals affirmed a trial court’s attempt to invalidate Ohio’s concealed weapon statute in 2002, but the Ohio Supreme Court quickly reversed. The court reaffirmed that a prohibition on concealed weapons was a mere regulation of the manner of bearing arms. *Klein v. Leis*, 99 Ohio St. 3d 537, 2003-Ohio-4779, 795 N.E.2d 633, *rev’g* 767 N.E.2d 286 (Ohio Ct. App. 2002). The Vermont Supreme Court, in *State v. Rosenthal*, 55 A. 610 (Vt. 1903), reversed a person’s conviction for carrying a concealed pistol, but the statute at issue forbade all carrying of pistols. It is not clear how Vermont would have ruled if the act had only applied to concealed pistols. The Seventh Circuit invalidated Illinois’s complete prohibition on carrying weapons, but it is unclear whether that decision translates into a right to have a concealed weapon or merely some right to carry a weapon outside the home for protection. *See Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). Because California prohibits all carrying of pistols without a license, the Ninth Circuit has required California counties to issue licenses to carry concealed pistols without regard to whether applicants can show that they personally are in special danger of victimization. *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014). (A petition for rehearing en banc in *Peruta* was under review as of the time of publication.)

119. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 161–62 (1840).

120. *See infra* Part I.B.3.a.

121. *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833), was the first case to approve a concealed weapons statute. But that case was a one-sentence per curiam opinion simply stating, “IT was held in this case, that the statute of 1831, prohibiting all persons, except travellers, from wearing or carrying concealed weapons, is not unconstitutional.”

122. 1 Ala. 612, 612–13 (1840).

123. *Id.* at 615.

himself and the State.”¹²⁴ The *Reid* court could have very easily said that “defense of himself” meant self-defense from illegal executive power—the same reason that Protestants maintained a right to have arms against the Catholic monarchs—and that carrying a personal weapon for private self-defense was not within the scope of the right, as historically understood.¹²⁵ Instead, the Alabama Supreme Court allowed—consistent with the practice of the time—individuals to carry personal weapons for self-defense against “lawless aggression and violence.”¹²⁶ The prohibition against concealed weapons merely prohibited one manner of exercising the right to bear arms that proved especially harmful. As long as the legislature did not require arms to be “render[ed] . . . wholly useless for the purpose of defence”—that is, prohibit the carrying of them openly¹²⁷—the legislature had the power to regulate the right.¹²⁸ The court then quoted *Bliss* at length and explicitly rejected its absolutist position.¹²⁹

One might argue that *Reid*’s analysis of the right to bear arms is irrelevant for the Second Amendment. The Alabama Constitution explicitly guaranteed the right to bear arms “in defence of himself,” which is arguably broader than the Second Amendment’s mere reference to “the right of the people to keep and bear arms.” Moreover, Alabama’s constitution lacks the militia prefatory language.

Although antebellum courts did sometimes briefly parse the different constitutional language, state courts never grounded their decisions in the minor variations in language. In fact, their decisions were remarkably uniform on the scope of the right. The theory underlying this was that both the federal and the various state constitutions “confer[red] no *new rights* on the people which did not belong to them before.”¹³⁰ Whatever their minor variations in language, both the state and federal right-to-bear-arms provisions codified the same preexisting right. The various constitutions may have used different language to express the same proposition—but courts treated the proposition as identical despite these variations in language.

If one looks at the judicial outcomes, the decisions are mostly consistent regardless of the specific wording of the constitutional provision. *Nunn v. State*, which was cited in *Heller*, invalidated Georgia’s prohibition on openly carried pistols while affirming the constitutionality of its ban on concealed weapons.¹³¹

124. ALA. CONST. of 1819, art. I, § 23.

125. See *infra* note 166 and accompanying text.

126. *Reid*, 1 Ala. at 617.

127. *Id.* at 616; see also *id.* at 619 (“[W]e incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence.”). The court’s opinion on this point, however, was not completely clear. At times, the court’s dicta suggested that the legislature could select the manner of bearing arms, provided that it left some method to carry arms in public. See *id.* at 616–17, 618–20 (discussing *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822)).

128. *Id.* at 616–17.

129. *Id.* at 617–20.

130. *Nunn v. State*, 1 Ga. 243, 249 (1846) (emphasis in original).

131. *Id.* at 251; see also *District of Columbia v. Heller*, 554 U.S. 570, 612–13 (2008) (citing *Nunn*).

Like the *Reid* court, the *Nunn* court restricted the legislature to regulating only concealed weapons. In so doing, the court relied on the Second Amendment, notwithstanding *Barron v. Baltimore*.¹³² In striking down the prohibition on unconcealed weapons, we see an example of a court curtailing the legislative authority to regulate the right to bear arms when a legislature strayed beyond the remainder of the country.

The effect of popular sentiment can also be seen in *State v. Chandler*,¹³³ a Louisiana case. Like *Nunn*, *Chandler* relied on the Second Amendment, this time in approving Louisiana's ban on concealed weapons. The court found that weapons in open view "place[d] men upon an equality" and was the right secured by the Second Amendment.¹³⁴ Six years later, in *State v. Smith*,¹³⁵ the court determined that the Second Amendment applied only to those arms "such as are borne by a people in war, or at least carried openly."¹³⁶ The militia language in the Second Amendment did not limit the right to bear arms to carrying them in war; it included carrying them openly outside of war as well—consistent with the prevailing view of the time. Again, like in *Reid* and *Nunn*, the legislature could only regulate concealed weapons, rather than select the manner of bearing arms.

Perhaps most remarkable was *State v. Huntly*,¹³⁷ which arguably ignored textual limitations in its state constitutional provision. *Huntly* was an antebellum North Carolina Supreme Court case that, like *Simpson*, considered whether the state would recognize the common-law offense of going armed to the terror of the people. Huntly was indicted after openly arming himself with a gun and threatening to kill another man over the possession of certain slaves.¹³⁸ The North Carolina Constitution only guaranteed the right to bear arms for "defence of the State."¹³⁹ If any state constitutional right were to be limited to militia service, North Carolina's would qualify. Yet, the opinion does not even contain the word "militia."

The North Carolina Supreme Court, unlike the Tennessee court in *Simpson*, did recognize the common-law offense. As a preliminary matter, in contrast to *Heller*, the *Huntly* court held that *all* guns were "unusual weapons."¹⁴⁰ Although gun

132. 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights did not apply to the states).

133. 5 La. Ann. 489 (1850).

134. *Id.* at 490; cf. Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172 (2010) (discussing different ways in which the law protects vulnerable people from more powerful ones).

135. 11 La. Ann. 633 (1856).

136. *Id.* at 633.

137. 25 N.C. (3 Ired.) 418 (1843).

138. *Id.* at 418–19.

139. *Id.* at 422 (quoting N.C. CONST. of 1776, Declaration of Rights, § XVII).

140. *Id.* ("It has been remarked, that a double-barrelled gun, or any other gun, cannot in this country come under the description of 'unusual weapons,' for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an 'unusual weapon,' wherewith to be armed and clad. No man amongst us carries it about with him, as one of his every day accoutrements—as a part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.").

ownership was common, the court felt that it was unusual to *carry a gun at all times* as part of one's everyday dress.¹⁴¹

Even if it was unusual, the court took great pains to explain that citizens were “at perfect liberty” to carry a gun “[f]or any lawful purpose—either of business or amusement.”¹⁴² The court held that Huntly's conduct was punishable because his carrying of the gun—for the purpose of terrifying others and in such manner as would terrify the public—was an *abuse* of the right to bear arms.¹⁴³ The court did not hold—as it could have—that carrying weapons for purposes other than defending the state fell outside the right to bear arms.

When state courts approved significant limitations on the right to bear arms outside of the mainstream, they did so on the grounds that the person—generally a free black—fell outside the constitutional guarantee. The North Carolina Supreme Court, in *State v. Newsom*,¹⁴⁴ approved a statute requiring free blacks to obtain a license to possess or carry a firearm. The *Newsom* court did make a brief attempt at arguing that the statute was a regulation, not a prohibition of the right. The court said that the statute did not “deprive the free man of color of the right to carry arms about his person, but subjects it to the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of persons, shall have a right to the licence, or whether any shall.”¹⁴⁵ But the court was fairly transparent in holding that this statute was a “regulation” only as it applied to nonwhites, whose constitutional rights were less. The court repeatedly argued that “free people of color have been among us, as a separate and distinct class, requiring, from necessity, in many cases, separate and distinct legislation.”¹⁴⁶ The decision left little doubt that licensing white citizens in the same manner would be unconstitutional. Licensing the right to bear arms might be a mere “regulation” of the right to bear arms in 2011,¹⁴⁷ but it was almost certainly a “prohibition” for full citizens in 1844.¹⁴⁸ *Dred Scott* would follow thirteen years later, saying that free blacks could never be full citizens, lest they have a right “to keep and carry arms wherever they went.”¹⁴⁹

141. *Id.*

142. *Id.* at 423.

143. *Id.*

144. 27 N.C. (5 Ired.) 250 (1844).

145. *Id.* at 253.

146. *Id.* at 252; *see also id.* at 254.

147. *See, e.g.,* *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) (upholding New York City's \$340 licensing fee); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011) (largely upholding the District's registration requirements post-*Heller*); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 631 (2008) (refusing to address the licensing requirement because *Heller* did not challenge nondiscriminatory licensing).

148. *See also* *State v. Kerner*, 107 S.E. 222 (N.C. 1921) (striking down a local requirement to obtain a license to carry a pistol openly).

149. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

3. Antebellum Outliers

The antebellum period had two outlier cases that did not fit neatly into recognizing the right to bear arms in conjunction with the contemporaneous understanding. The first was a Tennessee case, *Aymette v. State*,¹⁵⁰ that provided the civic republican version of the right to bear arms that would take hold in the second half of the nineteenth century. The second, the Arkansas case *State v. Buzzard*,¹⁵¹ arguably provided the first precedent for the collective rights view that predominated in the twentieth century.

a. *Aymette v. State*

Although chronologically, *Aymette* was the fifth significant case on the right to bear arms—after *Bliss, Mitchell*,¹⁵² *Reid*, and *Simpson*—intellectually, *Aymette* occupies a transitional position. Like most antebellum courts, *Aymette* seemingly accepted a general right to bear arms openly, despite the Tennessee Constitution only granting a “right to keep and to bear arms for their common defence.”¹⁵³ But this recognition of a broad right is arguable—and almost forced—for reasons I will explain below.

On the other hand, *Aymette* provided the intellectual foundation for the civic republican theory of the right to bear arms—the theory that would take hold in the late eighteenth hundreds.¹⁵⁴ *Aymette* was the primary authority on which the Supreme Court relied in *United States v. Miller*.¹⁵⁵ Its influence over Second Amendment jurisprudence was so profound that, until *Heller*, it was the single most important opinion ever delivered on the right to bear arms. Although Justice Scalia unfairly maligned the opinion in *Heller*,¹⁵⁶ the opinion is far more “originalist” than *Heller* or *McDonald*’s supposedly historical analysis in defining the purpose and scope of the right to bear arms.

William Aymette was convicted of violating Tennessee’s 1838 law against carrying concealed Bowie knives. He had had an argument with another man and responded by later attempting to track him down at a hotel to kill him. As Aymette was searching for the man in various places, he occasionally drew his knife, which led to his concealed weapons charge. The court sentenced Aymette to a \$200 fine and the statutory minimum three months’ imprisonment.¹⁵⁷

150. 21 Tenn. (2 Hum.) 154 (1840).

151. 4 Ark. 18 (1842).

152. *Mitchell* was a one-sentence per curiam opinion affirming Indiana’s concealed weapon statute. *See supra* note 121.

153. TENN. CONST. of 1835, art. I, § 26 (“That the free white men of this State have a right to keep and to bear arms for their common defence.”). Tennessee had amended its state constitution in 1835 to exclude free blacks, who were arguably protected by the 1796 constitution. TENN. CONST. of 1796, art. XI, § 26 (“That the freemen of this State have a right to keep and to bear arms for their common defence.”).

154. O’Shea, *supra* note 10, at 632–34.

155. 307 U.S. 174, 178 (1939).

156. *See* District of Columbia v. Heller, 554 U.S. 570, 613–14 (2008).

157. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 154–55 (1840).

The opinion, written by Judge Nathan Green, Sr., began by giving a brief history of the purpose of the right to bear arms. The right to bear arms, he correctly recognized,¹⁵⁸ had its origins in the Glorious Revolution. The opinion skips much of the revolutionary details about the struggles between Parliament and the Crown: seventeenth-century England was torn between Catholic monarchs and a predominantly Protestant population. When debates over control of the nation's military forces reached an impasse, King Charles I sent a small contingent of a standing army—which did not even exist in England until the seventeenth century—to arrest members of Parliament. This action triggered a civil war between backers of Parliament and the Crown.¹⁵⁹

Judge Green's opinion picked up after the Restoration. He noted that seventeenth-century English law only permitted subjects whose lands had a clear yearly value in excess of £100 or those whose social rank was above esquire to have guns.¹⁶⁰ Even among this limited group, King James II—without parliamentary sanction—disarmed the Protestants and quartered Catholic soldiers among the population to enforce his rule. By disarming the Protestant population and turning the army against the majority of the people, King James II enforced his rule in derogation of Parliament and, by extension, popular legitimacy. Judge Green wrote:

The evil that was produced by disarming the people in the time of James II[] was that the king, by means of a standing army quartered among the people, was able to overawe them, and compel them to submit to the most arbitrary, cruel, and illegal measures. Whereas, if the people had retained their arms, they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the king to respect their rights, or surrender (as he was eventually compelled to do) the government into other hands. No private defence was contemplated, or would have availed anything. If the subjects had been armed, they could have resisted the payment of excessive fines, or the infliction of illegal and cruel punishments. When, therefore, Parliament says that “subjects which are Protestants may have arms for their defence, suitable to their condition, as allowed by law,” it does not mean for private defence, but, being armed, they may as a body rise up to defend their just rights, and compel their rulers to respect the laws. This declaration of right is made in reference to the fact before complained of, that the people had been disarmed, and soldiers had been quartered among them contrary to law. The complaint was against the government.¹⁶¹

As a matter of original interpretation, this is considerably more accurate than Justice Scalia's opinion for the Court in *Heller*. It comports with Madison's

158. *Id.* at 156. See generally JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994).

159. MALCOLM, *supra* note 158, at 16–23; see also *id.* at 58–76 (discussing the continuing conflicts after the Restoration).

160. 22 & 23 Car. II, c. 25, § 2 (1671); see also *Aymette*, 21 Tenn. (2 Hum.) at 156.

161. *Aymette*, 21 Tenn. (2 Hum.) at 157.

understanding of the right to bear arms in *Federalist Number 46*, in which Madison explains that an armed populace could resist government oppression.¹⁶² Justice Story offers a similar view.¹⁶³ And it better fits with Blackstone's quotations, which *Heller* selectively—and misleadingly—edits.¹⁶⁴ *Aymette* also argues—contrary to Justice Stevens's analysis in *Heller*¹⁶⁵—that early state constitutional provisions guaranteeing citizens the right to bear arms “in defence of themselves” meant in defense of the citizenry at large against oppression, not individual self-defense against criminals.¹⁶⁶ Under Judge Green's view, the Second Amendment and the state analogues are broader than the English right, though they serve the same purpose.¹⁶⁷

The purpose of the right to keep and bear arms informs the content of that right.¹⁶⁸ Because the right is about resisting oppression, Judge Green draws several conclusions about the right's content. First, the right covers only those weapons that are “employed in civilized warfare, and that constitute the ordinary military equipment”—personal arms that citizens would carry “in their hands” to repel invasions of their rights.¹⁶⁹ Weapons that are used to commit crimes or in private fights, such as the Bowie knife, are not constitutionally protected “arms.”

Second, although the right to bear arms is a “great political right,” it is subject to legislative regulation to ensure that the right is not abused. Here, the opinion draws a very crucial distinction between the right to keep arms and the right to bear arms.¹⁷⁰ Citizens have an unqualified right to keep constitutionally protected arms in their homes.¹⁷¹ This makes the weapons available if they are needed to provide

162. THE FEDERALIST NO. 46, at 321–22 (James Madison) (Jacob E. Cooke ed. 1961).

163. STORY, *supra* note 43, §§ 1889–1890, at 746–47; *cf.* *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 52–53 (1820) (Story, J., dissenting) (stating that the Second Amendment does not appear to have any “important bearing” on whether a state has concurrent power to arm the militia).

164. *See infra* notes 368–71 and accompanying text.

165. *District of Columbia v. Heller*, 554 U.S. 570, 642–43 (2008) (Stevens, J., dissenting).

166. *Aymette*, 21 Tenn. (2 Hum.) at 160–61. On the civic republican meaning of “in defence of themselves,” see generally Nathan Kozuskanich, *Defending Themselves: The Original Understanding of the Right to Bear Arms*, 38 RUTGERS L.J. 1041 (2007).

167. Unlike the English provision, the American right to bear arms is not limited by one's status in life; all citizens have the right to bear arms, regardless of their net worth. *Aymette*, 21 Tenn. (2 Hum.) at 157–58.

168. This is also what *United States v. Miller*, 307 U.S. 174, 178–79 (1939), was following when Justice McReynolds wrote that the Second Amendment must be viewed with a purpose toward maintaining the militia.

169. *Aymette*, 21 Tenn. (2 Hum.) at 158–59.

170. *Id.* This also provides powerful evidence that, unlike Michael Dorf's argument (and a similar argument in Justice Stevens's dissent), “the right to keep and bear arms” was not commonly understood as a unitary phrase. *See* *District of Columbia v. Heller*, 554 U.S. 570, 651 (2008) (Stevens, J., dissenting); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHL.-KENT L. REV. 291, 317 (2000).

171. *Aymette*, 21 Tenn. (2 Hum.) at 160 (“The citizens have the unqualified right to keep the weapon, it being of the character before described as being intended by this provision. But the right to bear arms is not of that unqualified character. [T]he citizens may bear them

for the common defense against oppression. When collective rights opinions cite *Aymette* as supporting their argument¹⁷²—usually because the opinion says “bear arms” refers exclusively to war¹⁷³—they miss the unrestrained notion of the right to keep arms in *Aymette*. *Aymette* does not limit the right to have arms only to when the government enrolls the person in a well-regulated militia. If this were the limit of the right, then the government could refuse to enroll people in the militia and the people would have no right to possess arms—which means that there would be no impediment to illegal executive power.¹⁷⁴

In contrast to the right to keep arms in the home, the right to bear arms in public is more limited, since the purpose of allowing citizens to carry weapons is to provide for the common defense.¹⁷⁵ Citizens have peacetime duties when exercising their right to bear arms—for example, not showing up to a public gathering heavily armed to the terror of the people. The legislature may regulate abuses of the right with criminal penalties.¹⁷⁶

As a corollary of this second point, Judge Green argues that there is a “manifest” distinction between openly carried weapons and concealed weapons. When one bears arms for the common defense, the arms—such as rifles, muskets, and swords (note that pistols and knives are not included in the list)—have to be carried openly, as they would be in warfare. To deny the right to bear arms openly is to destroy the right, whereas this is not true for carrying weapons concealed.¹⁷⁷

But in this last point, we see the transitional nature of *Aymette*. Judge Green could have argued—as did many courts during the late eighteenth hundreds¹⁷⁸—that the legislature could mostly restrict the right to bear arms, while maintaining a broad right to keep arms in the home. Someone carrying a rifle in public on a random occasion likely does not bear arms with the common defense in mind. The rationale of *Aymette* would seemingly support a legislative decision completely

for the common defence; but it does not follow that they may be borne by an individual, merely to terrify the people or for purposes of private assassination.”)

172. *E.g.*, *Heller*, 554 U.S. at 613–14 (majority opinion) (noting that *Aymette* is cited by those advocating restricting the right to the militia); *id.* at 648 n.10 (Stevens, J., dissenting); *Silveira v. Lockyer*, 312 F.3d 1052, 1073 (9th Cir. 2002).

173. *Aymette*, 21 Tenn. (2 Hum.) at 161.

174. *See Heller*, 554 U.S. at 596; *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 182–85 (1871).

175. *See, e.g.*, Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915). Although this article has been widely cited by federal cases adopting the collective rights holding, Emery actually takes the *Aymette* approach of a broad right to keep war arms and a limited right to bear them; he sees defense of the community as the right’s primary justification, with personal protection against criminals, at best, a secondary concern. *See id.* at 476–77.

176. *Aymette*, 21 Tenn. (2 Hum.) at 159–60.

177. *Id.* at 160–61.

178. *See, e.g.*, *Hill v. State*, 53 Ga. 472, 475–76, 479–80 (1874) (recognizing an “absolute” right to keep arms but upholding prohibition on carrying weapons in many locations and in a concealed manner); *State v. Wilburn*, 66 Tenn. 57, 62–63 (1872) (upholding prohibition against carrying all pistols, except openly in the hand); *State v. Duke*, 42 Tex. 455, 459 (1874) (upholding law that restricted the carrying of pistols to homes, places of business, when needed for public service, and in emergency defensive circumstances).

prohibiting weapons in public, except for militia duty or for individual incidents related to militia duty (e.g., bringing the gun home from a place of purchase or the person going target shooting, on his own accord, to increase his proficiency with the weapon).¹⁷⁹ Nevertheless, Judge Green still sees—consistent with the antebellum sentiment—that “a prohibition to bear them openly would be a denial of the right altogether.”¹⁸⁰ This shows the profound constraining influence that contemporaneous popular sentiment of the right to bear arms has over courts’ interpretations, even when, intellectually, judges think the right should have different dimensions.

Aymette thus fills a transitional role. It provides the intellectual framework for the second half of the nineteenth century, when the right to bear arms in public would be sharply curtailed. But, like nearly all antebellum cases, *Aymette* also recognizes a general right to bear arms openly. The right to keep and bear arms, according to Judge Green, is the right to keep military rifles, muskets, and swords in the home and to bear them openly in public.

b. *State v. Buzzard*

The second major outlier is *State v. Buzzard*.¹⁸¹ *Buzzard*, another concealed weapons case, is the only antebellum case that arguably takes a view that the Second Amendment belongs only to the militia. The case had limited precedential value in the nineteenth century—after the Civil War, Arkansas (the only state to adopt it) abandoned the doctrine in favor of the Tennessee approach¹⁸²—but it became the predominant federal court approach beginning in the 1930s.¹⁸³

Making matters more complicated, *Buzzard* has no court opinion. The 1842 Arkansas Supreme Court had three judges, and the opinions in *Buzzard* were delivered *seriatim*. The full court’s holding is unclear. Two of the three judges—Chief Justice Daniel Ringo and Justice Townsend Dickinson—argue that the right belongs to “the people” solely so they may perform militia-related objectives.¹⁸⁴ Justice Thomas J. Lacy, in dissent, argues that the right includes personal defense. He also accuses Justice Dickinson of holding that “it is the militia alone who possess this right in contradistinction from the mass of the people.”¹⁸⁵ I think Justice Lacy is wrong about Justice Dickinson’s opinion, for reasons I will discuss momentarily.¹⁸⁶ But if I am incorrect about this assessment, then we have a *Bakke*-style breakdown: Justice Dickinson argues that the right is limited to militia

179. See *Andrews*, 50 Tenn. (3 Heisk.) at 178–79, which later took this approach.

180. *Aymette*, 21 Tenn. (2 Hum.) at 161.

181. 4 Ark. 18 (1842); see also George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 *FORDHAM L. REV.* 2113, 2148 (2008) (analyzing the opinions in *Buzzard*).

182. See, e.g., *Wilson v. State*, 33 Ark. 557 (1878); *Fife v. State*, 31 Ark. 455 (1876); see also *infra* note 360 (recounting the history).

183. See *United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935); see also *infra* Part III (recounting the post-*Miller* history).

184. *Buzzard*, 4 Ark. at 24–25 (opinion of Ringo, C.J.); *id.* at 30 (opinion of Dickinson, J.).

185. *Id.* at 35 (opinion of Lacy, J., dissenting).

186. See *infra* notes 201–06 and accompanying text.

service; Justice Lacy would hold that it encompasses the private use of arms; and Chief Justice Ringo opines, like *Aymette*, that the right is not limited to those enrolled in the militia, but the right exists only for the purpose of public defense.

Chief Justice Ringo's opinion reads similarly to *Aymette*: the right to bear arms is designed to allow resistance to "those who should conspire to overthrow the established institutions of the country, or subjugate their common liberties."¹⁸⁷ Much of his opinion is dedicated to refuting that the right to bear arms is absolute—which Chief Justice Ringo feared it would be if it were disconnected from its militia-related objective.¹⁸⁸ Justice Dickinson makes a similar argument in his opinion.¹⁸⁹

Language in both majority opinions gives some support to the collective rights view. Chief Justice Ringo, for example, does state that the right "enable[s] the militia to discharge this most important trust [i.e., prevent overthrow of the government], so reposed in them, and for this purpose only, it is conceived the right to keep and bear arms was retained."¹⁹⁰ Justice Dickinson refers to the "power given the militia to keep and bear arms"¹⁹¹ as well as the power of the state to regulate weapons "when . . . not required or necessary for military purposes."¹⁹² He further writes, "The militia constitutes the shield and defence for the security of a free State; and to maintain that freedom unimpaired, arms and the right to use them for that purpose are solemnly guaranteed."¹⁹³ Chief Justice Ringo's quotation, along with its surrounding text, provided support to the government's brief in *United States v. Miller*, when the government cited *Buzzard* as one of three American cases holding that the right to bear arms only belongs to people serving in a militia.¹⁹⁴ One person who compiled a history of state court decisions on the right to bear arms called it "by far the most extreme statement in opposition to an individual right to keep and bear arms in the period before the Civil War."¹⁹⁵

Treating *Buzzard* as a collective rights decision overreads the opinions. Both majority opinions treat "militia" as synonymous with "able-bodied free white men"; neither suggests that the right to bear arms is limited to only those citizens who are currently enrolled in highly regulated, constantly drilling militia units (i.e., "select militia").¹⁹⁶ Indeed, Justice Dickinson says that the "militia" is "*necessarily*

187. *Buzzard*, 4 Ark. at 24–25 (opinion of Ringo, C.J.).

188. *Id.* at 21–22. A similar jurisprudential concern occurred in federal courts after *Miller*. See *infra* text accompanying note 326.

189. *Buzzard*, 4 Ark. at 30–32 (opinion of Dickinson, J.).

190. *Id.* at 25 (opinion of Ringo, C.J.).

191. *Id.* at 30 (opinion of Dickinson, J.).

192. *Id.* at 32.

193. *Id.*

194. See Brief for the United States, *supra* note 32, at 16–18. The other two cases were *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905), and *United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935). The latter case was the first reported decision on the constitutionality of the National Firearms Act of 1934. See *infra* text accompanying note 294.

195. CRAMER, *supra* note 10, at 82.

196. See *Buzzard*, 4 Ark. at 27 (opinion of Ringo, C.J.) (treating the "free white men" provision in the right to bear arms as securing the state's "republican institutions," that is, the militia).

composed of the people”; unlike the collective rights view, he does not suggest that the “militia” includes only that subset of people whom the government chooses to enroll for military service.¹⁹⁷ Moreover, Justice Dickinson’s opinion rejects the states’ rights theory of the Second Amendment. He writes, “It is not contended that the General Assembly of this State could interfere with any regulations made by Congress, as to the organizing, arming, or disciplining the militia, or in the manner in which that militia are either to keep or bear their arms.”¹⁹⁸

Justice Lacy, in dissent, takes a libertarian view of the right to bear arms: he recognizes only the power of the state to regulate the dangerous *use* of weapons.¹⁹⁹ He argues that if the right to bear arms means nothing more than the right of a state to arm a militia, then the right is worthless since the state has that power anyway.²⁰⁰ Contrary to the majority, Justice Lacy views the militia as including only those citizens designated by state authority as enrolled in military service.²⁰¹ As a result, if the majority’s view were correct, the state could deprive people of their arms by not enrolling them in military service. For Justice Lacy, the right to bear arms means the “privilege of the people to keep and to bear their private arms, for the necessary defence of their person, habitation, and property, or for any useful or innocent purpose whatever.”²⁰²

Justice Lacy’s opinion is probably closest to the prevailing model that dominated other state courts.²⁰³ Even though the Arkansas Constitution guaranteed the right to bear arms “for the common defence,” his opinion recognized the right as being much broader.²⁰⁴ The majority, of course, disagreed, holding that the right to bear arms exists only for purposes of public defense. With the possible exception

197. *Id.* at 30 (opinion of Dickinson, J.) (emphasis added); *see also* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 802–04 (1998) (explaining that the militia has generally included the entire able-bodied political community). One might object that Justice Dickinson was simply referencing the popular militia of the nineteenth century. This would be wrong for two reasons. First, Justice Dickinson treats the militia as “necessarily composed of the people,” not contingently composed. *Buzzard*, 4 Ark. at 30. Second, the universal militia system largely died after the War of 1812. *See, e.g.*, H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 119–26 (2002); Frederick Bernays Wiener, *Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 188–93 (1940). Those who argue that “times have changed” and that today’s “well-regulated militia” does not involve universal service ignore the fact that many antebellum cases, including *Buzzard*, arose thirty years following the collapse of the universal militia system and the primary emergence of volunteer units.

198. *Buzzard*, 4 Ark. at 29 (opinion of Dickinson, J.).

199. *See id.* at 39–40 (opinion of Lacy, J., dissenting) (“[I]f the right be innocent of itself, it cannot be interdicted; but its unlawful exercise, degenerating into licentiousness, is subject to regulation.”).

200. *Id.* at 35–36.

201. *See id.* at 35.

202. *Id.* at 43.

203. But Justice Lacy would have struck down the prohibition on concealed weapons, so this places him closer to *Bliss*—and on the far end of the individual rights spectrum.

204. *See* ARK. CONST. of 1836, art. II, § 21 (“That the free white men of this State shall have a right to keep and to bear arms for their common defence.”).

of Justice Dickinson's opinion, no antebellum judicial authority supports limiting the right to bear arms to service in the militia. Nor does any authority suggest that the right is limited to the select (or volunteer) militia, even though the universal militia largely became extinct after the War of 1812.

In limiting the right to keep and bear arms to the right to have individual weapons of war for the purpose of resisting oppression, *Buzzard* and *Aymette* cut strongly against the prevailing broad view of the antebellum right to bear arms. But this view of the right to bear arms would predominate after the Civil War, when courts would struggle to adapt the right to bear arms against new social pressures to control handgun violence.

II. THE RIGHT TO BEAR ARMS DURING AND FOLLOWING RECONSTRUCTION

The antebellum right to bear arms was a struggle between a divided citizenry, those who viewed public weapons as a nuisance and those who maintained a strong belief in the right to bear arms in public for individual purposes. Antebellum courts generally synthesized a compromise position that recognized both positions: allow states to prohibit only concealed weapons to control crime, while recognizing a broad right to bear arms openly, whether or not related to militia duty. The three courts that did not strike this compromise—two finding an absolute right to bear arms (the Kentucky Court of Appeals in *Bliss* and the Tennessee Supreme Court in *Simpson*) and one court limiting the right only to military purposes (the Arkansas Supreme Court in *Buzzard*)—found their doctrines overturned.

The post-Civil War period marked a failure of the antebellum compromise. Handguns proliferated after the Civil War, and concealed weapons bans largely proved inadequate to stem crimes committed with them. Legislatures and the people clamored for new authority to regulate—and even prohibit—handguns. Moreover, legislatures faced new challenges, including minors with guns, persons showing up to court armed, armed persons “intimidating” voters at the polls with weapons,²⁰⁵ armed corporations breaking strikes, and the new legal recognition of blacks as full citizens with a right to have guns—something the Southern white community feared and resented.²⁰⁶ The scope of the popularly accepted right to bear arms changed.

Faced with new pressures to allow legislatures to regulate guns more extensively, courts largely altered the scope of the right to bear arms. The right to bear arms following the Civil War was primarily the right contained in *Aymette*: a broad right to keep arms in the home, but a very limited right to have arms in public. Legislatures could regulate the right to carry handguns in a manner that made the right extremely difficult to exercise (e.g., limiting the right to military-style revolvers carried openly in the hand). Constitutionally protected “arms” were only those arms constituting the “ordinary military equipment”—arms, such as

205. Of course, many times these were Union soldiers guarding the polls and preventing the intimidation of blacks.

206. I am omitting discussion of the Black Codes, which, among other things, required the freedmen to obtain licenses before possessing firearms. These laws were overturned by Congress. See Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67, 71 (1991).

rifles, appropriate for individual citizens to use when in military service. Handguns received little constitutional protection after the Civil War, with the exception that a majority of courts recognized at least the right to have military-style revolvers. Courts also reconstructed the “regulation/prohibition” distinction to fit the new legislative framework. Total prohibitions on carrying guns in certain places would be “regulations”—not prohibitions—provided they were not overbroad. This supplanted the old theory that prohibitions on concealed weapons did not restrict the right to bear arms because such laws merely prescribed the manner in which arms were borne.

A. Community Standards and the Legislative Framework

Before the Civil War, gun control revolved primarily around concealed weapons, dueling, and honor-related killings. After the Civil War, the primary concern of legislatures was crime committed with handguns. Beginning in the 1870s—and continuing at various times throughout the twentieth century—states began banning the sale and carrying of handguns. Tennessee and Arkansas imposed this through outright bans on all handguns, except army- or navy-model revolvers.²⁰⁷ Alabama, Texas, and Virginia taxed dealers or imposed transfer taxes on the sale of pistols.²⁰⁸ North Carolina imposed a property tax.²⁰⁹

Although many commentators today malign these Southern laws as racist—which they were—they also had legitimate crime-control objectives, and calls for them were not limited to Southern states. In 1873, a New York grand jury requested a ban on carrying pistols or concealed weapons.²¹⁰ A few years later, these efforts met with some success when the New York City aldermen adopted a proposal to require a license to carry a pistol.²¹¹ The *Philadelphia Inquirer* reported in 1880 that carrying pistols had declined in Pennsylvania outside of Philadelphia.²¹²

Social pressures were clearly turning against carrying guns in public. In 1887, a Michigan man tried to defend himself against a concealed weapons charge by claiming that he showed the gun to persons with whom he came into contact and thus lacked the intent to conceal it. But he testified that he did not wear the gun openly, “lest people should think him a madman.”²¹³ He pled for an acquittal, saying that honest citizens needed to be able to carry guns to defend themselves

207. Act of Apr. 1, 1881, No. 96, 1881 Ark. Acts 191, 191–92; Act of Mar. 14, 1879, ch. 96, 1879 Tenn. Pub. Acts 135, 135–36; see also Tahmassebi, *supra* note 206, at 74–75.

208. Tahmassebi, *supra* note 206, at 74–75.

209. Act of Feb. 26, 1867, ch. 72, § 14, 1866–1867 N.C. Pub. Laws 95, 103 (requiring a tax on pistols and making it a crime to carry a handgun without paying the tax). An 1866 act required a tax of \$50 on pistols, Bowie knives, dirks, sword canes, or other deadly weapons worn upon the person without the permission of the board of aldermen. Act of Mar. 10, 1866, ch. 7, § 19, 1866–1867 N.C. Priv. Laws 53, 63.

210. *Concealed Weapons*, HARTFORD DAILY COURANT, Feb. 21, 1873, at 3.

211. *The Pistol Ordinance*, N.Y. HERALD, Mar. 20, 1878, at 10.

212. *The Law Supreme*, PHILA. INQUIRER, Dec. 17, 1880, at 4.

213. *A Fine Argument: Robert M. Buyse Gives Good Reasons Why He Carried a Revolver*, JACKSON WKLY. CITIZEN (Mich.), Dec. 13, 1887, at 5.

against robbers—an older form of today’s “if you ban guns, only bad guys will have them” argument. The newspaper approved of his argument, noting that robberies were an everyday event.²¹⁴

Indeed, the population was torn between those who favored banning the carrying of pistols and those who believed that, if this were done, honest citizens would be at the mercy of criminals. In 1889, the *Knoxville Journal* spoke quite approvingly of Tennessee’s bans on carrying and selling pistols. The newspaper thought that the ban had reduced heat-of-passion killings and called for a complete prohibition of handguns.²¹⁵ These calls were not limited to the South. The *San Jose Evening News* reprinted a *Templeton Times* article calling for people to stop carrying guns, unless they had a legitimate need.²¹⁶

On the other hand, many believed that they needed to carry guns for protection. In 1889, an Omaha news article detailed several people as examples of a “fad” to carry pistols for protection.²¹⁷ Members of Congress “very generally carried” pistols in the Capitol.²¹⁸ A Louisiana editorial complained that the Louisiana concealed pistol law was not working and that people needed to carry guns for protection.²¹⁹

In addition to these legitimate crime-control objectives, anti-pistol laws had some racist overtones. There was widespread belief that blacks used guns to commit crimes against whites. One paper quite bluntly stated that “[e]ven the stalwarts who believe in John Brown, and regard Lincoln’s emancipation proclamation as greater than the Sermon on the Mount, carry pistols in this city now to protect themselves from negro robbers and murderers.”²²⁰ An ex-Confederate officer was asked why he took his gun into an opera house when only “Democrats” would be present. He responded that he always carried his gun and thought that was the practice among both whites and blacks.²²¹

Instead of Black Codes, legislatures responded by prohibiting “vagrants” or “tramps” from carrying weapons.²²² Commentators have noted that the ban on pistols—except army pistols—effectively priced black citizens out of weapons.²²³ Army pistols were more expensive—out of the price range of most black Americans—and whites generally retained such pistols from their Civil War

214. *Id.*

215. *The Sacredness of Human Life*, KNOXVILLE J., May 10, 1888, at 2.

216. *Carrying Pistol*, EVENING NEWS (San Jose), Sept. 26, 1887, at 2.

217. *People Who Carry Pistols: How the Hip Pocket Fad Has Enveloped Male Omaha in Its Dangerous Embrace*, OMAHA DAILY HERALD, Apr. 28, 1889, at 10.

218. *Congressmen Who Carry Pistols: Pocket Pistols Very Generally Carried—Legislators Who Go Armed*, COLUMBUS ENQUIRER-SUN (Ga.), Aug. 6, 1886, at 5.

219. *Criminalities: Pistols*, DAILY PICAYUNE (New Orleans), May 16, 1874, at 6.

220. *The Negroes of the District: The Care Required by the Colored Vagrants*, WHEELING REG. (W. Va.), Feb. 3, 1880, at 1.

221. *A Very Frank Witness: Testifies Before the Danville Investigating Committee Today*, EVENING CRITIC (D.C.), Feb. 19, 1884, at 3.

222. See, e.g., Act of Mar. 13, 1880, ch. 213, § 2, 1880 Me. Laws 212, 212–13; Act of Mar. 12, 1879, ch. 198, § 2, 1879 N.C. Laws 355, 355; Act of Apr. 30, 1879, No. 31, § 2, 1879 Pa. Laws 33, 34; Act of Mar. 4, 1879, ch. 188, § 4 Wis. Laws 273, 274.

223. Tahmassabi, *supra* note 206, at 74–75.

service.²²⁴ Indeed, the effect of the weapons laws was to produce a double standard: white citizens were usually left alone to possess and carry guns—enforcement of the law against them was viewed as violating the right to bear arms for defense—while black citizens were routinely prosecuted.²²⁵

There is some evidence that the population also began to divide on whether the right to bear arms existed for individual defense or only for militia-related purposes. From Louisiana to New York, articles began to appear which contained strong statements that the right to bear arms applied to individual self-defense.²²⁶ The New York editorial expressed disapproval of police proposals to ban gun carrying while exempting the police. It argued against the militia-centric view of the right to bear arms, saying instead that the provision was intended to prevent one standard for government officers who carry guns and a separate standard for normal citizens.

But the modern collective rights argument also began to take hold in the late-1870s in some quarters. In response to armed strikebreaking, Illinois prohibited groups of people from parading with arms.²²⁷ While the law was undergoing court review, editorials supported it by arguing that the right to bear arms only belonged to people when they were acting in a state-sponsored “well-regulated militia,” not in private armed groups.²²⁸

The Supreme Court never accepted this militia-only position, instead affirming the constitutionality of the act on narrower grounds in *Presser v. Illinois*.²²⁹ The Supreme Court very carefully said that the act did not affect the right of individuals to bear arms, but only to parade as groups with weapons.²³⁰ Indeed, the Court said that “all citizens capable of bearing arms constitute the . . . reserve militia of the United States as well as of the States” and that states could not prohibit their citizens from keeping and bearing arms, since that would deprive the federal government of its power to call forth the militia.²³¹ But the right to keep and bear arms, the Court held, did not include the right to band together as armed groups.²³²

224. *Id.*

225. *The Right to Bear Arms*, WKLY. PELICAN (New Orleans), Feb. 9, 1889, at 2; see also Robert J. Cottrol & Raymond T. Diamond, “Never Intended to Be Applied to the White Population”: Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence?, 70 CHI.-KENT L. REV. 1307 (1995) (describing the history of racial disparities in firearms regulation following 1893).

226. *Criminalities: Pistols*, *supra* note 219; INDIANAPOLIS SENTINEL, May 15, 1882, at 4 (reprinting article from N.Y. J. COMMERCE).

227. Act of May 28, 1879, art. 11, §§ 5–6, 1879 Ill. Laws 193, 203–04.

228. *The Right to Bear Arms*, INTER OCEAN (Chi.), June 27, 1879, at 4.

229. 116 U.S. 252 (1886).

230. *Id.* at 264–65.

231. *Id.* at 265; see also Robert Leider, Federalism and the Military Power of the United States 91–92 (Sept. 24, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330648 (explaining *Presser*’s holding and the theory of the militia on which it relies).

232. *Presser*, 116 U.S. at 267–68. Arizona and Washington would adopt language in their state analogues of the Second Amendment clarifying that the right to bear arms does not include the right of private corporations to employ armed groups. See ARIZ. CONST. art. II, § 26; WASH. CONST. art. I, § 24.

Thus, post-Civil War courts were being torn in several directions. New legislation was strictly regulating guns. These included prohibitions on most handguns, minors having guns,²³³ carrying a gun while intoxicated, and the possession of guns in certain locations such as courthouses, polling places, and public gatherings.²³⁴ Many citizens were frustrated with gun crimes, including robberies and heat-of-passion killings. White Southerners did not want black Americans possessing guns. At the same time, many citizens wanted the right to carry guns for personal protection against crime. And labor unions worked to stop private detective agencies from banding together as armed groups to break up labor protests. Finally, contemporaneous opinions on the scope of the right began to split between those who thought the right should belong to the government-sponsored “well-regulated militia”—which now primarily consisted of the National Guard—and those who retained the belief that the right included private self-defense.

B. The Courts Respond

In response to these competing social pressures, post-Civil War courts reconceptualized the purpose and scope of the right to keep and bear arms. Instead of placing a high emphasis on personal defense, the civic republican view articulated in *Aymette* took precedence. The only constitutionally protected weapons were those that had value for militia service—the “ordinary military equipment.” Most handguns did not qualify. Post-Civil War courts recognized a broad right to keep arms in the home and, in general, a very limited right to bear arms in public.²³⁵ I should note two caveats: First, like their antebellum predecessors, different courts deviate from the rules I have identified above, so one can find a few exceptions in the case law. Second, some of the state constitutional provisions enacted during the post-Civil War period gave legislatures explicit authority to regulate the wearing (or bearing) of weapons, instead of the narrower permission to regulate only *concealed* weapons.²³⁶

As I articulated in Part I, *Aymette* had three main holdings. The first was that the only constitutionally protected weapons were those “usually employed in civilized warfare” and that constituted the “ordinary military equipment.” Second, the right to keep arms in the home was broader than the right to bear arms in public, the latter not including the right to carry a weapon concealed. Third, the right to bear arms was for public—not private—defense. Post-Civil War courts almost

233. See, e.g., Act of Mar. 5, 1883, ch. 105, 1883 Kan. Laws 159 (prohibiting both minors and those of unsound mind); Act of Feb. 10, 1882, ch. 4, 1882 N.J. Laws 13; Act of Apr. 3, 1883, ch. 329, 1 1883 Wis. Laws 290.

234. See, e.g., Act of Oct. 18, 1870, No. 285, 1870 Ga. Laws 421; Act of Mar. 16, 1870, No. 100, § 73, La. Acts 2d Sess. 145, 159–60; Act of Mar. 5, 1883, 1833 Mo. Laws 76 (prohibiting carrying a firearm while intoxicated); Act of Apr. 12, 1871, ch. 34, 1871 Tex. Laws 1st Sess. Gen. Laws 25; Act of Aug. 15, 1870, ch. 78, § 55, 1870 Texas Laws Gen. Laws 128, 139.

235. See generally O’Shea, *supra* note 10, at 641–59 (discussing cases).

236. See FLA. CONST. of 1885, Declaration of Rights, § 20; GA. CONST. of 1868, art. I, § 14; OKLA. CONST. art. II, § 26; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; TEX. CONST. of 1868, art. I, § 13; UTAH CONST. of 1895, art. I, § 6.

unanimously adopted the first holding. With respect to the second holding, no court during this period found a right to carry a concealed weapon.²³⁷ But courts, again, wobbled on the third issue of whether they would recognize a right to bear arms in public for private purposes. Most of them did find a right for private purposes, but they further constrained the constitutional right of gun carrying to make the right to bear arms for private purposes basically useless. And they recognized that a legislature has wide latitude to ban guns completely in “sensitive locations,” provided that the restrictions are not overbroad.

1. What Arms Are Protected?

In the post–Civil War era, the Tennessee Supreme Court would take the lead. In *Andrews v. State*,²³⁸ the court reaffirmed *Aymette*, holding that protected arms included:

Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature.²³⁹

The court then reversed the convictions of each defendant because the indictments did not specify the type of pistol. Army revolvers, the full-sized revolvers that were adopted by the U.S. Army as standard pistols, were constitutionally protected handguns, and as such, a total ban on them would be void.²⁴⁰ All other handguns could be prohibited.²⁴¹ The Arkansas Supreme Court followed suit, holding that an 1875 ban on carrying all pistols (whether openly or concealed) did not apply to army pistols.²⁴² The court explicitly relied on *Aymette* and *Andrews* in reaching its decision. Georgia applied the term “arms” to militia weapons, such as “guns of

237. Most courts did not comment on the scope of the right to keep arms in the home since few laws restricted that. I discuss the sparse commentary on the scope of the right below. See *infra* Part II.B.2.

238. 50 Tenn. (3 Heisk.) 165 (1871).

239. *Id.* at 179.

240. *Id.* at 186–87.

241. *Id.*; see also *id.* at 192 (issuing holding). Handguns come in different sizes. Traditionally the military adopts full-sized handguns as its standard-issue pistol. The distinction between army pistols and other pistols is largely a distinction between larger handguns that have military value and are difficult to conceal and smaller handguns that have little military value but are easy to conceal.

242. *Fife v. State*, 31 Ark. 455, 458–61 (1876).

every kind, swords, bayonets, [and] horseman's pistols" but not including "pistols, dirks, Bowie-knives, and those weapons of like character."²⁴³

West Virginia's Supreme Court of Appeals, assuming that the Second Amendment applied to the states, listed "swords, guns, rifles, and muskets" as protected, but "pistols, bowie-knives, brass knuckles, billies, and [other brawling weapons]" as excluded.²⁴⁴ This was one of the few decisions to exclude handguns entirely.²⁴⁵

Between 1871 and 1874, the Texas courts took a broader view of permissible military weapons. In *English v. State*,²⁴⁶ the Texas Supreme Court held:

The word "arms" in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.²⁴⁷

This holding was under both state and federal constitutional guarantees. This is the only case I have found that protected weapons (artillery guns) that individuals could not physically bear, as opposed to only those ordinary personal arms of the infantry.

In 1874, the Texas Supreme Court reversed course on whether solely military arms were protected. In *State v. Duke*,²⁴⁸ the court held that "arms" included "such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State."²⁴⁹ The court held that this included double-barreled shotguns, the huntsman's rifle, and pistols not adapted for concealed carry, lest "the only arms which the great mass of the people of the State have, [would not be] under constitutional protection."²⁵⁰ This is the only case to foreshadow the civilian common-use test announced by Justice Scalia in *Heller*.²⁵¹

Thus, by 1900, the almost-unanimous view of state courts was that the "arms" protected by the Second Amendment and state analogues were only those arms that citizens would employ in war. They were generally individual weapons that a citizen would possess and carry, such as rifles, muskets, and army pistols. Weapons that were not ordinarily employed by soldiers as personal weapons were not included. This category generally included weapons that were not sufficiently powerful to be of military value, such as Bowie knives and small pistols—weapons

243. *Hill v. State*, 53 Ga. 472, 474 (1874).

244. *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891).

245. Some later cases also excluded pistols. *See, e.g., Ex parte Thomas*, 97 P. 260 (Okla. 1908).

246. 35 Tex. 473 (1871).

247. *Id.* at 476.

248. 42 Tex. 455 (1874).

249. *Id.* at 458.

250. *Id.* at 458–59.

251. *See District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008).

that were often employed for criminal purposes and which would lead to an “offense against discipline” if carried by a soldier.²⁵² By curtailing the scope of protected arms to only militia arms, the courts gave legislatures leeway to regulate handguns and knives, and to address the social externalities caused by the illegal use of such weapons.

2. Scope of the Right to Keep Arms

Not a single court, post–Civil War through 1900, held that the right to keep arms in the home was contingent on active service in a well-regulated militia—even though the National Guard system already had begun replacing the universal militia. This was consistent with the majority post–Civil War view that citizens have a right to keep arms. To the extent that Justice Dickinson’s opinion in *Buzzard* suggested it, by the time *Fife v. State* was decided, Arkansas had firmly abandoned the militia-only approach in favor of the Tennessee approach articulated by Judge Green in *Aymette*.²⁵³ No court adopted the collective rights view until 1905, when the Kansas Supreme Court became the first court in American history to limit the right to keep and bear arms to only those citizens actively participating in an organized militia.²⁵⁴

There are very few cases on the right to keep arms during the decades following the Civil War. Most banned weapons were insufficiently powerful to have military application, so courts simply held that the weapons at issue were not “arms.” The Tennessee Supreme Court in *Andrews* fleshed out fully what the court thought were the incidents of the right to keep arms. These included the right to purchase arms, repair them and keep them in a useable state, purchase ammunition, practice shooting, and use arms for traditionally lawful purposes.²⁵⁵ In *Jennings v. State*,²⁵⁶ the Texas Court of Appeals did not allow the forfeiture of a pistol that was illegally carried, saying that the forfeiture violated the defendant’s right to keep the arm.²⁵⁷

252. *English*, 35 Tex. at 477.

253. See *Fife v. State*, 31 Ark. 455, 458–59 (1876).

254. *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905).

255. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178–79 (1871). This is important to note for contemporary case law, which is struggling with the question of whether the Second Amendment extends beyond the home. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (majority opinion of Wilkinson, J.) (“There may or may not be a Second Amendment right in some places beyond the home”); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) (“If the Supreme Court, in [*McDonald*’s] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.”). As *Andrews* makes clear, incidents of the right to keep arms in the home extend beyond the home. These include the right to carry a gun to and from a place of purchase, repair, or target practice. Courts, thus, do not mean to ask whether the Second Amendment extends beyond the home; it clearly does. The actual question they are asking is whether the right extends to carrying loaded guns outside the home for individual self-defense.

256. 5 Tex. Ct. App. 298 (1878).

257. *Id.* at 300–01.

3. Right to Bear Arms

With the increasing social pressure placed on legislatures to curtail handgun carrying, post–Civil War courts scrutinized legislation restricting public gun carrying less strictly than they did in the antebellum period. This is perhaps the most significant transformation of the right to bear arms from the antebellum to the post–Civil War period.

Unlike the Kentucky antebellum case *Bliss*, no court during this period upheld a constitutional right to carry a concealed weapon, regardless of whether claims were raised under the Second Amendment or state analogues.²⁵⁸ Courts went so far as to even deny individuals a constitutional right to carry a concealed weapon in their own homes.²⁵⁹ By 1900, it was clear that the right to carry concealed weapons was not part of the constitutional right to bear arms.²⁶⁰ Thus, the U.S. Supreme Court stated in the 1897 case *Robertson v. Baldwin*²⁶¹ that the Bill of Rights had “exceptions, which continued to be recognized as if they had been formally expressed. Thus, . . . the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons”²⁶²

Courts began acknowledging that prohibitions on concealed weapons were designed to prevent *all* public carrying of weapons consistent with the right to bear arms. During the Civil War, the Georgia Supreme Court had held that the purpose of the concealed weapons statute was to alert people that a person was armed and to be avoided in a fight.²⁶³ The South Carolina Supreme Court understood the South Carolina statute to have a broader purpose, , asserting that the “purpose was, as far as may be consistent with the right of the citizen to bear arms, absolutely to prohibit the carrying of deadly weapons, with a view to prevent acts of violence and bloodshed.”²⁶⁴ The Louisiana Supreme Court agreed.²⁶⁵

Indeed, for the first time, courts began allowing legislatures generally to prohibit unconcealed pistols. When the Tennessee Supreme Court held in *Andrews* that a ban on carrying pistols could not be applied to all handguns,²⁶⁶ the Tennessee legislature responded by prohibiting the carrying of all handguns, except army pistols carried openly in the hand.²⁶⁷ Obviously, this made the carrying of handguns extremely difficult.²⁶⁸ Nevertheless, the Tennessee Supreme Court upheld the

258. *See, e.g.*, *Smith v. State*, 11 So. 71 (Ala. 1892); *State v. Shelby*, 2 S.W. 468 (Mo. 1886); *State v. Johnson*, 16 S.C. 187 (1881); *Andrews*, 50 Tenn. (3 Heisk.) 165.

259. *Carroll v. State*, 28 Ark. 99 (1872).

260. Wisconsin challenged this convention in 2003 when it found a right to conceal weapons in the home or a fixed place of business. *See supra* note 118.

261. 165 U.S. 275 (1897).

262. *Id.* at 281–82.

263. *Stockdale v. State*, 32 Ga. 225, 227–28 (1861).

264. *Johnson v. State*, 16 S.C. 187, 191 (1881).

265. *See State v. Bias*, 37 La. Ann. 259, 260 (1885).

266. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 192 (1871).

267. Act of Dec. 14, 1871, ch. 90, 1871 Tenn. Pub. Acts 81.

268. Arkansas passed a similar law ten years later. As the Arkansas Supreme Court noted with reference to its law:

law.²⁶⁹ A similarly restrictive law was upheld in Arkansas,²⁷⁰ which, like Tennessee's law, was a legislative response to court holdings that there was a right to carry army pistols openly.²⁷¹ The Texas Supreme Court allowed a law banning the carrying of handguns, except while traveling or when a person had reasonable grounds to fear attack.²⁷²

Further, state courts upheld prohibitions on various "abuses" of the right. The Missouri Supreme Court approved restrictions on carrying firearms while intoxicated.²⁷³ Other courts sustained prohibitions on carrying firearms concealed with unlawful intent²⁷⁴ and pointing firearms at others,²⁷⁵ and one court held that the right to bear arms did not extend to escaped convicts trying to avoid arrest.²⁷⁶ Moreover, courts held that complete bans on the possession of firearms in narrowly defined areas, such as courthouses, polling places, and public gatherings, were permissible regulations of the right to bear arms, not complete prohibitions on exercising the right.²⁷⁷ By the early nineteenth century, a few outlier states still afforded broad constitutional protection for individuals who carried pistols. In these states, courts did not allow legislatures to generally prohibit or broadly restrict the carrying of pistols; some decisions distinguished, for example, total prohibitions on carrying a pistol within an entire city from narrowly tailored restrictions on possessing weapons in courthouses, polling places, and public assemblies.²⁷⁸

Thus, to borrow Bruce Ackerman's term, we see intergenerational synthesis.²⁷⁹ Courts held over some residue of a right to bear arms openly for private purposes. But post-Civil War courts severely curtailed the right in response to popular demand that handguns be further regulated. One need not analogize "guns as smut" to defend a largely homebound Second Amendment,²⁸⁰ the civic republican reading

It must be confessed that this is a very inconvenient mode of carrying them habitually, but the habitual carrying does not seem essential to "common defense." The inconvenience is a slight matter compared with the danger to the whole community, which would result from the common practice of going about with pistols in a belt, ready to be used on every outbreak of ungovernable passion.

Haile v. State, 38 Ark. 564, 566 (Ark. 1882).

269. State v. Wilburn, 66 Tenn. 57 (1872).

270. *Haile*, 38 Ark. at 567.

271. See, e.g., *Holland v. State*, 33 Ark. 560 (1878); *Wilson v. State*, 33 Ark. 557 (1878); *Fife v. State*, 31 Ark. 455 (1876).

272. *State v. Duke*, 42 Tex. 455 (1874).

273. *State v. Shelby*, 2 S.W. 468 (Mo. 1886).

274. *Wright v. Commonwealth*, 77 Pa. 470 (1875).

275. *Davenport v. State*, 20 So. 971 (Ala. 1896).

276. *Tolbert v. State*, 14 So. 462 (Miss. 1893).

277. See, e.g., *Hill v. State*, 53 Ga. 472 (1874).

278. See, e.g., *In re Brinkley*, 70 P. 609 (Idaho 1902); *State v. Kerner*, 107 S.E. 222 (N.C. 1921) (striking down a licensing ordinance for unconcealed pistols); *State v. Rosenthal*, 55 A. 610 (Vt. 1903).

279. On intergenerational synthesis, see, for example, 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 90 (1991).

280. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009). Miller also provides historical reasons to support his argument for limiting the Second Amendment to the home.

accomplishes this. By 1900, the right to keep and bear arms was the right to keep military-style weapons in the home and, in very limited cases, to bear them openly in public. This required changing the structure of the right to bear arms by emphasizing almost exclusively the right's purpose as public defense against oppression—and de-emphasizing individual self-defense.

III. *UNITED STATES V. MILLER*: THE FAILURE TO REACH AN ACCEPTABLE SOCIAL COMPROMISE

*United States v. Miller*²⁸¹ is one of the most maligned cases in constitutional history. Justice Scalia, in *Heller*, writes that the case “did not even purport to be a thorough examination of the Second Amendment.”²⁸² Brian Frye, who compiled a detailed history of the case, asserts that both individual and collective rights theorists find *Miller* to be “an impenetrable mess.”²⁸³ Discussion of *Miller* often involves mentioning Justice McReynolds's personal or professional failings.²⁸⁴

In this Subpart, I make two claims. First, *Miller* is completely clear as to its holding. Without retracing all of Frye's extensive analysis, I will review the parts of *Miller* that clearly establish that the Court was disposing of the case on grounds considered “startling” today²⁸⁵: sawed-off shotguns are not “ordinary military equipment.” *Miller* held, following *Aymette*, that only military arms were protected. *Miller* explicitly refused to rule on the scope of the right.

Miller's principal difficulty is not its opacity—the decision, fairly read, is unambiguous; instead, *Miller*'s failing is that it entrenched a Second Amendment right that could not adapt to changing popular constitutional norms concerning the scope of the right to bear arms. Changing technology, along with the failure of the militia system, created a situation where the contemporaneous population considered military arms to be inappropriate for civilian possession. By recognizing a right to have arms that the contemporaneous society was not prepared to accept, the Supreme Court jammed the lower courts after *Miller* between recognizing a collective right to keep and bear arms—which is essentially no right—and recognizing a right considered so extreme that it was beyond the pale. Faced with this choice, lower federal courts chose to adopt the collective rights view, thereby removing themselves from deciding the scope of the Second Amendment. Thus, *Miller* was not a failure because the case was opaque or wrongly decided; it was neither. (Indeed, it was more originalist than *Heller*.) *Miller* failed because it left courts unable to fashion a right to bear arms that comported with the popular understanding of the right.

281. 307 U.S. 174 (1939).

282. *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008) (citing Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 65–68 (2008)).

283. Frye, *supra* note 282, at 49.

284. *See id.* at 70.

285. *Heller*, 554 U.S. at 624; *see also* Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 354–62 (2009) (suggesting three possible interpretations of *Miller* and arguing that the best interpretation was that the weapon at issue did not constitute “ordinary military equipment”).

A. United States v. Miller

In 1934, Congress adopted the second major gun control law in this country's history: the National Firearms Act.²⁸⁶ The Act was a response to gangster-era violence, which Prohibition fueled.²⁸⁷ The Act attempted to ban gangster weapons, most notably the Thompson submachine gun.²⁸⁸ Because Congress was concerned that it did not have the constitutional power to ban machine gun possession—the New Deal Commerce Clause jurisprudence had not yet been developed—Congress imposed a tax modeled on the Harrison Narcotics Act.²⁸⁹ The law required an expensive license to manufacture, import, or deal in certain highly destructive weapons, most notably machine guns, short-barreled rifles and shotguns, silencers, and concealable weapons other than pistols and revolvers (e.g., pen guns or other gadget guns).²⁹⁰ Unlicensed individuals could only obtain these weapons if they underwent a fingerprint-based criminal background check and paid a \$200 transfer or making tax—a tax steep enough to deter nearly all sales.²⁹¹

Jack Miller and Frank Layton were arrested on April 18, 1938, for possessing a sawed-off shotgun in interstate commerce in violation of the National Firearms Act.²⁹² The district court dismissed the indictment, holding, with no analysis, that the Act violated the Second Amendment.²⁹³ The case came before the Supreme Court on direct appeal by the government.

By the time of the appeal, the district courts had split on this issue. A district court in Florida had upheld the Act, declaring, “The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights.”²⁹⁴ Despite the “collective body and not individual

286. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–72 (2012)). The first major gun control law was the Miller Act, which prohibited sending concealable firearms through the mail. *See* Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059 (codified as amended at 18 U.S.C. § 1715 (2012)). Frye gives a brief summary of the history of the National Firearms Act. *See* Frye, *supra* note 282, at 60–63.

287. *See* H.R. REP. NO. 73-1780, at 1 (1934).

288. *See* David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENV. U. L. REV. 901, 911 (2009). On the Thompson submachine gun and its relationship to state machine gun laws, *see* Marshall, *supra* note 56, at 705 n.57.

289. Frye, *supra* note 282, at 61. Congress decided in 1986 that it did have the power to ban machine guns. Firearms Owners' Protection Act, Pub. L. No. 99-308, sec. 102, § 922(o), 100 Stat. 449 (1986) (codified at 18 U.S.C. § 922(o) (2012)).

290. National Firearms Act, 48 Stat. at 1236.

291. Frye, *supra* note 282, at 61. For the legal framework, *see* National Firearms Act, 48 Stat. at 1236–40. Congress subsequently reduced the transfer tax on certain concealable weapons when they decided that some of the weapons had legitimate purposes. *See* Act of June 16, 1938, Pub. L. No. 75-651, 52 Stat. 756 (establishing a \$1 transfer tax); Act of June 1, 1960, Pub. L. No. 86-478, 74 Stat. 149 (raising the tax to \$5). The tax remains at \$5 today. 26 U.S.C. § 5811(a) (2012).

292. Frye, *supra* note 282, at 48–49.

293. *United States v. Miller*, 26 F. Supp. 1002 (D. Ark. 1939).

294. *United States v. Adams*, 11 F. Supp. 216, 219 (D. Fla. 1935).

rights” language, the opinion was not entirely clear about what it held. The district court found that the Constitution did not apply to “weapons of the character dealt with in the act” and then cited *Workman* and *Hill*, both of which held that individuals have a right to possess ordinary military arms for public defense purposes.²⁹⁵ It did not cite *Blaksley*, which held that the right only could be exercised in state-organized military units.²⁹⁶ Thus, it is possible that the Florida district court was recognizing a right to have military arms for public defense but not for individual self-defense. Alternatively, the court may have been recognizing a collective right to bear arms and just failed to cite the Kansas case.

The government’s brief in *Miller* contained two arguments.²⁹⁷ First, the government argued that the right to bear arms “is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.”²⁹⁸ The government’s brief cited and quoted heavily from the three precedents that arguably gave a collective rights view: Justice Dickinson’s *seriatim* opinion in *Buzzard*, the Kansas Supreme Court’s opinion in *Blaksley*, and the Florida district court opinion in *Adams*.

Second, the government argued:

While some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property as well as the right of the people to bear them collectively, the cases are unanimous in holding that the term “arms” as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals.²⁹⁹

The “while some courts” language was an understatement. The government backed its second argument with nearly twenty cases directly on point. As I have described above, it was the overwhelmingly accepted view of the right to keep and bear arms at the time—unlike the government’s collective rights argument, for which the government could muster only two court opinions and one concurrence.

The Supreme Court clearly adopted the government’s second argument. The Court held:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of

295. See *supra* notes 243–44 and accompanying text.

296. *City of Salina v. Blaskley*, 83 P. 619 (Kan. 1905).

297. Brief for the United States, *supra* note 32, at 18; see also *United States v. Emerson*, 270 F.3d 203, 222–23 (5th Cir. 2001) (recognizing the government’s alternative arguments); Frye, *supra* note 282, at 66 (same).

298. Brief for the United States, *supra* note 32, at 15.

299. *Id.* at 18 (citations omitted).

the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State of Tennessee*, 2 Humph., Tenn., 154, 158.³⁰⁰

Miller's holding is as clear as day. Justice McReynolds was explicitly following *Aymette*, which held that only those weapons that constitute the “ordinary military equipment” are constitutionally protected.³⁰¹ The sawed-off shotgun was never ordinary military equipment. The whole essence of the sawed-off shotgun was that it was an ordinary shotgun specially adapted for concealment and criminal purposes, giving the user the destructive power of a shotgun and the portability of a handgun. *Miller* was following *Aymette* and the post-Civil War progeny that it had spawned: shortened weapons that have little or no military value—and were specially adapted for concealment and criminal purposes—fell outside the scope of “arms” protected by the Second Amendment. By the time *Miller* came down, there were nearly 100 years of case law holding this, albeit usually applied to pocket pistols rather than sawed-off shotguns.³⁰²

300. *United States v. Miller*, 307 U.S. 174, 178 (1939).

301. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840); see also Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873 (1960) (“Although the Supreme Court has held this Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute.”).

302. Nelson Lund reads the holding very literally. He observes:

Note that the Court does not hold that short-barreled shotguns are outside the coverage of the Second Amendment. The Court says only that it has seen no evidence that these weapons have certain militia-related characteristics—which is no surprise given the procedural posture of the case—and that the Court could not take judicial notice of certain facts about the military utility of these weapons. After this statement, one would expect the case to be remanded to give the defendants an opportunity to offer the kind of evidence called for in the Court’s holding.

Nelson Lund, *Heller and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335, 338 (2009) (noting also that the Court, in fact, remanded the case).

While Lund correctly observes the cautiousness of the holding, he reads the holding out of its historical context. By the time *Miller* had been decided, a century of cases had held that weapons specially adapted to concealment, and thus criminal purposes, were beyond the scope of the right to bear arms. This is why the Supreme Court, at the end of its opinion, notes that the district court’s opinion had no support in any state court decision. See *Miller*, 307 U.S. at 182 (“[No state court decision] seem[s] to afford any material support for the challenged ruling of the court below.”). This would be an oddly sweeping condemnation if the district court’s only failure had been to collect enough evidence of the military usefulness of a sawed-off shotgun. Even if sawed-off shotguns had *some* military value, they have never been *ordinary* military equipment—that is, commonly issued to soldiers, like muskets and rifles have been. This fact—not the failure of *Miller* and *Layton* to argue in the Supreme Court—is likely why the Court stated, “Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” *Id.* at 178. The remand that Lund cites was a remand for a criminal trial, not a remand for them to present more evidence about the military value of a sawed-off shotgun.

Indeed, *Aymette* clearly found that individuals have an “unqualified right” to keep military arms—and a more limited right to bear them—so that the people may resist oppression. If the Court had intended to hold that the right was collective, it would have cited *Blaksley* and argued that Miller and Layton were not active members of the National Guard.

Just because the Court followed *Aymette*’s negative holding—that arms having no military value are not constitutionally protected—does not mean that the Court followed *Aymette*’s affirmative holding that all citizens have a right to keep military arms.³⁰³ The Court, in fact, did not adopt *Aymette*’s affirmative holding. This becomes clear when one analyzes the very end of the opinion—which, as far as I can tell, only Brian Frye has done.³⁰⁴ The Court stated:

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.³⁰⁵

Frye concludes from this passage that “McReynolds assumed the scope of the Second Amendment guarantee depends upon the relevant state constitution. Or at the very least, the guarantees incorporated into the state constitutions illuminate the scope of the right guaranteed by the Second Amendment.”³⁰⁶

Neither of Frye’s conclusions quite accurately explains the function of this passage. In the next sentence, the Court stated, “In the margin some of the more important opinions and comments by writers are cited.”³⁰⁷ Here, the Court cited a number of state supreme court cases, including *City of Salina v. Blaksley*, the Kansas case upholding only a collective right to bear arms in a state-organized militia, as well as *Aymette*, *Duke*, *Fife*, *Workman*, and *People v. Brown* (a Michigan case described below)—all of which upheld various species of an individual right. In this final passage, the Supreme Court *acknowledged* the debate in state courts over the *subjects* and *content* of the right to keep and bear arms.³⁰⁸ And it explicitly stated that it did not need to resolve this dispute because, whatever the scope of the right, it did not encompass possessing and carrying weapons specially adapted for criminal purposes. In the footnote, the Court cited cases holding that there was a

303. For a contrary assumption, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 655 (1989) (classifying bazookas and rocket launchers as possibly protected weapons).

304. Frye, *supra* note 282, at 76.

305. *Miller*, 307 U.S. at 182.

306. Frye, *supra* note 282, at 76.

307. *Miller*, 307 U.S. at 182.

308. These cases differed on whether they were applying the Second Amendment or state analogues, but the analysis would be the same regardless. Most of these decisions had long held that the federal and state constitutions were codifying the same preexisting right to bear arms. See *supra* note 18. In some cases, the Second Amendment was applied directly. *Workman*, for example, assumed the Second Amendment directly applied to the states. *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891). West Virginia did not adopt a state analogue to the Second Amendment until 1986. See Volokh, *supra* note 99, at 204.

private right to bear arms for self-defense (e.g., *Brown and Duke*), an individual right to bear arms only for public defense against oppression (e.g., *Aymette*, *Workman*, and *Fife*), and a collective right to bear arms only in a state-organized militia (*Blaksley*).³⁰⁹ No line of cases supported sawed-off shotguns as protected weapons. That is likely why the Court's opinion was unanimous, in an otherwise bitterly divided Court.³¹⁰

*B. Miller and the Contemporaneous Understanding of the Right:
The Failure to Incorporate the Popular Understanding of the Right to Bear Arms*

Miller's drawback was not its holding or rationale. Excluding weapons with little or no military value that were adapted for criminal purposes comported with *Aymette* and nearly all of the case law from the post-Civil War era.³¹¹ Limiting the Second Amendment's protection to the ordinary personal arms of civilized warfare would still guarantee that the people could resist oppression—the original purpose of the right to bear arms.

Miller failed as a constitutional decision because it entrenched an originalist version of the right to keep and bear arms that did not comport with the contemporaneous understanding of the right in 1939. The failure of *Miller* was in its timing.

By 1939, the militia system had disintegrated. Indeed, the system largely died out following the War of 1812.³¹² Justice Story noticed the system was failing in the antebellum period.³¹³ The Tennessee Supreme Court in *Andrews*—an 1871 case—noted that the militia system had “passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.”³¹⁴ The Dick Act, passed in 1903, divided the militia into an organized and reserve component and eliminated the requirement that all white, male citizens have firearms.³¹⁵ All able-bodied men between eighteen and forty-five were (and currently are³¹⁶) part of the militia and subject to militia duty. As a practical matter, however, no president or governor will call forth a member of the “reserve” or “unorganized” militia. And by 1939, the United States had a sufficiently stable political system that citizens did not feel a need to be armed to resist public oppression. As a result, citizens had no ordinary use for militia-type weapons.

309. *Miller*, 307 U.S. at 182 n.3.

310. Given that the collective rights view was in the distinct minority among courts, it would have been shocking if the Supreme Court reached unanimity—even without a concurrence—on whether the right was individual or collective.

311. *See supra* Part II.

312. *See supra* note 197.

313. STORY, *supra* note 43, § 1890, at 746–47.

314. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 184 (1871).

315. Act of Jan. 21, 1903 (Dick Act), ch. 196, 32 Stat. 775. The requirement to have arms only applied to whites because Congress never updated the Militia Act of 1792 after the Civil War. *See* Act of May 8, 1792, ch. 33, 1 Stat. 271.

316. *See* 10 U.S.C. §§ 311–312, 331–335 (2012); *Perpich v. Dep't of Def.*, 496 U.S. 334, 352 n.25 (1990). The current minimum age of militia service is seventeen. 10 U.S.C. § 311.

In the nineteenth century, courts could use the “military arms” formulation because the weapons associated with crimes and duels—Bowie knives and small handguns—were not sufficiently powerful to have military value. Courts could vindicate the full value of the right to bear arms to resist public oppression (or to use military arms for self-defense), while allowing states to ban weapons that had a high propensity to be used in criminal wrongdoing.

This situation changed in the twentieth century: the Thompson submachine gun became associated with the “public enemy,” while the military was also transitioning to automatic weapons.³¹⁷ In 1936, the military adopted the semiautomatic M1 rifle, which would be the last standard-issue army rifle lawful for general civilian possession.³¹⁸ The advent of the machine gun and the submachine gun clearly foreshadowed that the military would issue soldiers automatic weapons as common military equipment. When the military adopted the automatic M14 in 1957, for the first time in American history the soldier’s “ordinary military equipment” was considered too dangerous for civilians generally to possess.³¹⁹ Thus, in the nineteenth century, “war arms” and arms appropriate for “manly self-defense” were one and the same and were distinct from weapons having criminal application; in the twentieth century, “war arms” and “gangster weapons” were automatic weapons, whereas civilian guns for self-defense, hunting, or target shooting were not.

Making the timing worse for the Supreme Court in *Miller*, only a few state court cases recognized the problem. As early as 1921, the North Carolina Supreme Court noted that modern military technology had diminished the importance of personal small arms, especially the pistol, in warfare.³²⁰ The court singled out poison gas, airplanes with bombs, and submarines as examples of weapons too powerful for general civilian possession. At the other end of the spectrum, it reaffirmed traditional prohibitions against certain knives carried as concealed weapons and having no military value. The court determined that the proper test was weapons

317. See *supra* note 288. A brief note on the terminology in this paragraph: semiautomatic firearms fire only one round each time the trigger is pulled, while fully automatic firearms continue to fire until the trigger is released. (Both types of guns are “automatic” in the sense that the gun automatically ejects the spent shell and reloads a new round in the chamber without the need for the shooter manually to reload.) For legal purposes, the term “machinegun” includes any firearm with the capability to shoot more than one round with a single pull of the trigger. See 26 U.S.C. § 5845(b) (2012).

318. By 1936, the military had a variety of fully automatic firearms in its arsenal. Although these weapons were military equipment, they were not “ordinary military equipment” because they were not issued to most infantry soldiers as part of their general equipment. On the meaning of ordinary military equipment, see *infra* text accompanying notes 338–43.

319. For a brief description of the U.S. Army’s move to automatic weapons, see EDWARD CLINTON EZELL, *SMALL ARMS OF THE WORLD* 24–26 (12th ed. 1983). Although not generally illegal for civilians to possess under federal law until 1986, the M14 was a “machinegun” subject to the strictures of the National Firearms Act. See 26 U.S.C. § 5845(b) (2012). Many state laws did ban machine gun possession. In contrast, the M1 rifle was only semiautomatic. EZELL, *supra*, at 16. The M1 rifle would not have fallen within any state or federal prohibitions then existing.

320. *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921).

“in common use, and borne by the people as such when this provision was adopted”—including “rifles, muskets, shotguns, swords, and pistols”—even if such weapons presently lacked significant military value.³²¹

The Michigan Supreme Court took a different approach to refashioning the right to bear arms around contemporaneous sentiments. In *People v. Brown*,³²² the Michigan Supreme Court changed the scope of the “arms” that were constitutionally protected to those arms useful for individual self-defense, rather than arms useful for militia service. The court recognized that the militia was “legally existent” but “practically extinct”—and, in any event, armed by the state.³²³ The court asserted that “[s]ome arms”—almost certainly implying machine guns—“although they have a valid use for the protection of the state by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals, and, in times of peace, find their use by bands of criminals and have legitimate employment only by guards and police.”³²⁴ As a result, the court held that the Michigan Constitution protected the “possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property.”³²⁵ Although the Supreme Court cited *People v. Brown* in the *Miller* footnote, it did not address *Brown*’s critique of the nineteenth-century definition of “arms.” This was a fairly new problem, and the Supreme Court did not have the benefit of many new state court cases reformulating the right. Instead, the Court accepted the almost-unanimous view of nineteenth-century cases that the Constitution protects, at a minimum, common military arms.

*C. Miller and the Courts of Appeals:
The Myth of Miller as Accepting a Collective Right*

Because *Miller* used the nineteenth-century definition of “arms”—that the only arms that were protected were militia arms—the courts of appeals became unable to fashion the right to keep and bear arms around the contemporaneous understanding of the right. No court wanted to entrench a right that seemed too countermajoritarian, that is, too extreme by contemporaneous standards. For the most part, the courts of appeals adopted the collective rights view—not because they necessarily thought it correct—but because they wanted to remove themselves from adjudicating Second Amendment questions. Given a choice between legitimizing the civilian possession of war arms and withdrawing from deciding Second Amendment claims, the courts of appeals selected to withdraw. Lower federal courts largely avoided defining the content of the Second Amendment right until *Heller* restored their authority to shape the right around contemporaneous standards of reasonableness.

The courts of appeals noticed the problem with *Miller* immediately. In 1942, the First Circuit opined that *Miller*’s “ordinary military equipment test” for “arms” was

321. *Id.* at 224, 225.

322. 235 N.W. 245 (Mich. 1931).

323. *Id.* at 246.

324. *Id.*

325. *Id.* at 247.

not meant to be a general rule applicable to Second Amendment cases. As a general rule, the “ordinary military equipment” test:

would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in the so called ‘Commando Units’ some sort of military use seems to have been found for almost any modern lethal weapon.³²⁶

The court did not want to be left in the absurd situation of holding that Congress could only “regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus,” while having no authority over machine guns and antiaircraft weapons—weapons private persons would lack “any legitimate reason for having.”³²⁷ The court held that the Second Amendment did not apply in the case because the defendant was “on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia.”³²⁸

The Sixth Circuit’s 1976 opinion in *United States v. Warin*³²⁹ also noticed the problem—though this time the court faced a defendant with a more sophisticated challenge. Francis Warin was charged with the possession of an unregistered machine gun, and as an able-bodied adult male, he was a member of the militia of the United States and the militia of Ohio.³³⁰

The Sixth Circuit agreed with *Cases* that *Miller* did not intend to lay down a general rule. (Of course this was wrong: *Miller* did lay down a general rule—the nineteenth-century rule.) But from the Sixth Circuit’s perspective, if the “ordinary military equipment” test was out of date by *Cases*, the rule was positively nuts in a time of nuclear weapons.³³¹ The Sixth Circuit had developed a new rule: the right to bear arms “applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms.”³³² Membership in the unorganized militia did not suffice; Warin would have to show that the gun was connected to the organized militia³³³—what the Framers would have called the “select militia.” But in case this holding was erroneous, the Sixth Circuit alternatively held that the machine gun law was a reasonable regulation of the right to bear arms, which was not unlimited at common law.³³⁴

Both *Cases* and *Warin* became extremely influential as other federal courts cited them for the authority that individuals could not exercise the right to bear arms unless their particular conduct—not the particular weapon—would contribute to a well-regulated militia. These courts did not conduct significant further historical analysis of the scope of the right.³³⁵ They simply paired citations to *Miller* with

326. *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

327. *Id.*

328. *Id.* at 923.

329. 530 F.2d 103 (6th Cir. 1976).

330. *Id.* at 104–05.

331. *Id.* at 106.

332. *Id.* (quoting *Stevens v. United States*, 440 F.3d 144, 149 (6th Cir. 1971)).

333. *Id.* at 106-07; *see also* *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977).

334. *Warin*, 530 F.2d at 107.

335. *See, e.g., Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999);

citations to other courts of appeals cases holding that the *person's possession of the weapon* had to relate to current organized militia service. These cases, thus, twisted *Miller's* holding—that the *firearm* has to relate to the militia. To provide extra support for this bait and switch, these cases quoted the background principle stated in *Miller* that the Second Amendment must be “interpreted and applied with [the purpose of assuring the militia’s effectiveness].”³³⁶ A few cases, though, engaged in some perfunctory historical analysis to justify why the right to bear arms only belonged to organized militia.³³⁷

To be fair to Justice McReynolds, *Cases*, *Warin*, and their progeny created a straw-man argument. One can view the phrase “ordinary military equipment” in two ways. First, if the weapon is ordinarily somewhere within the military arsenal, then it is protected. This is the reading offered by *Cases* and *Warin* when they object that the contemporary military has a vast array of weapons. *Cases* worried that “commando units” could make use of virtually anything, and *Warin* stated that this was more ridiculous in the nuclear age. Professor Sanford Levinson made a similar claim in his groundbreaking article, *The Embarrassing Second Amendment*.³³⁸

Neither *Miller* nor *Aymette* took this extraordinarily broad view of “ordinary military equipment.” Almost no nineteenth-century case extended the phrase beyond those weapons *ordinarily issued to individual soldiers* as part of their equipment.³³⁹ Courts routinely provided examples, such as rifles, muskets, and army pistols. They never said that Gatling guns or heavy machine guns—which Hiram Maxim first invented in 1884³⁴⁰—were constitutionally protected. If one wanted further guidance on the phrase “ordinary military equipment,” he could look to the constitutional purposes of the militia and ask what weapons soldiers are ordinarily issued when enforcing the laws, suppressing insurrections, and repelling invasions.³⁴¹ Even today, soldiers typically carry weapons like the M16 rifle, the M4 carbine, and the M9 pistol.³⁴² Although submachine guns, machine guns, and bombs have their places somewhere in the military arsenal, they are not the

Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996); United States v. Hale, 978 F.2d 1016, 1019–20 (8th Cir. 1992) (citing *Cases* and *Warin*); Cody v. United States, 460 F.2d 34, 36–37 (8th Cir. 1972); United States v. Synnes, 438 F.2d 764, 772 (8th Cir. 1971) (citing *Cases*). A few cases simply cited *Miller* for the proposition that the right to bear arms only belonged to organized militiamen—as though *Miller* stood for the same proposition as *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905). See, e.g., *Oakes*, 564 F.2d 384; United States v. Decker, 446 F.2d 164, 166–67 (8th Cir. 1971); *Stevens*, 440 F.2d at 149.

336. United States v. Miller, 307 U.S. 174, 178 (1939).

337. See, e.g., United States v. Wright, 117 F.3d 1265 (11th Cir. 1997); United States v. Tot, 131 F.2d 261 (3d Cir. 1942). *Tot* also provided an alternative holding that the right to bear arms was not absolute. The Ninth Circuit engaged in the best historical analysis of a collective rights court, as an effort to rebut the Fifth Circuit’s similarly scholarly analysis in *Emerson*. See *Silveria v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

338. See *supra* note 303.

339. See *supra* Part II.

340. See JOHN ELLIS, THE SOCIAL HISTORY OF THE MACHINE GUN 33–36 (1975).

341. Cf. *Kates*, *supra* note 30, at 259 (offering a different narrowing test).

342. See *PortfolioFY2013*, ARMY.MIL (April 2013), <http://www.army.mil/factfiles/equipment/individual/index.html>. Some of the heavier weapons listed (e.g., machine guns) are crew serviced—not ordinary individual—weapons.

ordinary military equipment—commonly issued to each individual soldier to possess and carry, in the same way that the automatic rifle or pistol is. *A fortiori*, no military in the world ordinarily issues its soldiers nuclear bombs. Our paradigm mental image of the militiaman is the citizen with his musket, not a citizen with a private battleship or cannon.

But the courts of appeals were not trying to engage in a careful reading of *Miller* or of the history of the Second Amendment. They were trying to extricate themselves from deciding Second Amendment claims. Even if the Second Amendment protected ordinary army rifles, by the time Second Amendment cases were largely being heard—after the Gun Control Act of 1968—army rifles consisted of weapons like the M16 assault rifle, which is (legally speaking) a “machinegun” under the National Firearms Act.³⁴³ Allowing the general civilian population to have free access to such weapons would not have comported with modern notions of a reasonable right to bear arms under contemporaneous standards.

The collective rights view of the Second Amendment removed the federal courts from this quagmire. In all of the law review pages discussing the individual versus collective right to bear arms, to my knowledge, no one has fleshed out how a person could ever successfully challenge a law as violating a “collective right” to bear arms. I suspect that this is because such a claim is impossible. Given the Supreme Court precedent on the Militia Clauses, the rub of the collective rights view is that courts can never hold that a law violates the Second Amendment.

Although there are a few different versions of the collective right,³⁴⁴ generally one must assert that he is a member of a well-regulated state militia. But I am not sure how one proves that he is in a “well-regulated militia.” The training of the militia is a political question, not subject to judicial scrutiny.³⁴⁵ And yet, when *Warin* (and many other cases) denies that technical militia membership suffices—a person must be in a “well-regulated militia”—this assumes that the court has some background notion of how much training and organization a militia must have before the court can take judicial notice of the fact that it is “well-regulated.” “Technical” militia members (i.e., members of the unorganized militia), like their organized counterparts, are subject to militia duty under the Constitution and federal law.³⁴⁶ The fact that they are not subject to periodic training is a legislative choice. But suppose that the mass of people were assembled once a year—as Hamilton suggested in *Federalist Number 29*—would this make them “well-regulated”?³⁴⁷ If not, how much training is required, and how does a court decide this? Deciding whether a militia is “well-regulated” presupposes the ability

343. 26 U.S.C. § 5845(b) (2012).

344. See generally *United States v. Emerson*, 270 F.3d 203, 218–20 (5th Cir. 2001) (explaining the different “models” and collecting scholarship).

345. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.”).

346. 10 U.S.C. §§ 331–335 (2012).

347. THE FEDERALIST NO. 29, at 184 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (“Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.”).

of the courts to *evaluate* the amount of training and organization that the militia has—an evaluation that *Gilligan v. Morgan* declares the judiciary incompetent to undertake.

And to the extent that the Second Amendment only applies to the organized militia, it is useless. No governmental body is going to organize and maintain a body of troops—especially to the degree that they are “well-regulated”—and then refuse to arm them.³⁴⁸ Instead, Congress simply will not enroll them in an organized militia.³⁴⁹

With respect to individuals in an organized militia, even if the government armed them inappropriately, no court would dare interfere.³⁵⁰ This would require a court to assess what weapons a militiaman *ought* to be armed with, and then pass judgment on whether Congress or the states handled the task appropriately. *Gilligan* clearly makes this improper for courts to do. In fact, today’s National Guard members are *prohibited* by orders from possessing private firearms in the performance of their duties.³⁵¹ I cannot imagine a court enjoining the practice and requiring state and federal governments to allow Guardsmen to bring their personally owned weapons to war.

Nor as a “right of the state to arm the militia” does the collective rights view accomplish anything. A state does not have a right to have its own military force. In the *Selective Draft Law Cases*,³⁵² the Supreme Court held that the power to raise and support armies was not limited by the Militia Clauses. Congress could, if it wanted, draft every able-bodied citizen into military service, leaving the states with no one in the militia.³⁵³ No federal court has *ever* held that the states can override federal military policy on the militia.³⁵⁴ At most, by the end of the twentieth century, the right to bear arms stood for the proposition that the states had *concurrent power* to arm citizens in a state-organized part-time fighting force,³⁵⁵ provided that (1) Congress did not wish to conscript the people in those state forces into federal military service and (2) the state forces were not organized contrary to

348. Moreover, this presupposes the conceptual possibility that one could be in a “well-regulated militia” while that militia lacked arms. But a militia without arms almost certainly would not be “well-regulated” in the Framers’ use of that phrase.

349. See *District of Columbia v. Heller*, 554 U.S. 570, 600 (2008) (noting that Congress has plenary power over how to enroll in the militia).

350. *Gilligan*, 413 U.S. at 10.

351. U.S. ARMY MULTI-NATIONAL CORPS–IRAQ, GENERAL ORDER NUMBER 1 (GO-1), PROHIBITED ACTIVITIES FOR U.S. DEP’T OF DEF. PERSONNEL ASSIGNED TO THE MULTI-NATIONAL CORPS–IRAQ (MNC–I) OR PRESENT WITHIN THE MNC–I AREA OF RESPONSIBILITY (AOR) 2 (2009), available at <http://lawprofessors.typepad.com/files/go-1.pdf> (prohibiting private firearms in Iraq). Similar orders prohibit National Guardsmen from carrying private firearms at other times and locations.

352. *Arver v. United States (Selective Draft Law Cases)*, 245 U.S. 366 (1918).

353. *Id.* at 382–83; see also J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001).

354. See *Selective Draft Law Cases*, 245 U.S. 366; see also *Perpich v. Dep’t of Def.*, 496 U.S. 334 (1990).

355. The force could not be full-time since this would violate the constitutional prohibition on keeping “troops” in time of peace. See U.S. CONST. art. I, § 10, cl. 3; 32 U.S.C. § 109(a) (2012).

otherwise-valid federal legislation on the military or militia. A subservient concurrent power hardly qualifies as a “right.” As the Eighth Circuit candidly observed in 1992, “Since the *Miller* decision, no federal court has found any individual’s possession of a military weapon to be ‘reasonably related to a well regulated militia.’”³⁵⁶

The exploding popularity of a vacuous “collective” right to bear arms directly descends from *Miller*’s holding that only military weapons have constitutional protection. Before *Miller*, only two courts and possibly one concurring opinion had ever adopted the collective rights view.³⁵⁷ The remaining courts tailored the right to bear arms to be compatible with prevailing social norms on the place that weapons have in society. *Miller* left the federal courts unable to do this, so the lower federal courts extricated themselves from deciding Second Amendment cases. Contrary to what Justice Stevens stated in his *Heller* dissent,³⁵⁸ hundreds of judges were not *relying* on the holding in *Miller*; they were *avoiding* it.

IV. *HELLER*: REFRAMING THE RIGHT TO BEAR ARMS FOR A NEW GENERATION

Justice Scalia’s majority opinion in *District of Columbia v. Heller* was not a “Triumph of Originalism.”³⁵⁹ There is almost nothing originalist about the opinion’s pronouncement on the content of the right to bear arms. The Court’s originalism was limited to discerning the proper subjects of the right—that individuals, not in active military service, have a right to bear arms. The Court held that the right is not limited to being a member of a state-sponsored, highly organized militia—which, as I described above, is really no right at all.

Instead, *Heller* has a direct continuity with the nineteenth-century right to bear arms. In the eighteen hundreds, two generations of courts refashioned the scope of the right to comport with popular constitutional sentiment. The right—and the restrictions on the right—reflected contemporaneous notions of reasonableness. As crime with knives and concealed weapons became ubiquitous, antebellum courts allowed legislatures to pass laws governing concealed weapons, while still protecting the right to carry arms for private self-defense. The three courts that failed to do this—two courts that found an absolute right, and one court that found no private right at all—had their doctrines overturned *at the next available opportunity*.³⁶⁰ In the post-Civil War period, courts allowed greater legislative

356. *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992).

357. *See United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935); *State v. Buzzard*, 4 Ark. 18, 33 (1842) (opinion of Dickinson, J.); *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905).

358. *District of Columbia v. Heller*, 554 U.S. 570, 638 (2008) (Stevens, J., dissenting).

359. Siegel, *supra* note 5, at 191 & n.5 (collecting sources celebrating *Heller* as an originalist opinion).

360. The three courts were the Kentucky Court of Appeals in *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), which held the right to be absolute; the Tennessee Supreme Court in *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833), which although not holding that the right was absolute, had dicta to that effect; and *State v. Buzzard*, 4 Ark. 18 (1842), in which two of the three judges held that the right did not protect arms for private defense. The Kentucky Constitutional Convention in 1849 overturned *Bliss* by amending the right-to-bear-arms

latitude to deal with the problems inflicted with handguns. Post–Civil War courts recognized the right to bear arms as consisting primarily in the right to have arms for defense against public oppression, although they often held that individuals could carry them for private self-defense, too. But private self-defense, especially with a handgun, was in the outer perimeter of the right to keep and bear arms: by 1900, few types of pistols had constitutional protection, and courts were approving sharper limits on carrying weapons in public, even if not concealed.

Heller likewise refashioned the right for a new generation. With military weapons considered inappropriate for civilian use, *Heller* “clarified” the *Miller* common-use test. Military rifles were declared beyond the constitutional right. The Court, in dicta, approved limits on felons having guns, despite the restriction having no historical basis. *Heller* held that the *core* of the right to keep and bear arms consisted of possessing handguns in the home for personal self-defense—even though, in the nineteenth century, it was arguable whether handguns had constitutional protection and whether private self-defense fell within the scope of the right to bear arms. *Heller* did not rule on whether requiring a license is appropriate, even though antebellum courts only allowed licensing of free blacks, who were not full citizens. In short, *Heller*’s right to keep and bear arms is the Second Amendment right supported by a majority of Americans *today*. This right, then, was enforced against jurisdictions that adopted laws deemed unreasonable by *contemporary standards*.

Dick Heller was a special policeman living in the District of Columbia. He was too old to even be a member of the unorganized militia.³⁶¹ Heller attempted to register a .22 caliber revolver, a target-shooting gun that had no military value whatsoever and had little value for self-defense.³⁶² He attempted to register the

provision to exclude concealed weapons. *See* KY. CONST. of 1850, art. XIII, § 25 (1850) (“That the right of citizens to bear arms in defense of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms.”). *Aymette* repudiated *Simpson*. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 161 (1840). *Buzzard*’s overruling was a bit more complicated. The Arkansas Supreme Court nominally reaffirmed *Buzzard* in *Carroll v. State*, 28 Ark. 99, 101 (1872), but reinterpreted the decision to be about the authority of the legislature to regulate the “constitutional right to bear arms in defense of person and property.” Four years later, *Fife v. State*, 31 Ark. 455, 458–61 (1876), explicitly held that citizens had a limited right to bear arms openly for private defense.

One might object that *Aymette* did not recognize a right of bearing arms for private self-defense, and yet, was not overturned. Although *Aymette*’s dicta rejects the individual self-defense rationale, *Aymette*, 21 Tenn. at 157, the court nevertheless reaffirmed a general right to carry arms openly, *id.* at 160–61. Practically, therefore, individuals still had a right to bear arms for individual self-defense.

361. Heller was sixty-six years old when the case was being decided and too old to be a part of the District militia. *District of Columbia v. Heller*, 554 U.S. 570, 707 (2008) (Breyer, J., dissenting).

362. *See* Paul Duggan, *Having Toppled D.C. Ban, Man Registers Revolver*, WASH. POST, July 19, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/18/AR2008071801212.html>. The Internet site has a picture of the revolver. According to the article, Heller also apparently had a .45 Colt M1911 pistol, which was the military’s standard sidearm from 1911 until 1986. *See* Scott Engen, *The History of the 1911 Pistol*, BROWNING.COM (Jan. 24, 2011), <http://www.browning.com/library/infonews/detail.asp>

revolver, but the police denied his application because of a 1976 District of Columbia ordinance prohibiting new registrations of pistols.³⁶³ Moreover, D.C. law prohibited carrying a pistol in the home without a license to carry, which was almost never issued.³⁶⁴

The District defended the law on three grounds. First, the District alleged that the right to bear arms was a collective right. Second, the District argued that since the law only applied to the District, the handgun ban had no relevance to protecting state governments from federal interference. Third, even if it were an individual right, complete bans on some kinds of protected arms were acceptable, provided other weapons were available.³⁶⁵ The District did allow residents to register some rifles and shotguns, provided that the weapons were not semiautomatic with a detachable magazine.³⁶⁶ In a poor strategic choice, the District did not argue that, regardless of the scope of the Second Amendment, the right did not protect handguns—or at least Heller’s .22 caliber revolver. Given the “originalist” character of the Court, the District could have marshaled significant nineteenth-century precedent on this point.

The Court held that the Second Amendment protects “an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”³⁶⁷ Its historical support for a right of private self-defense required some creative liberties. After giving a fairly lengthy—and accurate—description of the right’s genesis in the English Civil War and Glorious Revolution, Justice Scalia then cited Blackstone for the proposition that the right to have arms protects “the natural right of resistance and self-preservation” and “the right of having and using arms for self-preservation and defence.”³⁶⁸

Justice Scalia’s quotation of Blackstone is selective—and misleading. The full quotation reads that the right to have arms “is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the *violence of oppression*.”³⁶⁹ Blackstone is talking about self-defense against the Crown—not

?id=301. But this was not part of the original *Heller* case because registering that would have required challenging D.C.’s machine gun ban, which also included virtually all modern semiautomatic weapons in its definition. See D.C. CODE § 22-4501(c) (2001) (including any weapon that could be readily restored to fire more than twelve times semiautomatically without reloading as a “machine gun”).

363. See D.C. CODE § 7-2502.02(a)(4) (2001), amended by Firearms Control Amendment Act of 2008, L. No. L17-0372, § 3(a)(10). Before this amendment, the District had also passed temporary legislation changing the definition.

364. D.C. CODE § 22-4506 (2001), repealed by Inoperable Pistol Amendment Act of 2008, L. No. 17-0388, § 2(f); see *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994) (“It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable.”).

365. Brief for Petitioners at 11, 35, 41, *Heller*, 554 U.S. 570 (No. 07-290).

366. Such weapons would violate the machine gun ban. See *supra* note 362.

367. *Heller*, 554 U.S. at 570; see also *McDonald v. Chicago*, 130 S. Ct. 3020, 3044 (2010) (describing *Heller*’s holding).

368. *Heller*, 554 U.S. at 594 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *144).

369. 1 WILLIAM BLACKSTONE, COMMENTARIES *144 (emphasis added).

self-defense against a burglar. And lest there be any doubt about the meaning, it becomes clear in Book Two of the *Commentaries*. Blackstone lists, among the various reasons for the game laws, “prevention of popular insurrections and resistance to the government, by disarming the bulk of the people: which last is a reason oftener meant, than avowed, by the makers of forest or game laws.”³⁷⁰ Blackstone never mentions any objection to not having arms available for personal self-defense against criminals. The concern is with the “bulk of the people” having arms so they can resist illegal executive power. And this view of the right comports with Madison’s exposition of the value of citizens having arms in *Federalist Number 46*.³⁷¹

But Justice Scalia is not aiming for historical accuracy on the scope of the right. He is changing the scope of the right, to make the right to bear arms primarily about individual self-defense with handguns. At the time *Heller* came down, 73% of Americans believed that they had a right to own a gun, versus 20% who thought it belonged only to the militia.³⁷² Another poll in 2009 by CNN asked:

Which of the following comes closer to your interpretation of the Second Amendment to the U.S. Constitution? In addition to addressing the need for citizen-militias, it was intended to give individual Americans the right to keep and bear arms for their own defense. It was only intended to preserve the existence of citizen-militias, and does not give individual Americans the right to keep and bear arms for their own defense.³⁷³

Americans answered the question by selecting “self-defense” by a 77%–21% majority. And Americans are strongly against banning handguns, by a nearly two-to-one margin.³⁷⁴ Interestingly, the population was more sympathetic to a handgun ban in the 1970s and 1980s, while the courts were adopting the collective rights view of the Second Amendment—so much for the Court acting as a countermajoritarian institution.³⁷⁵

Of course, although Americans do support the right to bear arms in principle, they are split on whether Congress should adopt greater gun controls. In 2007, two-thirds of Americans thought that handgun laws should be made stricter.³⁷⁶ About half of Americans in 2009 supported bans on so-called assault weapons, which was down from 75% two decades earlier—but still much higher than the

370. 2 WILLIAM BLACKSTONE, COMMENTARIES *412.

371. See *supra* note 162 and accompanying text.

372. Joan Biskupic, *Do You Have a Legal Right to Own a Gun?*, USA TODAY, Feb. 27, 2008, http://www.usatoday.com/news/washington/2008-02-26-guns-cover_N.htm.

373. CNN/Opinion Research Corp. Poll, May 14–17, 2009, available at <http://www.pollingreport.com/guns2.htm>.

374. This and the following statistics come from a CBS News/New York Times Poll Report. *Guns and Violence*, CBS News/N.Y. Times Poll (Apr. 23, 2007), available at http://www.cbsnews.com/htdocs/CBSNews_polls/aprbhandguns.pdf.

375. Jeffrey M. Jones, *Record-Low 26% in U.S. Favor Handgun Ban*, GALLUP (Oct. 26, 2011), <http://www.gallup.com/poll/150341/record-low-favor-handgun-ban.aspx> (graphing support over the last fifty years).

376. *Guns and Violence*, *supra* note 374, at 1.

proportion of the population that supports banning handguns.³⁷⁷ Convicted felons have the lowest popular support for their right to keep arms: a 2008 CNN poll found that 88% of Americans think the law should *ban* felons and those with mental illness from having guns.³⁷⁸ And Americans, even those in somewhat red states, believe that some places are inappropriate for guns: a 2011 poll of registered voters in Virginia, for example, found that voters overwhelmingly (75%–20%) oppose guns on college campuses and oppose by a nearly two-thirds majority allowing persons with permits to carry concealed firearms to bring their guns onto a college campus.³⁷⁹

This modern view of the right to keep and bear arms is exactly the right we get in *Heller*. The most important part of *Heller* is its dicta on permissible government regulation of the right, which courts now use as precedent to decide Second Amendment challenges. With no analysis whatsoever, the Court declared:

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.³⁸⁰

Again without analysis, the Court reaffirmed these categories in *McDonald v. Chicago*.³⁸¹

The problem is that many of these “longstanding” laws have no historical constitutional basis. Federal law banned felons from possessing guns in 1968; that is not very “longstanding.”³⁸² The closest nineteenth-century analogues I have found are laws prohibiting prisoners and vagrants from having guns.³⁸³

This is not to say that the passage is completely inaccurate as a historical matter. Laws prohibiting guns in “sensitive places,” for example, have a much more longstanding history.³⁸⁴ As I explained above, the nineteenth-century courts upheld

377. Hart/McInturff Study #6098, NBC/Wall St. J. Survey, Oct. 22–25, 2009, at 23, available at <http://online.wsj.com/public/resources/documents/wsjnbc-10272009.pdf>. Due to recent mass shootings, public opinion on this question may be in a state of flux.

378. CNN/Opinion Research Corp. Poll, June 4–5, 2008, available at <http://www.pollingreport.com/guns2.htm>.

379. See Michael Sluss, *Poll: Most in Virginia Oppose Guns on Campus*, ROANOKE TIMES (Dec. 23, 2011), <http://ww2.roanoke.com/politics/wb/302726/> (reporting a Quinnipiac University survey).

380. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

381. *McDonald v. Chicago*, 130 S. Ct. 3020, 3047 (2010) (“We repeat those assurances here.”).

382. Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213; see also Marshall, *supra* note 56. A 1961 amendment to the Federal Firearms Act of 1938 barred all felons (instead of merely individuals convicted of a violent felony) from receiving firearms in interstate commerce. The law did not bar possession, however. *Id.* at 698 (citing An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961)).

383. See *supra* note 54 and accompanying text; *supra* note 222 and accompanying text.

384. The Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.), prohibited guns in

prohibitions on carrying weapons into polling places, courthouses, and public gatherings.³⁸⁵ The usual concept was that such laws were permissible regulations of the right, provided they were not overbroad. The courts usually did not say that the conduct fell completely outside the scope of the right, but rather that the government could regulate a particular abuse of the right.

But the area where *Heller* completely divorces itself from history is its treatment of which weapons are constitutionally protected. Justice Scalia finds it startling to read *Miller* for the proposition that “ordinary military equipment” could mean that “only those weapons useful in warfare are protected.”³⁸⁶ Of course, this is exactly what *Aymette*, the authority cited in *Miller*, held: protected weapons were individual weapons of “civilized warfare.”³⁸⁷ In its place, the Court replaces this definition with the “common use” test: protected “arms” are those “typically possessed by law-abiding citizens for lawful purposes.”³⁸⁸ And why are handguns within the scope of the right? Because, Justice Scalia tells us, handguns are “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family.”³⁸⁹ Justice Breyer criticizes the new definition as circular—which it is—but then again, it is no more circular than “reasonable expectation of privacy.”³⁹⁰

The move to the “common use” test was undoubtedly a change—but not an unprecedented one. The Michigan Supreme Court in *People v. Brown* made a similar change to the right to bear arms.³⁹¹ And in *State v. Duke*, the Texas Supreme Court protected *both* military weapons and those commonly possessed by law-abiding citizens, lest citizens find their everyday weapons without constitutional protection.³⁹² Most importantly, this test solved *Miller*’s principal drawback of approving weapons considered inappropriate for civilian possession.

Perhaps most extraordinary in formulating the new test is what happens to army rifles. In the nineteenth-century cases, the army rifle was at the *very core* of constitutional protection. Banning army rifles or muskets would have been to the Second Amendment what banning a particular mainstream political opinion would be to the First. Justice Scalia finds, in the common-law prohibition against carrying dangerous or unusual weapons, authority for banning “M-16 rifles and the like”—the core ordinary, individual weapon of today’s infantry soldier.³⁹³ As Reva Siegel correctly argues:

In this remarkable passage, the majority imposes restrictions on the kinds of weapons protected by the Second Amendment that the

courthouses, marketplaces, and similar gatherings.

385. *See supra* note 277 and accompanying text.

386. *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008).

387. *See supra* note 169 and accompanying text.

388. *Heller*, 554 U.S. at 625.

389. *Id.* at 628–29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)); *see also* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (collecting quotations from *Heller* about the popularity of handguns for self-defense).

390. *Heller*, 554 U.S. at 721 (Breyer, J., dissenting); *see also* O’Shea, *supra* note 285, at 384.

391. *See supra* note 323 and accompanying text.

392. *See supra* note 249 and accompanying text.

393. *Heller*, 554 U.S. at 627 (majority opinion).

majority concedes would disable exercise of the right for the amendment's textually enunciated purposes. How could an originalist interpretation of the Second Amendment exclude from its protection the kinds of weapons necessary to resist tyranny—the republican purpose the text of the Second Amendment discusses and, on the majority's own account, “the purpose for which the right was codified”?³⁹⁴

Siegel's criticism is exactly right as a matter of originalism. Although Justice Scalia writes, “The traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense,”³⁹⁵ he has no authority for this proposition—likely because Justice Scalia has it backward.

The tradition in England was that individuals would possess ordinary *military* weapons. This tradition dated at least from the Assize of Arms in 1181.³⁹⁶ When the Crown required people to have arms, the Assize of Arms selected weapons and body armor that were in common *military* use—not weapons that individuals happened to otherwise possess in their civilian lives for lawful purposes like self-defense. In fact, individual self-defense against criminals was illegal in England at the time.³⁹⁷ The Assize of Arms listed weapons like chainmail, a helmet, a sword, and a shield—clearly military weapons, just like the muskets, pistols, and related military equipment prescribed by the Militia Act of 1792.³⁹⁸ I doubt seriously that twelfth-century Englishmen ordinarily kept chainmail, helmet, and a shield as part of their individual self-defense weapons in case a burglar broke into their home. The thought of someone trying to don all of this equipment in such an emergency is kind of ridiculous. Nor do I know of any evidence that ordinary citizens walked around in their helmets and chainmail in the usual course of their civilian lives. In fact, the common-law prohibition against carrying dangerous or unusual weapons may have originally punished exactly that: those who went out in public fully armed with their militia weapons and body armor in circumstances likely to provoke fear.

Justice Scalia's attempt to trace modern restrictions on military weapons to the common-law prohibition of going armed with dangerous or unusual weapons is unavailing. Although the crime is said to be a common-law offense, the Statute of Northampton implemented it and prescribed the punishment. That statute provided:

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

394. Siegel, *supra* note 5, at 200.

395. *Heller*, 554 U.S. at 624.

396. Assize of Arms, 27 Hen. 2 (1181) (Eng.).

397. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 478 (2d ed., Cambridge Univ. Press reprint 1968) (1895) (persons who killed in individual self-defense “deserve[d] but need[ed] a pardon”).

398. Assize of Arms §§ 1–2.

their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor 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.³⁹⁹

Despite the seemingly broad textual prohibition on carrying arms everywhere, courts construed the prohibition very narrowly—on the rare occasions that the statute was enforced. The common-law prohibition applied to carrying weapons *in public*. The Court of King's Bench required that the carrier have the illegal purpose of terrifying citizens.⁴⁰⁰ This was the construction given to it in the United States by the North Carolina courts, the only courts that have seriously enforced the prohibition.⁴⁰¹ The antebellum North Carolina Supreme Court, in *State v. Huntly*, stated that all guns are “dangerous or unusual weapons” for the purpose of this prohibition.⁴⁰² Although gun *ownership* was common among Americans (and included guns of all kinds), the court argued that most individuals did not frequently *carry* those weapons. The crime was committed by carrying deadly weapons in public only if the person carrying the weapons had both the unlawful purpose of terrorizing others and if he carried the weapons “in such manner as naturally will terrify and alarm a peaceful people.”⁴⁰³

Other authorities claim that the prohibition extended, beyond those with a specific intent to terrify, to those carrying weapons under circumstances that would provoke fear in reasonable people.⁴⁰⁴ William Hawkins distinguished between usual and unusual weapons. Because the public possession of common weapons does not cause fear in reasonable people, people are free to carry them for self-defense.⁴⁰⁵ In contrast, going armed with unusual weapons in ordinary circumstances will provoke fear in reasonable people, so carrying them is generally prohibited. This prohibition often included not just the carrying of certain weapons, but also walking the streets in armor.⁴⁰⁶ Nevertheless, no one violated the common-

399. The Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.) (brackets in original) (footnote omitted).

400. Sir John Knight's Case, (1686) 87 Eng. Rep. 75 (K.B.) 76; 3 Mod. 117, 118 (“[T]he meaning of the statute of . . . was to punish people who go armed to terrify the King's subjects.”); R v. Sir John Knight, (1686) 90 Eng. Rep. 330 (K.B.) 330; Comb. 38, 39 (requiring evil intent); *State v. Huntly*, 25 N.C. (3 Ired.) 418, 423 (1843) (requiring both a purpose to “terrify and alarm” and carrying the weapons in public “in such manner as naturally will terrify and alarm, a peaceful people”).

401. Tennessee declined early to recognize this common-law offense due to the right to bear arms. *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833). Most states have abolished English common-law offenses.

402. *Huntly*, 25 N.C. at 422–23.

403. *Id.* at 423.

404. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN §§ 4–10, at 488–89 (8th ed. 1824); 4 WILLIAM BLACKSTONE, COMMENTARIES *149.

405. 1 HAWKINS, *supra* note 404, § 9, at 489; *see also* R v. Sir John Knight, 90 Eng. Rep. at 330 (recognizing “a general connivance to gentlemen to ride armed for their security”).

406. 20 Rich. II, c. 1 (1396) (Eng.) (enumerating “sallets,” “Skull[s] of Iron,” and other armor); 1 HAWKINS, *supra* note 404, §§ 4–10, at 489; *cf.* 4 WILLIAM BLACKSTONE,

law prohibition by defending his home (or the home of another) against unlawful violence or by defending the state against invaders and domestic disturbances.⁴⁰⁷ In these circumstances, it is clear that the person carrying the weapons has no intention to breach the peace.

Justice Scalia erred in using this common-law prohibition as a historical precedent to justify a total ban on “M-16 rifles and the like.” Today, the M16 rifle and its derivatives are at the very core of the contemporary soldier’s individual arms. Without these, no militia could be “well-regulated.”

Justice Scalia might respond that England did occasionally ban specific weapons completely. Two statutes of Richard II, which further implemented the Statute of Northampton, did prohibit lancegays, a type of spear.⁴⁰⁸ Thus, there is some historical precedent for banning weapons completely, whether carried in public or not.

I doubt, however, that these statutes will support Justice Scalia’s argument. The ban on lancegays was on a very specific type of weapon. The statute would be more analogous to a Prohibition-era legislature simply banning the Thompson submachine gun in light of the violence of organized crime. The ban on lancegays in no way deprived people of military arms generally, as does a complete ban on all military rifles.⁴⁰⁹

Moreover, this particular ban did precede the creation of the right to have arms in the seventeenth century. By the time the right to have arms found its way into the English Bill of Rights, this particular weapon was obsolete, and so it is not clear if an analogous seventeenth-century ban would have been met with approval. Likely, a narrow ban on a very particular kind of weapon creating large public externalities would have been compatible with the right to have arms, whereas banning the entire class of military arms for civilian possession would not.

By using the common-law rule to justify prohibitions against “M-16 rifles and the like,” Justice Scalia completely inverted the Second Amendment from its nineteenth-century understanding: army rifles to resist tyranny are out; handguns in the home for private purposes are in. How could an originalist interpretation of the Second Amendment exclude from its protection the kinds of weapons necessary to resist tyranny? An originalist interpretation cannot. Justice Scalia is not engaged in originalism; he is engaged in Ackermanian-style intergenerational synthesis.⁴¹⁰

Heller could have taken a different approach to the “machine gun problem.” Contemporaneous detractors of the nineteenth-century definition of “arms” objected to the “ordinary military equipment” test on the grounds that it might invalidate the general federal prohibition on “machineguns.”⁴¹¹ For them,

COMMENTARIES *149 (discussing the Laws of Solon, which made Athenians finable for walking the street in armor).

407. 1 HAWKINS, *supra* note 404, §§ 8, 10, at 489.

408. 7 Rich. II, c. 13 (1383) (Eng.); 20 Rich. II, c. 1.

409. *See, e.g.,* Benjamin v. Bailey, 662 A.2d 1226 (Conn. 1995) (“[A] statutory ban on assault weapons, because it continues to permit access to a wide array of weapons, does not infringe on the right to bear arms”); Volokh, *supra* note 97, at 1454–55 (analogizing from First Amendment doctrine that looks to alternative channels of expression).

410. *See* 1 ACKERMAN, *supra* note 279, at 90. On Scalia’s opinion being an example of living constitutionalism, *see* Siegel, *supra* note 5, at 192 & n.6.

411. *See* 18 U.S.C. § 922(o) (2012) (generally prohibiting machineguns); O’Shea, *supra*

recognizing a general right of individuals to have automatic weapons was a *reductio ad absurdum* of recognizing an individual Second Amendment right to have arms that were useful for contemporary militia service.

In response, the Court simply could have said that the ban on machine guns was a *regulation*—not a prohibition—of a core component of the right to keep and bear arms. Bans on handguns were impermissible because they eliminated “an entire class of arms.”⁴¹² The machine gun ban does not do this. Handguns, rifles, shotguns, and other firearms become, in legal terminology, “machineguns” when they are capable of shooting multiple shots with a single function of the trigger.⁴¹³ The machine gun ban did not ban an entire class of weapons: the handgun, rifle, and shotgun are still lawful. The ban just narrowly restricts the mode in which these particular guns fire, limiting them to one shot per pull of the trigger—just like prohibiting guns in a courtroom narrowly restricts the right to bear arms in public. But this approach, of course, would not have totally refashioned the right to bear arms in the right’s contemporaneous popular image—as a right to have arms primarily for personal self-defense—and that is what Justice Scalia was trying to do.

CONCLUSION

When it comes to the right to keep and bear arms, courts have never been originalists. Subsequent generations remake the right to fit the popular conception of what the right ought to be. In the antebellum period, this meant expanding the right to include private self-defense and the right to carry guns openly for personal protection—while allowing state legislatures to enact concealed weapons laws in an effort to prevent crime and dueling. After the Civil War, courts curtailed the right to have guns in public; to justify this, they adopted a different theory of the right to bear arms, one that recognized its civic republican character and diminished the importance of individual self-defense. The courts thus altered their understanding of the purpose of the right to justify altering the dimensions of the right—dimensions that comported with the popular conceptions of the right’s scope and their demand for legislative solutions for the criminal use of weapons. Courts then applied the right against jurisdictions that adopted unusually severe laws for that time period. The content of the “regulation/prohibition” distinction that Winkler identifies is formed around contemporaneous notions of reasonableness.

Heller is not an originalist decision, and it should not purport to be. *Heller* remade the Second Amendment around its current popular understanding. The rule in *Miller*—while almost certainly historically accurate—failed to allow courts to refashion the right in a manner palatable to the contemporaneous population. This is why *Miller* failed. Likewise, the collective rights cases failed because few people seriously understand the right to bear arms to protect nothing.

The future of *Heller* remains uncertain. But I can say, with a fair amount of confidence, that how courts flesh out the right to bear arms tomorrow will strongly

note 285, at 361–62 (describing the potential invalidation of the machine gun ban as the Government’s overwhelming concern in its *Heller* arguments).

412. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (quotation marks omitted).

413. *See* 26 U.S.C. § 5845(b) (2012) (defining “machinegun”).

resemble how the contemporaneous population understands the right—not what James Madison thought when he drafted the provision in 1789.