THE EARLY AMERICAN ORIGINS OF THE MODERN GUN CONTROL DEBATE: THE RIGHT TO BEAR ARMS, FIREARMS REGULATION, AND THE LESSONS OF HISTORY

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I. INTRODUCTION

The debate over gun control is hardly a new development in American history. Although modern opponents of gun regulation have asserted that gun control is a recent phenomenon, inspired by a racist and anti-immigrant agenda, that claim, like so many claims in Second Amendment scholarship, is false. The earliest efforts at gun control were enacted during the Jacksonian era, when Americans grappled with the nation's first gun violence crisis. A number of states passed the first laws intended to reduce gun violence. Then, as now, the enactment of gun control prompted a backlash, which led to an intensified commitment to gun rights. The embarrassing truth about the Second Amendment debate that neither side wishes to admit is that gun rights ideology is the illegitimate and spurned child of gun control.[1]

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1. Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995). Both of these accounts ignore the early history of gun regulation, which was aimed at reducing violence, not social control. While it is certainly true that laws intended to disarm racial minorities existed since the colonial period, these laws were not efforts at gun control, but were aimed primarily at preventing armed rebellion. ALEXANDER

The early debate over gun control does not fit the modern individual/collective rights dichotomy.[2] The dominant model of the right to bear arms in the Jacksonian era built on a different model inherited from the Founding period. It would be more accurate to describe this original conception as a civic right. This right was neither a strong claim against government, nor was it a right of the states. The right belonged to citizens who exercised it when they acted collectively for public defense. This civic conception drew on the potent language of republican constitutionalism, which stressed the necessity of a well-regulated militia as a check against the danger posed by a standing army. American thinking about the right to bear arms also owed an important debt to English common law jurisprudence, particularly its conception of rights as obligations. Eighteenth-century ideas about the right to bear arms reflected the realities of the colonial experience. The militia provided colonists with a means of protecting themselves from external threats and served as a means of preserving public order against the danger of insurrection. Finally, Americans crafted their first constitutional provisions on the right to bear arms with the memory of recent British policy in mind. British efforts to disarm the colonial militias were etched in the minds of the men who wrote America's first

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DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL (2001) and Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004). The perception of a gun violence problem in the early republic is indisputable. Ohio State University historian Randolph Roth's exhaustive quantitative study of the early history of violence in America ought to demonstrate conclusively if this perception was an accurate reflection of reality or not. For a preliminary report of some of Roth's findings, see Randolph Roth, *Counting Guns: What Social Science Historians Know and Could Learn About Gun Ownership, Gun Culture, and Gun Violence in the United States*, 26 SOC. SCI, HIST. 699 (2002).

2. For the individual rights view, see Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Reynolds, *supra* note 1. For two good statements of the collective rights theory, see Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 293–94 (2000); Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000). On the civic model, see H. RICHARD UVILLER & WILLIAM MERKEL, THE MILITIA AND THE RIGHT TO BEAR ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002); Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161 (2004); David Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of 'the Right of the People to Keep and Bear Arms'*, 22 LAW & HIST. REV. 119 (2004). Each side in the modern debate claims that the other side has distorted the past to further its ideological agenda. One can find traces of the individual, collective, and civic rights tradition in the Founding era. The available evidence suggests that the individual rights model remained fairly weak in the Founding era, but emerged in a more robust form during the Jacksonian era. Although the civic model was the dominant model in the Founding era, there is strong evidence that the states' rights model also had vigorous champions in the early republic. *See* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstanding*, 47 WM. & MARY L. REV. (forthcoming 2006). For an important overview of this debate, see the article by William Merkel in this volume.

constitutions.[3]

America's first great charter of liberty, the Virginia Declaration of Rights, made no mention of the right to bear arms. It did, however, assert the necessity of a well-regulated militia. The first effort to include such a right in American constitutionalism was the Pennsylvania Declaration of Rights, which affirmed that "the people have a right to bear arms for the defence of themselves and the state." Several years later Massachusetts adopted a different formulation, proclaiming that the people had "a right to keep and bear arms for the common defense."[4] Partisans of the individual rights theory of the Second Amendment have claimed that the Founders uttered the right to bear arms in the same breath as freedom of speech. Actually, no eighteenth-century constitution conjoined these two rights. Statements about the right to bear arms were invariably coupled with explicit bans on standing armies, not affirmations of freedom of speech.[5]

These early constitutional texts linked the right to bear arms with exemptions for citizens who were conscientiously scrupulous about bearing arms. The right to be exempt from compulsory military service underscored the civic meaning of bearing arms in the first state constitutions. If the concept of bearing arms had been generally understood to be synonymous with a right to hunt or a right of individual self-defense, there would have been little need to include a religious-based exemption for bearing arms. Even the most robust theory of state regulation would not have included the right to force individuals to hunt or defend themselves. The state did, however, compel citizens to bear arms for the common defense.[6]

While it might seem strange to modern Americans to omit the right of self-defense from these early declarations of rights, the absence of such a right makes historical sense.[7] Indeed, in the voluminous writings from this era only

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3. On the intellectual traditions shaping the Founders' view of the Second Amendment, see the essays, in WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? (Saul Cornell ed., 2000).

4. Copies of eighteenth-century state constitutions are available at http://www.yale.edu/lawweb/avalon/states/stateco.htm.

5. This erroneous claim is made by Don Kates & Randy Barnett, *Under Fire: The New Consensus in Second Amendment Scholarship*, 45 EMORY L.J. 1139 (1999).

6. *See* discussion below *infra* section III.

7. As Barnett notes in a review of Uviller and Merkel, "we would be asked to believe that they sought instead to protect the right to defend the community ("in defence of themselves"), the right to defend the state ("and their own state"—notice the use of the word "their," by the way, as in the Fourth Amendment), and the right to kill game, but not the right to arms for personal self-defense. This interpretation would not only be bizarre, it would contradict Uviller and Merkel's repeated aspersion that the Pennsylvania dissenters were weird radicals and anarchists. Barnett mistakenly assumes that all rights at common law were explicitly singled out for constitutional protection in the Founding era. He also confuses anarchism, a late nineteenth-century form of radicalism, with eighteenth-century radicalism that was more democratic and localist in spirit. *See* Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?,* 83 TEX. L.

two examples have been identified that fit the individual rights model. Thomas Jefferson's failed proposal for the Virginia Declaration of Rights asserted a general right to own and use firearms. Rather than follow Jefferson's suggestion, Virginia rejected this model and adopted George Mason's militia-focused language. Citizens in western Massachusetts also voiced concerns over the absence of a constitutional provision asserting an individual right to keep or use firearms. The language of the Massachusetts Constitution's provision affirming the right to keep and bear arms linked this right to common defense. Once again, pleas to protect an individual right were ignored. Americans in the Founding era simply did not feel that this right was at risk, and they took no action to give explicit constitutional protection to a right that seemed well protected by the common law.[8]

Although most eighteenth-century Americans did not fear that the individual right of self-defense might be threatened, some Americans in the early nineteenth century did come to believe this right was under assault. The threat these Americans felt did not come from a despotic monarchy or an omnipotent Parliament, but from their own state legislatures. A profound shift in the character of firearms regulation occurred in Jacksonian America. The earliest gun control laws were time, place, and manner restrictions. These early laws were followed by a second wave of more robust regulations intended to prohibit guns with little value in promoting a well-regulated militia. Challenges to these gun control laws produced the first body of case law explicitly focused on the scope and meaning of the right to bear arms. Most courts upheld robust regulation. Working out of the dominant civic paradigm for the right to bear arms, courts treated bearing arms and bearing a gun as legally distinct. Only the former enjoyed constitutional protection. Regulations governing the latter were subject to the same restraints as any exercise of the state's police powers. A few courts rejected the civic model and developed the logic of Jefferson's earlier, more individualistic conception of arms bearing. According to this new paradigm, the right to bear arms encompassed the right of individual self-defense. The principal confusion in the modern debate over gun regulation—the blurring of the distinction between the constitutional right to bear arms for public defense and the individual right to bear a gun in self-defense—crystallized in the Jacksonian era. Public debate over gun control has stumbled over this issue ever since.

To understand the dynamics of the modern gun debate, one must understand how the Founding era's idea of bearing arms was challenged in the Jacksonian period. The struggles of this era shaped later developments in

REV. 237 (2004). On the character of eighteenth-century Pennsylvania radicalism, see GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1998).

8. RICHARD PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS (1999) discusses the need to place American constitutional developments in the context of the colonists' fears and experiences with British rule.

American law, including the meaning of arms bearing during Reconstruction.

II. ORIGINAL RULES FOR ORIGINALISTS?

There has been an extensive debate over the merits of originalism, including a lively discussion about the Founders' commitment to this method of constitutional interpretation.[9] Quite apart from the normative questions raised by originalist theory, one might still ask another important methodological question: has recent originalist scholarship been true to the interpretive principles employed by the Founders? Most originalists have gravitated toward a method often described as plain-meaning originalism. Randy Barnett, one of the leading partisans of this method, describes it as follows: "In constitutional interpretation, the shift is from the original intentions or will of the lawmakers, to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."[10] One of the most serious defects of this method is that it employs an approach to textual interpretation at odds with the Founders' guiding assumptions about how constitutional texts ought to be interpreted. Founding-era methods of legal and constitutional interpretation were far more sophisticated than the currently fashionable methods of plain-meaning originalism.[11]

A useful summary of the interpretive methodology familiar to the Founders may be found in Blackstone's *Commentaries*.[12] The learned judge noted that "words are generally to be understood in their usual and most known signification." While this method would seem to mirror the approach of plain meaning originalism, this was only one of several steps necessary to discern the true meaning of a text. Blackstone noted an important exception in cases where the words were terms of art, or technical terms, which, he noted, "must be taken according to the acceptation of the learned in each art, trade, and science." Thus, plain meaning was not always the meaning to be sought when

9. For overviews of the debate, see Daniel A. Farber, *The Originalism Debate: A Guide to the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). On the Founders' views of the matter, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

10. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

11. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101–47 (2001); Barnett, *supra* note 10. For Barnett's view of the Amendment, see Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 HARV. J.L. PUB. POL'Y 403–10 (1996).

12. William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 59 (St. George Tucker ed., William Young Birch and Abraham Small 1803) (1765).

interpreting legal and constitutional texts.[13] Another interpretive principle trumped both of these considerations, and it is a rule of construction that originalists have consistently failed to heed when approaching constitutional texts. "The most universal and effectual way of discovering the true meaning of a law," Blackstone declared, was to inquire into "the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it."[14] The meaning of a specific constitutional provision was to be gleaned from its immediate historical context. Specifically, one had to discover the evil a provision was intended to remedy.

Context is generally given short shrift in originalist scholarship. Indeed, plain meaning originalism is deeply anti-contextualist in method. While the historian's credo is usually the more context the better, Barnett's is just the opposite. "More historical context," Barnett claims, "is not automatically preferred." In his view, "too much attention to context may instead cloud what was otherwise a fairly clear meaning."[15] This was not how the Founders viewed the matter. Rather than simply seek the plain meaning of the text, the Founders were deeply concerned about the context that gave rise to specific constitutional provisions. Rather than lead away from context, the original understanding of originalism leads back to rigorous contextualism. If one applies all of the rules of construction esteemed by the Founders, and not just the ones most congenial to modern originalists, a radically different view of the original understanding of the right to bear arms in the first state constitutions emerges.[16]

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13. The meaning of the term "bear arms" has spawned a lively debate in Second Amendment scholarship. Individual rights proponents claim it was widely understood to encompass military and non-military meanings. Opponents of this view argue that the dominant meaning, at least for constitutional texts in the eighteenth century, was as a legal term of art clearly describing the use of arms in a military context. *See, e.g.*, Barnett, *supra* note 10. For the alternative view, see UVILLER & MERKEL, *supra* note 2.

14. GILES JACOB, THE STUDENT'S COMPANION: OR, THE REASON OF THE LAWS OF ENGLAND 191–92 (Garland Pub. 1978) (1725); *see also* Blackstone, *supra* note 12 at *59–61.

15. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 11 at 107. On the need for legal scholarship to remain current with historical scholarship, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995). For historical critiques of originalist scholarship on this topic, see Don Higginbotham, *The Second Amendment in Historical Context*, 16 CONST. COMMENT. 263–68 (1999); Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENT. 269–81 (1999); Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62; Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000).

16. This insight is central to the important but much underappreciated work of Primus, *supra* note 8. Reconstructing the rules of construction and interpretation that guided the writers of the Second Amendment is crucial to understanding its meaning. To support their individual rights theory, scholars have generally employed techniques of statutory construction and constitutional interpretation at odds with Founding-era norms. Thus,

Blackstone's guidelines were endorsed by "Senex," an author who commented on the meaning of Massachusetts' Constitution in an essay published in the very same year that the Federal Convention met to draft the U.S. Constitution. In terms reminiscent of Blackstone's interpretive guidelines, the author of this essay described the purpose of the arms-bearing provision of the Massachusetts Constitution in terms of historical context, specifically the problem of disarmament of the militia by British authorities: "In defining this article, we ought to consider the evil intended to be remedied."[17] This provision had been included because citizens of the Commonwealth recalled that "Great Britain meant to take away their arms," and when they drafted their own constitution, "they wisely guarded against it."[18]

In contrast to modern Americans who have come to view guns primarily as a means of personal self-defense, including plain-meaning originalists such as Barnett, colonial Americans saw the right to bear arms in different terms.[19] The aim of British disarmament policy was to deprive colonists of the means of mounting an effective resistance to the powerful standing army dispatched to America to subdue them. As one revolutionary leader recalled, "orders were issued to the provincial governors to deprive the people of the means of resistance, by removing military stores to places of security."[20] Another leading Revolutionary recounted that the goal was "to disarm the people of all the colonies at one and the same time, and thus incapacitate them for resistance in concert."[21] The nightmare colonists dreaded had little to do with a threat to the individual right of self-defense. The right of individual self-defense was well established under common law, and nothing in British policy threatened that right.

The right to keep and bear arms in a well-regulated militia, by contrast, *had* been attacked by the British. When Royal Marines entered Williamsburg in the middle of the night and stole the colony's gunpowder and disabled the firelocks on the muskets stored in the town's magazine, they were following a policy aimed at crippling the militia, not the individual right of self-defense. Similarly, when British Regulars marched on Concord to seize stores of weapons, they encountered Minutemen, members of a well-regulated militia, not individuals acting of their own accord. One cannot understand the relevant

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Eugene Volokh anachronistically discounts the functions of preambles. *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998). For a historical critique of Volokh's method, see Konig, *supra* note 2.

17. *Senex*, CUMBERLAND GAZETTE, Jan. 12, 1787.

18. *Id*.

19. *See* Barnett, *supra* note 7; Calvin R. Massey, *Guns, Extremists, and the Constitution,* 57 WASH. & LEE L. REV. 1095 (2000).

20. J.W. CAMPBELL, A HISTORY OF VIRGINIA FROM ITS DISCOVERY TILL THE YEAR 1781 154 (1813).

21. WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 131 (1817).

provisions of the Virginia Declaration of Rights or the Massachusetts Declaration of Rights dealing with the militia and the right to bear arms without appreciating the evils they were intended to remedy. Neither of these two documents fit the modern individual rights paradigm. Nor can these documents be fit into the modern collective rights model, which focuses on the right of the states to maintain their well-regulated militias. Both of these constitutional texts assert an essentially civic model of arms bearing. A desire to protect the right of citizens to keep and bear arms as part of a well-regulated militia lay at the core of these constitutional provisions.[22]

III. TO BEAR ARMS IN DEFENSE OF THEMSELVES AND THE STATE: THE LOST CONTEXT OF THE PENNSYLVANIA DECLARATION OF RIGHTS

Given that there is little in the history or the text of the Virginia and Massachusetts Constitutions to support individual rights theorists, one can readily appreciate why those eager to find some eighteenth-century historical foundation for this theory would lavish so much attention on the Pennsylvania Declaration of Rights.[23] In contrast to Virginia, the Pennsylvania Declaration of Rights explicitly asserted "a right of the people to bear arms in defense of themselves and the state."[24] Originalists claim to be interested in discovering the way words were commonly used in the Founding era. The focus on the Pennsylvania Constitution by modern gun rights advocates seems ironic given the fact that the Pennsylvania Constitution of 1776 was derided by many within the Founding generation, a fact that led Pennsylvanians to cast it aside within a generation of adopting it. Assuming that the Pennsylvania example is relevant to the debate over the original understanding of the right to bear arms, scholars have an obligation to interpret that text correctly.[25]

Taking a cue from Senex, we might ask a simple historical question: what evil was the Pennsylvania Declaration of Rights intended to remedy? To understand why the Pennsylvania Declaration of Rights protected "a right of the people to bear arms in defence of themselves and the state" requires some understanding of the political and legal context that gave rise to this document. The strong push for including this type of language came from spokesmen for

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22. ROBERT GROSS, THE MINUTEMEN AND THEIR WORLD (1976); WOODY HOLTON, FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA (1999); JOHN E. SELBY, THE REVOLUTION IN VIRGINIA, 1775–1783 (1988).

23. *See* Barnett, *supra* note 7; Kates, *supra* note 2; David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998).

24. PA. CONST., "Declaration of Rights," XIII (1776).

25. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (Rita Kimber and Robert Kimber trans., 1973); DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980).

backcountry interests who had been involved in a protracted battle with the Quaker-dominated legislature for decades to obtain a militia law. Backcountry Pennsylvanians fought for a militia law and state support for procuring arms so that they could defend their communities against Indians. The most notorious incident connected to this conflict was the Paxton Boys' uprising, a massacre of a group of defenseless Conestoga Indians by backcountry Pennsylvanians in 1763. "The Apology of the Paxton Volunteers" framed their grievances against the Pennsylvania government in the following terms:

> When we applied to the Government for Relief, the far grater part of our Assembly were Quakers, some of whom made light of our Sufferings & plead Conscience, so that they could neither take Arms in Defense of themselves or their Country, nor form a Militia law to oblige the Inhabitants to arm.[26]

The language of the Paxton apology anticipated the language included in the Pennsylvania Declaration of Rights, which asserted a right to "bear arms in defense of themselves and the state."[27] This language reflected more than a decade of struggle to gain legal recognition for the right of backcountry residents to bear arms in defense of their communities against their Indian neighbors. There is absolutely no evidence from pre-Revolutionary Pennsylvanians that supports the individual rights interpretation of this text. Indeed, demanding such a right would have seemed bizarre given that this right was well established under common law. What Pennsylvanians lacked, but desperately needed, was protection for a right to bear arms as part of a militia, not a right to bear a gun for personal self-defense. It is important to recall the nature of the struggle over this issue in the pre-Revolutionary era. The Quaker-dominated legislature had not disarmed backcountry inhabitants, nor had it passed laws that prevented them from defending their homes against intruders. What the assembly had refused to do was enact a militia law or provide arms for frontier communities to mount a concerted collective defense, including retaliatory raids on Indian communities.[28]

The claim that bearing a gun and bearing arms were legally synonymous in the Founding era is simply false. The illogic of the claim is easy to demonstrate. While a Quaker pacifist might bear a gun in pursuit of a deer, he would never bear arms. To be consciously scrupulous about bearing a gun makes you a vegetarian, not a pacifist! The plight of the Quakers in Pennsylvania after the American Revolution frames the issue perfectly. The Quakers were conspicuous losers in the struggle over the Pennsylvania Constitution, which made public safety a central concern; the new constitution

26. *The Apology of the Paxton Volunteers*, *in* THE PAXTON PAPERS (John R. Dunbar ed., 1957) (1764).

27. PA. CONST., "Declaration of Rights", *supra* note 24.

28. Nathan Kozuskanich, For the Security and Protection of the Community: The Frontier and the Makings of Pennsylvanian Constitutionalism, 1750–1776 (2006) (unpublished Ph.D. Dissertation, Ohio State University) (on file with University Microfilms).

defined the militia broadly and compelled all citizens to bear arms. Having lost this battle, Quakers were faced with the problem of how to protect their religious commitment to pacifism. It was vital for them to gain constitutional protection for a religious exemption that would allow them not to bear arms! It is logically absurd to argue that Quakers sought to obtain an exemption from a right of personal self-defense. The state could not compel individuals to defend themselves; it could only compel individuals to bear arms for public defense.

Another guiding principle of eighteenth-century constitutional interpretation that has not figured in originalist accounts of the right to bear arms is the notion that legal terms of art, such as the phrase "bearing arms," had to be construed according to their technical legal meaning. In doubtful cases, one had to interpret terms in the same sense in which they were used elsewhere in the text. While modern individual theorists are fond of quoting the Declaration of Rights' provision on bearing arms, they seldom bother to quote the first use of this term in that document. Rather than support the individual rights view, this usage unambiguously supports a civic conception of this right:

> That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.[29]

By including a right to bear arms and a right not to be forced to bear arms, the Pennsylvania Declaration of Rights arrived at a compromise that accommodated the interests of backcountry residents and Quakers. When the origins of the Pennsylvania Constitution's arms-bearing provision is set in its historical context, and not anachronistically presented as a modern gun rights manifesto, the true historical meaning of this text becomes obvious. Using the Founders' rules of legal construction only strengthens the arguments in favor of interpreting bearing arms as a civic right, not an individual right of self-defense.

Only after asserting the civic conception of the right to bear arms in unambiguous terms did the Pennsylvania Declaration of Rights then affirm:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination, to, and governed by, the civil power.[30]

As was invariably true in most revolutionary-era constitutions, the right to bear

29. THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES 87–89 (1781).
30. PA. CONST., "Declaration of Rights", *supra* note 24.

arms was also set against the danger posed by standing armies, a juxtaposition that only underscored the military civic character of the right.[31]

The Pennsylvania Constitution explicitly protected the right to hunt in a separate provision from the right to bear arms. The decision to separate the right to hunt and the right to bear arms underscores the difference between the personal use of firearms (hunting) and the public use of them (bearing arms as part of the militia). In contrast to England, where game laws made hunting the exclusive province of the wealthy, the Pennsylvania Constitution asserted that "[t]he inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property."[32] The formulation of this right implied a right of government regulation, conceding that this right was limited as to time, place, and manner. Still, by including the right to hunt as a constitutional right, Pennsylvanians made clear their opposition to the kinds of restrictions that the English game laws had codified, laws that had effectively disarmed a significant part of the English population. In contrast to the restrictive approach to firearms adopted by England, the Pennsylvania Constitution protected the right to hunt for all of its citizens.[33]

IV. LESSONS FROM AMERICA'S FORGOTTEN GUN VIOLENCE EPIDEMIC

American society changed dramatically in the decades after the first state constitutions were drafted. American constitutionalism grappled with a world that was more democratic, more aggressive, and more fragmented than the eighteenth-century world the Founders had inhabited. One of the most astute observers of American society in this period was the French aristocrat Alexis De Tocqueville, who arrived in America in the spring of 1831 and set out on an extensive tour of the nation. Officially, his purpose was to inspect America's prisons and report on recent reforms. In the course of his travels and interviews, De Tocqueville made detailed observations on American society, which he eventually published as *Democracy in America*. According to De Tocqueville, a distinguishing characteristic of American society in the 1830s, the era of Jacksonian democracy, was a pervasive spirit of individualism.[34]

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31. For unpersuasive efforts to read this provision from a modern individual rights perspective, see JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 148 (1994); Kopel, *supra* note 23 at 1406-07. While isolated examples of the term "bearing arms" being used in a non-military sense may be found in colloquial usage, this was clearly not the accepted legal understanding of the term.

32. PA. CONST., "Plan or Frame of Government," § 43 (1776).

33. *See* THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES, *supra* note 29 at 87–89. On the English game laws, see Lois G. Schwoerer, *To Hold and Bear Arms: the English Perspective* 76 CHI.-KENT. L. REV. 27 (2000).

34. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 506–08 (George Lawrence

The world De Tocqueville encountered was one in transition. Radical changes had swept over American society in the decades following the War of 1812, as an older, republican conception of law and politics yielded to a new, more individualistic ethos. This shift had not happened suddenly. New ideas did not simply sweep away the older world. Republican ideas persisted alongside the new individualism. The struggle between these opposing conceptions of law and politics shaped the contours of American life throughout the century. The conflict between traditional republican values and the new culture of individualism transformed the way the right to bear arms and the idea of self-defense were understood in American law and society.[35]

A profound change occurred in American gun culture in the early decades of the new century: the supply and demand for hand guns increased dramatically. The transformations in American society that prompted Alexis de Tocqueville to coin the term "individualism" influenced the way American law dealt with the new social problems created by handguns and other concealed weapons. This issue prompted much legislation, litigation, and soul searching. Some social commentators identified the origins of this odious practice with the more violent nature of southern culture, particularly its obsession with honor. In an account of his travels in the South, landscape architect Frederick Law Olmsted, the designer of New York's Central Park, reported a conversation in Kentucky about the practice of carrying a concealed weapon, in which he was told, "among young men a Bowie-knife was a universal, and a pistol a not at all unusual, companion."[36] Whig journalist and historian Richard Hildreth noted that southerners carried these types of weapons for two reasons: "as a protection against slaves" and for use "in quarrels between freemen."[37]

Although the practice of carrying concealed weapons was closely identified with southern culture, it was hardly a practice unique to the South. One Philadelphia clergyman lamented that "carrying deadly weapons, and avenging affronts, real or imaginary, with instant death" had become a common practice in the cities of the Northeast.[38] Indeed, he complained that "the generation of young men now coming forward in our cities, seem to think it manly to wear dirks and pistols, and to use them on the slightest

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trans. 1966) (1835). For a useful overview of the profound changes in American society, see CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815–1846 (1994).

35. For an argument that the War of 1812 marked a watershed in the evolution of the transition from republicanism to liberalism, see STEVEN WATTS, THE REPUBLIC REBORN: WAR AND THE MAKING OF LIBERAL AMERICA 1790–1820 (1987).

36. FREDERICK LAW OLMSTED, A JOURNEY THROUGH TEXAS; OR A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER 20 (1857). For comments on the different role of honor in northern and southern culture and its consequences for this issue, see ADAM G. DE GUROWSKI, AMERICA AND EUROPE 219 (1857).

37. RICHARD HILDRETH, DESPOTISM IN AMERICA: AN INQUIRY INTO THE NATURE, RESULTS, AND LEGAL BASIS OF THE SLAVE-HOLDING SYSTEM 90–91 (1854).

38. H. A. BOARDMEN, THE LOW VALUE SET UPON HUMAN LIFE IN THE UNITED STATES 7 (1853).

provocation."[39] One account of life in San Francisco wryly observed that America's most multicultural city of the nineteenth century "does furnish the best bad things that are obtainable in America including truer guns and pistols, larger dirks and Bowie knives."[40]

For some commentators, the problem concealed weapons posed was illustrative of larger issues plaguing Jacksonian America. De Tocqueville's observations about the potentially corrosive effect of individualism on American society were echoed by other contemporary commentators trying to understand the practice of carrying concealed weapons for self-defense.[41] Whig journalist Joseph Gales editorialized on this problem, which he explicitly linked to the decline of republican political values and the rise of individualism. Gales blamed this development on a "perversion of our political doctrines," which had abandoned traditional legal ideas in favor of an "extravagant notion of personal rights and personal independence."[42] The most pernicious consequence of this novel political doctrine was a new theory of the right of self-defense, "which turns every man into an avenger, not only of wrongs actually committed against his personal peace and safety, but renders him swift to shed blood in the very apprehension of danger or insult."[43] The traditional Blackstonian ideal of retreating to the wall before responding with deadly force had given way to a new more aggressive belief in the right to stand one's ground.[44] The rise of individualism and the practice of carrying concealed weapons were closely linked in Gales's view. He attacked the "demagogical," who opposed laws against this pernicious practice with arguments that regulation was "an invasion of American rights" or "unwarrantable restriction of personal liberty."[45]

Gales's analysis of the evils afflicting American society was echoed by other commentators who offered their own diagnosis of the roots of America's interpersonal violence problem. One observer blamed the forces of the market revolution, which fueled the rise of individualism. Reverend H. A. Boardmen compared the selfish impulse that led steamboat builders to compromise on quality, building boilers prone to explosion, to the same low regard for human life that led others to avenge any slight to their honor with a pistol or dirk. In

39. *Id*. at 7.

40. HINTON ROWAN HELPER, THE LAND OF GOLD: REALITY VERSUS FICTION 68 (1855). For evidence that the practice was common in Boston, see *Going Armed*, THE BOSTON PEARL, A GAZETTE OF POLITE LITERATURE, Aug. 31, 1836.

41. Arthur Schlesinger, Jr., *Individualism and Apathy in De Tocqueville's Democracy*, *in* RECONSIDERING TOCQUEVILLE'S *DEMOCRACY IN AMERICA* (Abraham S. Eisenstadt ed., 1988).

42. Joseph Gales, *Prevention of Crime*, *in* EARLY INDIANA TRIALS: AND SKETCHES 465, 476 (Oliver Hampton Smith ed., 1858).

43. *Id*. at 465.

44. RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1991).

45. Gales, *supra* note 42 at 465.

both cases, he sermonized, callous disregard for human life was rooted in a spirit of excessive individualism, a philosophy that untrammeled pursuit of profit encouraged.[46] The British traveler Charles Augustus Murray commented on the prevalence of personal arms during his travels across America in the 1830s. A contemporary review of Murray's account took issue with the Englishman's explanation of the practice as an outgrowth of American democracy. The reviewer challenged the notion that "the execrable custom of carrying about the person the Bowie knife, or pistol, or other deadly weapon, are properly attributable to democratic habits."[47] For these commentators, the growth of a more individualistic conception of the right to keep or carry firearms was a relatively new and decidedly negative development in American law and culture.

Meanwhile, the law struggled to keep up with changing social practice in the early Republic. Americans increasingly armed themselves with weapons that were easily concealed and had little military value. While many Americans sported such weapons, others petitioned their legislatures, demanding enactment of stringent laws prohibiting this practice. Americans were deeply divided over the wisdom and legality of concealed weapons.[48]

Kentucky passed the first law designed to curb the practice of carrying concealed weapons in 1813. The state forbade anyone but travelers from carrying "[a] pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon."[49] Violation of the statute was punishable by a hefty fine of $100. That same year, Louisiana passed an even more comprehensive act. The preamble of the act explained the urgent need for such a law to stem the "assassinations and attempts to commit the same," which the authors of the law complained "have of late been of such frequent occurrence as to become a subject of serious alarm to the peaceable and well disposed inhabitants of the state."[50] In addition to imposing a fine for violating the law, the Louisiana statute made it a capital offense "to stab, shoot, or in any way disable another person by such concealed weapons."[51] The law also empowered judges to issue search warrants if there was probable cause to suspect that someone was

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46. Boardmen, *supra* note 38, at 7.

47. *"D," British Travelers in America No. 2*, MAGNOLIA; OR SOUTHERN MONTHLY 363 (1841–1842); CHARLES AUGUSTUS MURRAY, TRAVELS IN NORTH AMERICA (reprinted 1974) (1839).

48. For general discussions of rioting and mobbing, see PAUL A. GILJE, RIOTING IN AMERICA (1996); DAVID GRIMSTED, AMERICAN MOBBING, 1828–1861: TOWARD CIVIL WAR (1998).

49. ACTS PASSED AT THE FIRST SESSION OF THE TWENTY FIRST GENERAL ASSEMBLY FOR THE COMMONWEALTH OF KENTUCKY 100–11 (1813) (An Act to Prevent persons in this Commonwealth from wearing concealed Arms, except in certain cases).

50. ACTS PASSED AT THE SECOND SESSION OF THE FIRST LEGISLATURE OF THE STATE OF LOUISIANA 172–75 (1813) (An Act against carrying concealed weapons, and going armed in public places in an unnecessary manner).

51. *Id.*

carrying a concealed weapon. Indiana followed suit in 1820 with a similar law. Politicians and social commentators in other parts of the country also remarked on the social problem posed by this pernicious practice. In his inaugural address to the New York legislature in 1820, Governor DeWitt Clinton warned that "our present criminal code does not sufficiently provide against the consequences which may result from carrying secret arms and weapons."[52] This cowardly practice threatened "an essential right of every free citizen."[53] Rather than treat the right to carry concealed weapons as a fundamental liberty or constitutional right, Clinton cast the practice as a threat to public liberty. The fundamental right government needed to protect, he argued, was the right of citizens to enjoy their liberty free from the fear created by this odious practice.[54]

In the ensuing decades, Georgia, Virginia, Alabama, and Ohio enacted laws against carrying concealed weapons.[55] Ohio enacted a law against the practice in 1859, a decision that prompted one newspaper to applaud the general assembly of Ohio, which "very properly passed a law to punish the carrying of concealed weapons in this State, a most cowardly as well as murderous practice."[56] The Ohio law provided an affirmative defense for those who ran afoul of its ban. If one could demonstrate to a jury that he was engaged in a lawful activity at the time and that the decision to carry such a weapon was "such as to justify a prudent man in carrying the weapon," the jury was empowered to acquit the accused of any wrongdoing.[57]

The first laws banning concealed weapons enacted in the period between 1813 and 1859 were essentially time, place, and manner restrictions. Acting under the authority of the individual states' police powers, regulations on weapons carried forward the logic of earlier exercises of the states' regulatory powers. Prohibitions on the practice of carrying concealed weapons were little different than laws that established rules about the storage of gunpowder, restricted hunting, or prohibited the discharge of weapons in certain areas. Eventually, states criminalized the sale or possession of certain weapons, effectively moving from regulation to prohibition of certain classes of

52. Interestingly, Clinton's speech was reported in the *Cleveland Register*. *See* ANNALS OF CLEVELAND, 1818–1935 1037 (1938).

53. *Id.*

54. *Id.*

55. 1 THE REVISED STATUTES OF THE STATE OF OHIO 452 (1870) ("An Act to Prohibit the Carrying of Concealed Weapons").

56. CLEV. MORNING LEADER, Apr. 11, 1859; CINCINNATI DAILY TIMES, Apr. 8, 1859.

57. 1 THE REVISED STATUTES OF THE STATE OF OHIO 452 (1870) ("An Act to Prohibit the Carrying of Concealed Weapons"). The evidence from Indiana, Ohio, and scattered evidence from urban areas undermines the claims of gun rights advocate Clayton Cramer that the practice of sporting concealed weapons laws was essentially a southern practice rooted in that region's distinctive culture. CLAYTON CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999). For another critique of the southern honor thesis, see GRIMSTED, *supra* note 48.

weapons.[58]

V. THE SPECTRUM OF ANTEBELLUM JURISPRUDENCE ON THE RIGHT TO BEAR ARMS

The first test of the new restrictive laws against carrying concealed weapons occurred in Kentucky in *Bliss v. Commonwealth* (1822).[59] Kentucky law criminalized the practice of wearing concealed weapons, and the defendant, Bliss, had been charged with and convicted of carrying a sword cane. Bliss appealed his conviction, citing Kentucky's own state constitutional provision affirming "the right of citizens to bear arms in defense of themselves and the state."[60] The Kentucky Supreme Court reversed the lower court's decision, holding that the state's law against concealed weapons was a violation of the right to bear arms protected by the state constitution. The court took an expansive view of the meaning of this right, stating "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."[61] The notion that constitutional rights were absolutes without any "limits short of the moral power of the citizens to exercise it"[62] stood well outside mainstream jurisprudence in both the Founding era and the antebellum era.

If one moves beyond the courts and examines the reception of *Bliss* within Kentucky, the ruling of the court appears even more bizarre and out of touch with mainstream legal and constitutional thinking in the early Republic. A committee of the Kentucky House of Representatives concluded that the state's Supreme Court had misconstrued the meaning of the state's constitutional provision on arms bearing. To suppose that bearing arms referred to carrying weapons in a private capacity for self-defense was "perfectly ridiculous" since the state could not compel one to "wear dirks or knives for the purposes of self-defense." The Kentucky House delivered a stinging rebuke to the Justices for their odd construction of the state constitution.[63]

The House chastised the court for ignoring well established rules of legal construction when interpreting the words of the constitution. The first error

58. For an example of the scope of eighteenth-century regulations of firearms, see Cornell & DeDino, *supra* note 1, at 506–12. For a general discussion of the police powers, see WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); ACTS PASSED AT THE ANNUAL SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ALABAMA (1837); ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA PASSED IN MILLEDGEVILLE 90–91 (1838).

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

60. *Id.*

61. *Id*. at 91.

62. *Id*. at 92. On the police power, see Novak, *supra* note 58.

63. JOURNAL OF THE KENTUCKY HOUSE OF REPRESENTATIVES 75. (Frankfort, Ky. 1837).

made by the *Bliss* court was to misconstrue the historical origins of the right to bear arms, which had nothing to do with personal self-defense but was occasioned by the historical memory of specific "acts of tyranny and oppression" endured by the ancestors of those who had drafted the constitution.[64] The right to bear arms was intended to prevent governments from disarming the militia. The arms covered by this clause of the state constitution were clearly the "weapons of the soldier, such as could be advantageously used in opposition to government," not those "appropriate to individual contest in private broils."[65] After faulting the court's shoddy history, the committee then turned to the language of the text, observing that the term 'to bear arms,' is in common parlance, even at this day, most usually and most appropriately applied only to the distinctive arms of the soldier, such as the musket or rifle."[66] Contemporary usage supported a civic military reading of the phrase "bear arms," and to illustrate this point, the committee reminded the legislature that young boys, the old, and the infirm were still listed among those groups exempted from the obligation to bear arms.[67]

In addition to the historical evidence and textual arguments, the House committee offered one final argument based on the structure of the Kentucky Constitution. The phrase "bear arms" appeared in an earlier provision of the constitution that exempted those with conscientious objections to military service from bearing arms. One of the "well established rules of construction," the House committee stated authoritatively, was that "the same phrase should receive one and the same construction, in every part of the same instrument; and where it is doubtful as used in one part, it shall be settled by its meaning as used in another part."[68] According to standard rules of legal interpretation, the court should have read the meaning of the phrase "bearing arms" in the same sense in which it was used in the clause protecting the rights of those conscientious objectors who were exempted from this military obligation. Since the legislature had no power to compel citizens to bear arms for personal defense, the only reasonable interpretation was that bearing arms was an activity inextricably linked to common defense of the state or locality. Kentucky eventually changed the language of its state constitution to effectively overrule the *Bliss* court's holding, explicitly enacting an amendment allowing the legislature to ban concealed weapons.[69]

The deliberations of the Kentucky legislature not only demonstrate how odd *Bliss* was, but they provide further evidence that the original language first

64. *Id.* at 74.
65. *Id*. at 74.
66. *Id.* at 74-75.
67. *Id*. at 75.
68. *Id*.
69. *Id.*; *see also* Robert Ireland, *The Problem of Concealed Weapons in 19th Century Kentucky*, 91 REG. KY. HIST. SOC'Y 370–85 (1993).

used by Pennsylvania to describe the right to bear arms was not generally understood as an individual right, but rather as a civic one. The House's critique of the court's decision also suggests that many of Blackstone's interpretive rules were still widely followed in antebellum America.

The judiciary of other states did not choose to follow the *Bliss* court's view of the meaning of the right to bear arms. The same issue posed by Kentucky's concealed weapons law was taken up by Indiana in *State v. Mitchell*, a case that upheld a ban on concealed weapons.[70] The next court to weigh in on the meaning of the constitutional right to bear arms under state law was the Alabama Supreme Court in *State v. Reid*.[71] Reid was charged with carrying a concealed pistol in violation of Alabama's ban on concealed weapons. After briefly reviewing the historical origins of the right to bear arms, going as far back as the English Bill of Rights, the court rejected the notion that the state lacked authority under its police powers to regulate weapons. The judges noted the tension between the conclusions of the *Bliss* court and the *Mitchell* court, but rejected the holding and reasoning of the former. In the view of the court in *Reid*, the state was well within its rights to "adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals."[72] The court also drew a distinction between reasonable regulation and a law that would effectively render the right entirely nugatory. Grasping to find a meaningful framework within which to establish a workable jurisprudence on this issue, the court drew a distinction between bearing arms openly, a practice consistent with the intent of the constitutional right to bear arms as part of a well-regulated militia, and carrying concealed weapons, which served no constitutionally protected purpose. The *Reid* court concluded that if citizens were to be trained in the use of arms, they would have to have the freedom to use those arms to perfect their martial skills. Recognizing this fact did not mean that this right could not be extensively regulated, nor did it imply that traditional common law restraints on traveling armed in terror of the people were no longer constitutional.

Aymette v. State, a Tennessee case, delved further into the practical questions of how to define the extent of the right to bear arms in a manner consistent with preserving a well-regulated militia and achieving the goal of well-regulated liberty.[73] Aymette was charged with having a Bowie knife, a particularly lethal type of edged weapon, hidden on his person. The judges in *Aymette* also took a long historical detour to trace the history of the right to bear arms back to the English struggle against standing armies. The court asserted that the right preserved to the people was done so that "they may as a body rise up to defend their just rights, and compel their rulers to respect the

70. State v. Mitchell, 3 Blackf. 229 (Ind. 1833).
71. State v. Reid, 1 Ala. 612 (1840).
72. *Id.* at 616.
73. Aymette v. State, 21 Tenn. 154 (1840).

laws."[74] The court further noted that the right had to be understood in terms of the grievances that had prompted its inclusion into fundamental law. "The complaint was against the *government*. The grievances to which they were thus forced to submit were for the most part of a public character, and could have been redressed only by the people rising up for their *common defense*, to vindicate their rights."[75] After defining the right to bear arms as essentially civic in nature, the court asserted that the weapons this right protected were those "usually employed in civilized warfare, and that constitute ordinary the military equipment."[76] Excluded from constitutional protection were "those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and assassin."[77] Bearing arms, the court concluded, referred to an activity that was exclusively military in nature: "A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms; much less could it be said that a private citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in a cane."[78] The court categorically asserted that the right "does not mean for private defense."[79]

In describing the right the Tennessee Constitution protected as a "public political right," the court noted that the legislature retained considerable latitude to enact laws regulating this right in a manner consistent with the public good.[80] "It is true," the court admitted, "it is somewhat difficult to draw the precise line where legislation must cease and where the political right begins, but it is not difficult to state a case where the right of legislation would exist."[81] The court described a number of scenarios in which the legislature might regulate and limit the exercise of this right. Indeed, the judges held that there were circumstances in which the state might even prohibit individuals from openly carrying military style weapons outside of the militia context.[82] While *Aymette* championed a distinctly civic conception of arms bearing, it also accepted the *Reid* court's notion that the goal of creating a well-regulated militia meant that citizens had to gain a familiarity with those weapons and therefore had a right to keep and bear them within the limits imposed by common law and statute. Seeking to find a suitable framework for evaluating laws designed to regulate weapons, the court acknowledged a nearly "unqualified right" to keep militia-style weapons, but noted that the right to

74. *Id.* at 157.
75. *Id.* (emphasis in original).
76. *Id*. at 158.
77. *Id*.
78. *Id*. at 161.
79. *Id*. at 157.
80. *Id.* at 159.
81. *Id*. at 159-60.
82. *Id*.

bear those weapons was more limited in scope.[83] This scheme granted scant protection to weapons that had little connection to military preparedness. In the view of the *Aymette* court, the legislature enjoyed the widest possible latitude to regulate pistols or other concealed weapons that had negligible value in promoting the maintenance of a well-regulated militia.[84]

Two years after *Reid* and *Aymette*, in *State v. Buzzard*, the highest court in Arkansas issued a ruling that endorsed *Aymette*'s conception of the civic character of the right to bear arms.[85] The court echoed the prevailing view that all rights were subject to state regulation. Even freedom of speech and the press were subject to reasonable regulations.[86] Invoking a concept central to Anglo-American jurisprudence since Blackstone, the court wrote that the goal of constitutional government was to protect those rights "essential to the enjoyment of well-regulated liberty."[87] To conclude, as had the court in *Bliss*, that the right to bear arms was not subject to reasonable regulation was to encourage anarchy, not liberty.[88] Regulation of weapons was a legitimate and necessary exercise of the state's police powers, which was entirely consistent with a long tradition of legislating on such matters as the storage of gunpowder.

The court in *Buzzard* distinguished between an individual right of personal self-defense and a public right of collective self-defense. The right to bear arms was not designed to "enable each member of the community to protect and defend by individual force his private rights against every illegal invasion."[89] The purpose of the right to bear arms was to "enable the militia to discharge" its important public trust.[90] The goal was to enhance the rule of law, not subvert it. "[S]o long as our civil liberties and republican institutions remain unimpaired," individuals were bound to "look for protection as well as redress" from government and the rule of law.[91] The court in *Buzzard* also drew attention to the fact that some states had included more expansive language in their state constitutions and explicitly protected an individual's right to defend himself or herself. This language had not, however, been incorporated in either the federal constitution or the Arkansas constitution.[92] Building on the precedent established in *Aymette*, the Supreme Court of Arkansas rejected this view and upheld a broad ban on certain classes of weapons, declaring that "the Legislature intended to abolish these most dangerous weapons entirely from use." The Arkansas court went on to note that "[t]he Legislature thought the

83. *Id*. at 160.
84. *Id*.
85. State v. Buzzard, 4 Ark. 18 (1842).
86. *Id*. at 20.
87. *Id*. at 21.
88. *Id*.
89. *Id*. at 22.
90. *Id*. at 24.
91. *Id*. at 26.
92. *Id*. at 27.

evil great, and, to effectually remove it, made the remedy strong."

On the eve of the Civil War, Americans were divided over the meaning of the right to bear arms and the scope of legitimate regulation of firearms. Most courts adopted something like the civic conception enunciated in *Buzzard.* Possession of militia weapons enjoyed fairly robust constitutional protection. The right to carry those weapons openly enjoyed less protection but was still constitutionally protected. The right to keep or carry handguns or other weapons not essential to the goal of preserving a well-regulated militia enjoyed no special constitutional protection and was subject to the full scope of the police power.

VI. THE IMPACT OF THE FOURTEENTH AMENDMENT ON THE RIGHT TO BEAR ARMS AND GUN REGULATION

One of the most interesting claims in recent Second Amendment debate concerns the impact of the Fourteenth Amendment on the right to bear arms. Gun rights advocates claim that the Fourteenth Amendment reasserted the individual rights character of arms bearing. Akhil Amar's theory of refined incorporation presents a different view in which the meaning of arms bearing morphed from a collective right into an individual right.[93] William Nelson, by contrast, finds more disagreement over the meaning of the Fourteenth Amendment and sees no evidence for incorporation of the Second Amendment as an individual right.[94]

If one moves beyond the originalist debate over the meaning of the Fourteenth Amendment, turning instead to the question of how mainstream legal thought approached the problem of the right to bear arms and the scope of gun regulation in the immediate aftermath of the adoption of the Fourteenth Amendment, the history looks rather different.[95] Legal theory from this era does not support the strong individual rights claims of gun rights advocates or

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93. AKHIL R. AMAR, THE BILL OF RIGHTS CREATION AND RECONSTRUCTION (1998); STEPHEN HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 1866–1876 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE 14TH AMENDMENT AND THE BILL OF RIGHTS (1986).

94. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988). On the problem of discerning ratifiers' intent, see Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998); J. Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEGAL HIST. 41 (1996). The most detailed study of ratification does not provide much support for the incorporation thesis. *See* James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985); James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 WAKE FOREST L. REV. 89 (1984).

95. The development of ratifier intent as the appropriate guide to constitutional interpretation occurred in the Jeffersonian era and marked a break with Blackstone's rules of construction. *See* Lofgren, *supra* note 9; Powell, *supra* note 9.

Amar's theory of refined incorporation. Rather than mark a sharp break with antebellum writing on this subject, legal writing from this period demonstrates a surprising level of continuity with pre-war jurisprudence. The adoption of the Fourteenth Amendment does not appear to have radically altered the way most lawyers and jurists approached these issues.[96]

One of the most influential constitutional theorists to take up the scope of the right to bear arms in the period after the adoption of the Fourteenth Amendment was Joel Prentiss Bishop, author of the influential *Commentaries on the Law of Statutory Crimes* (1873). The right to have arms, Bishop concluded, was constrained by both statute and common law. One of the most important common law restrictions was the crime of affray. Restrictions on "traveling armed in terror of the people" were, in Bishop's view, well adapted "to the wants of every civilized community." Even more dangerous to public safety was traveling with concealed weapons, a practice many states had sensibly outlawed. Such statutes posed no serious legal or constitutional problems and were entirely consistent with the idea of well-regulated liberty. The rules of common law jurisprudence profoundly influenced Bishop's approach to the problem of regulation. Although he acknowledged that a state possessed considerable authority under its police powers to regulate and in some cases prohibit certain classes of firearms and severely restrict the ability to use them, Bishop also accepted that rare circumstances might arise when an individual's right to self-protection would trump a statute. In such extreme instances, he concluded, it was best to let the courts handle these situations on a case-by-case basis.[97]

Bishop devoted a small section of his *Commentaries* to the meaning of the constitutional right to bear arms protected by the Bill of Rights and comparable provisions in various state constitutions. Jurisprudence on the matter had established that only a small class of weapons suitable for the goal of preserving a well-regulated militia enjoyed full constitutional protection. Weapons "employed in quarrels, brawls, and fights between maddened individuals" were entirely within the scope of individual states' police powers and could be regulated or prohibited by law. Although Bishop noted that a few courts had embraced a more expansive conception of bearing arms under state constitutional law, the dominant view was the more limited civic, militia-based right, articulated in *Buzzard*, an interpretation Bishop characterized as the "Arkansas doctrine."[98]

Additional confirmation that Bishop's views reflected mainstream legal

96. *See* Carole Emberton's essay in this volume.

97. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 494 (Boston, 1873).

98. *Id.* at 497-98. The Arkansas doctrine was embodied in State v. Buzzard, 4 Ark. 18 (1842); other cases following this line of thought included Aymette v. State, 21 Tenn. 154 (1840); State v. Reid, 1 Ala. 612 (1840); State v. Mitchell, 3 Blackf. 229 (Ind. 1833).

thinking may be found in a series of articles in the *Central Law Journal* published a year later in 1874. John Forrest Dillon, the editor of the journal, was one of the most accomplished legal figures in America. Recognizing that the U.S. Supreme Court had not yet entered the fray and offered its own view of the matter, Dillon concluded that lawyers and judges ought to look to the small body of state case law for guidance. He concluded that the dominant view of the courts was Bishop's "Arkansas doctrine."[99]

A strong consensus had emerged that time, place, and manner restrictions, including bans on carrying concealed weapons, "did not deprive the citizen of his *natural* right of self-defense, or his constitutional right to bear arms."[100] Although the line demarcating the constitutional right to bear arms and the common law right of self-defense had become murkier over the course of the century, Dillon believed that the law still regarded the two concepts as distinct.[101] The purpose of the right to bear arms was to preserve the militia, not provide protection for an individual right of self-defense. The existence of that latter right was indisputable, but it remained rooted in common law, not constitutional law. As far as regulations were concerned, the scope of state authority over firearms was broad, but not unlimited.[102]

In the second installment of its comprehensive summary of the right to bear arms, the *Central Law Journal* addressed the types of weapons enjoying constitutional protection. Although there was a range of views expressed in antebellum jurisprudence on this issue, once again it was the "Arkansas doctrine" that defined legal orthodoxy. The only weapons entitled to constitutional protection were those associated with the goal of preserving a well-regulated militia.

The potential conflict between the natural right of self-defense and the regulation of firearms was the third issue that prompted extensive commentary from the *Central Law Journal*. While a state could not abrogate the common law right of self-defense, the scope of this right was subject to state regulation. Taking a cue from the common law, the essay noted that any statutory prohibitions or restrictions enacted were subject to legal exceptions. There would always be unusual "circumstances under which to disarm a citizen would be to leave his life at the mercy of a treacherous and plotting enemy." Under extraordinary circumstances, leniency was appropriate: "Such a case

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99. John Forrest Dillon and S. D. Thompson, *The Right to Keep and Bear Arms for Private and Public Defense*, 1 CENT. L.J. 259, 272 (1874). For a brief biography of Dillon, see George S. Clay, *John Forrest Dillon*, 23 THE GREEN BAG 447 (1911). In addition to serving on the Iowa Supreme Court and the Eight Circuit, Dillon later was president of the ABA, and a professor of law at Yale and Columbia.

100. Dillon and Thompson, *supra* note 99, at 260. The quote was taken from *Nunn* v. *State*, 1 Ga. 243, 251 (1946) (emphasis in original), one of the antebellum cases most sympathetic to gun rights.

101. *Id.*

102. Dillon and Thompson, *supra* note 99, at 260.

might clearly be said to fall within that class of cases in which the previously existing common law interpolates exceptions upon subsequently enacted statutes."[103]

Dillon encapsulated the larger problem courts faced when attempting to balance the right of individual self-defense against the right of public safety. Society could not "require the individual to surrender and lay aside the means of self protection." Nonetheless, "the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons." The right to be protected and the right to protect oneself were obviously in conflict. Faced with such an intractable situation, the best the law could achieve was to "strike some sort of balance between these apparently conflicting rights." The legislative authority to strike such a balance was undeniable. "Every state has the power to regulate the bearing of arms in such a manner as it may see fit, or to restrain it altogether."[104]

The *Central Law Journal* article also dealt with the impact of the Fourteenth Amendment on firearms regulation.[105] In its view, the Fourteenth Amendment had not transformed the meaning of arms bearing or created any new barriers to state regulation of firearms. According to the *Central Law Journal* authors, "there would seem to remain no doubt that if the question should ever arise in that court it would be held that the second amendment of the federal constitution is restrictive upon the general government merely and not upon the states." Dillon's conclusions anticipated the view adopted a year later by the Supreme Court in *United States v. Cruikshank*.[106] In that case, the court held that the Second Amendment was "one of the amendments that has no other effect than to restrict the powers of the national government."[107]

One of the most serious problems with recent individual rights theory and its interpretation of the Fourteenth Amendment is that this body of scholarship makes it impossible to understand *Cruikshank*. Rather than representing a radical break with the past, the decision in *Cruikshank* was actually well grounded in American jurisprudence on the right to bear arms. The 1875 decision echoed sentiments that had been articulated a year earlier in the

103. *Id*. at 286.

104. *Id*. at 287.

105. *Id*. at 296. Dillon did not quote the *Slaughter-House* decision, but did cite *Twitchell v. Pennsylvania*, 74 U.S. 321 (1869) as an anti-incorporation text. Dillon's reading contradicts Akhil Amar's claim that *Twitchell* sheds no light on incorporation. *See* Amar, *supra* note 93. For modern readings of *Twitchell* that support Dillon's reading of the case, see Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I go Down that Wrong Road Again*", 74 N.C. L. REV. 1559 (1995-1996); George C. Thomas, III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001-2002).

106. United States v. Cruikshank, 92 U.S. 568 (1875).

107. ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL (3d ed. 2004).

Central Law Journal's exhaustive survey of the state of American legal thinking on the meaning of the right to bear arms.

VII. CONCLUSION

Gun policy has been ruled by a predictable dynamic of outrage, action, and reaction. This cycle is hardly a modern development. The same pattern is evident in antebellum efforts to regulate firearms. As a general rule, Americans are much more comfortable with regulations than they are with prohibitions. The fundamental problem in American law remains the one identified by the *Central Law Journal* more than a century ago. How do we balance the right of individual self-defense against the danger an armed population poses to public safety, particularly in an age when most Americans do not live in rural communities in which the majority of citizens are active participants in a well-regulated militia? Finding a solution to America's gun violence problem will not be easy, but the often repeated demand that the Second Amendment be treated as an individual right only confuses this issue. There is very little evidence to support the gun rights claim that if the Supreme Court suddenly reversed *United States v. Miller* and affirmed the existence of an individual right to own guns, gun rights advocates would suddenly turn their energies toward framing an effective regulatory framework for firearms.[108] The underlying ideology behind gun rights culture is rooted in a worldview that is unlikely to be assuaged by a new Supreme Court ruling sympathetic to their views.[109] Many gun rights advocates are committed to dismantling the entire legacy of the New Deal, particularly its commitment to federal regulation.[110] The most vocal wing of the gun rights community does not believe that guns impose any social cost. Supporters of this ideology continue to cling to the discredited theory of John Lott that more guns means less crime.[111] Finally, the absolutist view of the right of self-defense embraced by many in the gun rights community makes any idea of balancing social costs against individual rights unacceptable.[112]

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

109. Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3–12 (2003); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003). For an argument that a Supreme Court decision affirming an individual right to bear arms would assuage gun rights partisans, see ABIGAIL A. KOHN, SHOOTERS: MYTHS AND REALITIES OF AMERICA'S GUN CULTURES (2004).

110. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

111. For an argument that social costs have no role in constitutional interpretation, see Reynolds, *supra* note 1. For a brief overview of the Lott scandal, see John J. Donohue, *Guns, Crime, and the Impact of State Right-to-Carry Laws*, 73 FORDHAM L. REV. 623 (2004).

112. WAYNE LAPIERRE & JAMES JAY BAKER, SHOOTING STRAIGHT: TELLING THE TRUTH ABOUT GUNS IN AMERICA (2002). For additional discussion of the militant nature of

The academic debate about the meaning of the Second Amendment may turn out to be moot. Even if the courts abandoned precedent and suddenly embraced the individual rights view of the Second Amendment there would be a host of questions about what level of judicial scrutiny to apply to gun laws. Even under strict scrutiny many laws would survive, and courts might well opt to employ some type of intermediate scrutiny, which would make it even less likely that gun laws would be declared unconstitutional.[113]

For much of American history, the right most esteemed by modern gun rights advocates—the right of individual self-defense—was understood to be a right protected by common law, not constitutional law. Rather than drag this issue into the arena of constitutional law, it might be more useful to look to the common law for guidance on framing a pragmatic jurisprudence.[114]

If nothing else, a genuinely historical account of the early history of gun regulation demonstrates that the simplistic claims made by modern opponents of gun regulation have little basis in the historical record. Gun control is not a new development in American history. At the same time, supporters of gun control should not be surprised by the depth of opposition to even the most basic types of regulation. Opposition to gun control also has deep roots in the American past. Only when both sides recognize that both of these claims are true can we move forward in this debate.

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the most vocal segments of the gun rights community, see Joan Burbick's essay in this volume.

113. Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective: Keynote Address*, 73 FORDHAM L. REV. 477–85 (2004). *See also* Adam Winkler's essay in this volume.

114. For evidence of broad popular support for a wide range of gun regulations, including support among gun owners, see the paper by David Hemenway in this volume.